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The Admissibiity of Inculpatory Statements in Washington under the Rule for Declarations Against Interest after *Williamson v. United States*

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THE ADMISSIBILITY OF INCULPATORY STATEMENTS IN WASHINGTON UNDER THE RULE FOR DECLARATIONS AGAINST INTEREST AFTER *WILLIAMSON V. UNITED STATES*

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Abstract: Washington courts hold that where a statement by an unavailable declarant, offered in the trial of a third party inculpated by the statement, is predominantly disserving to the declarant's penal interest, the statement is admissible under the hearsay exception for declarations against interest. Federal courts have split on the admissibility of such declarations, with some courts holding that any non-disserving portions must be severed and excluded. In *Williamson v. United States*, the United States Supreme Court narrowed the scope of Federal Rule of Evidence 804(b)(3) on declarations against interest and held that only the individual portions of such statements that are against the declarant's interest are admissible. This Comment considers the balance of the policy against admitting hearsay with the need for reliable evidence, and examines the guidance offered by the advisory committee note to 804(b)(3). This Comment additionally contemplates the practical applicability of both the *Williamson* and Washington courts' approaches, and concludes that Washington courts should retain their current interpretation of the rule for declarations against interest regarding inculpatory statements.

Out-of-court confessions of criminal activity generally are inadmissible as hearsay under the Federal Rules of Evidence[1] unless a recognized exception to the hearsay rule applies.[2] Hearsay is considered untrustworthy because the declarant is not under oath or subject to cross-examination and the trier of fact is not present at the time the statement is made.[3] Exceptions to the hearsay rule often apply where a statement is thought to be trustworthy despite an absence of the traditional safeguards surrounding in-court statements.

One such hearsay exception is applied to declarations against interest, allowing a witness to testify to hearing another person's out-of-court admission. Under this exception, testimony regarding the out-of-court

1. Fed. R. Evid. 802 ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."); Fed. R. Evid. 801(c) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.").

2. Admissions by a party are exempted from hearsay treatment, and are admissible under Fed. R. Evid. 801(d)(2)(A). The advisory committee's note to Fed. R. Evid. 801(d)(2) explains that out-of-court admissions by a party meet the definition of hearsay, but are exempted for policy reasons, and no further guarantee of their trustworthiness is required. Specifically, under an adversary system, parties are estopped from claiming that their own statements should be excluded as hearsay, and are considered to have adequate opportunity to explain or deny their own statements at trial.

3. *See* Introductory Note; The Hearsay Problem preceding the Federal Rules of Evidence.

statement is admissible if the substance of the statement heard by the witness is so far contrary to the pecuniary, proprietary, or penal interest of the declarant that it is presumable that a reasonable person would not have made the statement without believing it to be true.[4] Out-of-court statements against a declarant's penal interest that could subject the declarant to criminal liability may incriminate the declarant alone, both the declarant and another person, or may incriminate only the declarant while exonerating another person.[5]

In *Williamson v. United States*,[6] the confessions at issue incriminated both the declarant and the defendant. The United States Supreme Court held that federal courts must separate confessions into their component parts when applying the hearsay exception for declarations against interest.[7] The Court determined that only remarks that individually are against the declarant's interest are admissible; non-disserving remarks must be excluded.[8]

Washington courts currently treat third-party declarations as a whole, admitting them in their entirety if they are predominantly disserving.[9] This Comment considers whether Washington courts should adopt the decision and reasoning of *Williamson*, and argues that they should not. Part I focuses on pre-*Williamson* federal and Washington judicial interpretations of the hearsay exception for declarations against interest. Part II examines the *Williamson* case and the divergent reasoning among the Supreme Court justices on the issue of whether non-disserving remarks are admissible as part of longer, disserving declarations, or must be edited out. Part III argues that the Court's interpretation in *Williamson* was not required by Rule 804(b)(3) or its advisory committee note and that the current approach of Washington courts is preferable to that of the Supreme Court. Finally, part IV uses a hypothetical confession to demonstrate the practical advantages of the Washington approach.

4. Fed. R. Evid. 804(b)(3).

5. Confessions that incriminate a third party are called inculpatory declarations against interest, while those that incriminate the declarant but exonerate another person are referred to as exculpatory declarations against interest.

6. 114 S. Ct. 2431 (1994).

7. *Id.* at 2435.

8. *Id.*

9. *See* 5B Karl B. Tegland, *Washington Practice* § 403, at 268 (3d ed. 1989).

I. JUDICIAL INTERPRETATIONS OF THE HEARSAY EXCEPTION FOR INCULPATORY DECLARATIONS AGAINST PENAL INTEREST

A. Federal Split

The federal rule for declarations against interest was enacted in 1975 and emerged from an exception under the common law.[10] Federal Rule of Evidence 804(b)(3) provides for the admission of a "statement" that is so far contrary to the declarant's penal interest that a reasonable person in the declarant's position, knowing of the potential for criminal liability, would be unlikely to make the statement without believing it to be true.[11] Judicial application of Rule 804(b)(3) generally involves a two-pronged approach, requiring first that the declarant be unavailable as a witness,[12] and second, that the statement contain facts against the declarant's interest.[13] Although inculpatory declarations that incriminate both the declarant and a third party are not directly mentioned in the text,[14] federal courts generally have held that they nevertheless fall within the scope of the rule.[15] The rule additionally requires corroborating circumstances to

10. Fed. R. Evid. 804(b)(3). Under the common law, the exception was limited to statements against the declarant's pecuniary or proprietary interest, with courts mostly refusing to recognize declarations against penal interest as falling within its scope. *See* Donnelly v. United States, 228 U.S. 243 (1913) (holding that a third-party confession to murder is inadmissible in the trial of a defendant charged with the murder). *But see* Chambers v. Mississippi, 410 U.S. 284 (1973) (holding that Mississippi's refusal to recognize declarations against penal interest violates due process where a third party made a trustworthy confession exonerating the defendant). Professor Wigmore criticized the exclusion of statements against penal interest from the scope of the common law rule. 5 John H. Wigmore, *Evidence* § 1477 (James H. Chadbourn rev., 1974).

11. Fed. R. Evid. 804(b)(3).

12. Fed. R. Evid. 804(a).

13. Under Rule 804(b)(3), a statement is against "penal" interest if it "tends" to subject the declarant to criminal liability; the statement need not be an outright confession. *See* United States v. Alvarez, 584 F.2d 694, 699 (5th Cir. 1978).

14. The text of the rule includes a corroboration requirement for exculpatory declarations but fails to mention inculpatory declarations. Fed. R. Evid. 804(b)(3).

15. *See* United States v. Sarmiento-Perez, 633 F.2d 1092, 1098 (5th Cir. 1980), *cert. denied*, 459 U.S. 834 (1982) ("[T]he rule clearly contemplates the admission, under appropriate circumstances, of such inculpatory . . . statements."). The advisory committee note to Rule 804(b)(3) suggests that the rule applies to certain inculpatory statements that were spoken without an apparent motive to lie. The legislative history of the rule similarly suggests that inculpatory statements are within the scope of the rule. A sentence in an early draft, which explicitly excluded inculpatory statements, was deleted to avoid codification of a constitutional principle. This deletion has been interpreted to mean that at least some inculpatory statements were contemplated as admissible. *See* Michael D. Bergeisen, Comment, *Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest*, 66 Cal. L. Rev. 1189, 1191 (1978). *But see* 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence: Commentary on Rules of Evidence for the United States Courts and State*

guarantee the trustworthiness of exculpatory statements before they are deemed admissible.[16] Although the text of the rule does not require corroboration for inculpatory declarations, a number of courts have read this requirement into the rule to satisfy Confrontation Clause requirements that evidence offered against the accused be reliable.[17]

Some federal courts have separated inculpatory declarations into individual admissible and inadmissible segments, following the approach advocated by Bernard S. Jefferson, who suggested that only those remarks directly against the declarant's interest may be considered reliable, while all non-disserving portions should be severed.[18] For example, this approach was taken by the Second Circuit in *United States v. Williams*.[19] In *Williams*, the guilty pleas of witnesses in a drug conspiracy were deemed admissible as evidence against the defendants only after all references to the defendants were severed and excluded.[20] The redacted pleas were admissible only to prove the existence of a conspiracy and not as evidence of the defendants' membership in the conspiracy.[21]

Other federal courts, however, have rejected the notion that confessions should be divided into individual remarks and have examined confessions as a whole, admitting non-disserving remarks collateral to disserving ones. This approach more closely approximates suggestions made by Professor Wigmore, who asserted that as long as a

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Courts 804(b)(3)[03], at 804-158 (J.M. McLaughlin ed. 1993) (asserting that the sentence was dropped because it was not needed and inculpatory statements were meant to be excluded); *see also* James E. Beaver & Cheryl McCleary, *Inculpatory Statements Against Penal Interest:* State v. Parris *Goes Too Far*, 8 U. Puget Sound L. Rev. 25, 29 (1984) (urging the exclusion of all inculpatory declarations against interest from the scope of the rule, based in part on the legislative history, which the authors asserted favors exclusion of inculpatory statements).

16. Fed. R. Evid. 804(b)(3). The advisory committee note explains that this requirement is to be applied to circumvent fabrication.

17. *See, e.g., Alvarez*, 584 F.2d at 701 ("To bring Rule 804(b)(3) within the mandate for reliability, we hold that the admissibility of *inculpatory* declarations against interest requires corroborating circumstances that 'clearly indicate the trustworthiness of the statement.'"). The Confrontation Clause of the Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI.

18. Bernard S. Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 Harv. L. Rev. 1, 60 (1944). A more moderate approach is advocated by Dean McCormick. Charles T. McCormick, *Law of Evidence* § 256, at 552–53 (1954) (suggesting that clearly self-serving portions should be excluded, while remarks that are neither disserving nor self-serving should be admissible).

19. 927 F.2d 95 (2d Cir.), *cert. denied*, 502 U.S. 911 (1991).

20. *Id.* at 98.

21. *Id.* at 99.

statement is made while the declarant is in a trustworthy state of mind, related statements should be deemed similarly trustworthy and therefore admissible.[22] In applying this method of considering statements as a whole, the First Circuit, in *United States v. Barrett*,[23] admitted an entire statement into evidence, including remarks collateral to those against interest. The *Barrett* court noted that it did not read the rule as broadly as did Professor Wigmore, but it did embrace the idea that non-disserving remarks which tended to "fortify" the disserving remarks should be admitted.[24] The court reasoned that it was not Congress's intent to restrict the exception to the point of excluding collateral material which was "sufficiently integral to the entire statement."[25] Similarly, in *United States v. York*,[26] the Seventh Circuit rejected the possibility of excising non-disserving remarks from the hearsay comments of a murder victim, and admitted incriminating portions of her statement that were not explicitly against her interest, but were related closely enough to such remarks to indicate their trustworthiness.[27]

B. Washington State Courts Consistently Have Treated Inculpatory Declarations as a Whole

Although many state codes of evidence are based on the Federal Rules of Evidence, states are sovereignties, and as such are not bound by federal interpretations of evidence rules. Even the application and interpretation of generally uniform evidence rules may differ from state to state. Interpretations of evidence rules by federal courts may be persuasive and serve as guidance,[28] but the state courts still are free to form independent interpretations of state evidence rules. For example, the court in *State v. Brown*[29] indicated its reluctance to adopt the federal interpretation of Rule 609 relating to the admissibility of prior

22. Wigmore, *supra* note 10, § 1465, at 339.

23. 539 F.2d 244, 252–53 (1st Cir. 1976).

24. *Id.* at 252.

25. *Id.* at 253.

26. 933 F.2d 1343 (7th Cir.), *cert. denied*, 502 U.S. 916 (1991).

27. *Id.* at 1361. *See also* United States v. Lieberman, 637 F.2d 95, 103 (2d Cir. 1980) ("Even if [a remark] were wholly neutral . . . it could constitute a statement against interest within the meaning of Rule 804(b)(3) since it was part and parcel of a larger conversation in which clearly self-incriminating statements were made.").

28. *See* 5 Karl B. Tegland, *Washington Practice* § 6, at 11 (3d ed. 1989).

29. 111 Wash. 2d 124, 761 P.2d 588 (1988), *superseded on reh'g*, 113 Wash. 2d 520, 782 P.2d 1013 (1989).

convictions, which it viewed as overly restrictive.[30] In so doing, the court emphasized that Washington courts were not bound to adopt the federal interpretation of the rule.[31]

The Washington rule for declarations against interest was enacted in 1979 and shares the same text and advisory committee note as its federal counterpart.[32] Washington courts, in accord with their federal counterparts, require unavailability of the declarant as a witness, an "against interest" element in the statement, and, like some federal courts,[33] corroboration for both inculpatory and exculpatory declarations.[34] While the federal courts have split on whether inculpatory declarations should be edited to exclude non-disserving portions, Washington courts have rejected the notion of dividing declarations into admissible and inadmissible portions and consistently have chosen to consider out-of-court inculpatory declarations as a whole. In *State v. Parris*,[35] for example, the court examined the declarant's narrative as a whole and noted that if a self-serving motive predominated, the entire statement should be excluded.[36] In *State v. Valladares*,[37] the court cited Parris and chose to admit the inculpatory comments of a drug informant in their entirety.[38] Washington courts have continued to apply this standard in more recent cases as well, regularly examining the context

30. *Id.* at 151, 761 P.2d at 603.

31. *Id.*

32. Wash. R. Evid. 804(b)(3). Historically, Washington law, like federal law, did not include declarations against penal interest in its interpretation of the rule for declarations against interest, so the codification of the rule substantially broadened the scope of this hearsay exception. *See* Tegland, *supra* note 9, § 405, at 273.

33. *See supra* note 17 and accompanying text.

34. *See, e.g.*, State v. Parris, 98 Wash. 2d 140, 148, 654 P.2d 77, 81 (1982) (finding that inculpatory declarations are only admissible if accompanied by "particularized guarantees of trustworthiness"). Corroboration may consist of specific circumstances indicating a statement's reliability, or may be found in other evidence of the defendant's guilt. *See* Robert H. Aronson, *Law of Evidence in Washington* 804–24 (2d ed. 1993). Among the factors the courts consider to ensure the reliability of a statement are whether the declarant had an apparent motive to lie, the general character of the declarant, whether more than one person heard the statement, whether the statement was made spontaneously, the timing of the declaration, and the relationship between the declarant and witness. *See* State v. Hutcheson, 62 Wash. App. 282, 292, 813 P.2d 1283, 1289 (1991), *review denied*, 118 Wash. 2d 1020, 827 P.2d 1012 (1992).

35. 30 Wash. App. 268, 633 P.2d 914 (1981), *aff'd*, 98 Wash. 2d 140, 654 P.2d 77 (1982).

36. *Id.* at 277 n.9, 633 P.2d at 920 n.9.

37. 31 Wash. App. 63, 639 P.2d 813 (1982), *aff'd in part, rev'd in part*, 99 Wash. 2d 663, 664 P.2d 508 (1983).

38. *Id.* at 70, 639 P.2d at 816.

and circumstances surrounding the declarations in order to guarantee their reliability.[39]

II. *WILLIAMSON V. UNITED STATES*

A. Case Facts

In *Williamson*, the petitioner had been convicted in federal district court in Georgia of possessing cocaine with the intent to distribute, conspiring to possess cocaine with the intent to distribute, and traveling interstate to promote the distribution of cocaine.[40] The defendant was implicated by the out-of-court confessions of another person, Reginald Harris. After stopping Harris on the highway, a police officer discovered nineteen kilograms of cocaine in the trunk of his rental car.[41] Following Harris's arrest, and while Harris was in custody, a drug enforcement agent interviewed Harris by telephone and in-person. During these interviews, Harris revealed his participation in the drug activities and also implicated Williamson as the owner of the cocaine, as well as an unidentified third party, whose existence Harris later admitted he had fabricated.[42] Harris told the agent that he had received the drugs belonging to Williamson and was supposed to deliver them to a dumpster.[43] After the agent arranged for a controlled delivery of the drugs in order to arrest the third party Harris described, Harris changed his story. He stated that there was no third person, that he was afraid of Williamson, and that he had been transporting the drugs to Atlanta for Williamson, whom he was following on the highway when he was pulled over and arrested.[44] Harris refused to sign a written account of his confessions and later refused to testify at Williamson's trial, invoking his Fifth Amendment privilege.[45]

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39. *See, e.g.*, State v. Rice, 120 Wash. 2d 549, 844 P.2d 416 (1993) (excluding entire confession in murder case made while declarant was in police custody and where circumstances surrounding confession indicated a lack of reliability); State v. Whelchel, 115 Wash. 2d 708, 801 P.2d 948 (1990) (excluding entire narrative in a murder case where surrounding circumstances suggested unreliability).

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

41. *Id.* at 2433.

42. *Id.*

43. *Id.*

44. *Id.* at 2433–34.

45. United States v. Williamson, 792 F. Supp. 805, 806 (M.D. Ga.), *aff'd*, 981 F.2d 1262 (11th Cir. 1992), *vacated*, 114 S. Ct. 2431 (1994).

B. *Lower Court Rulings*

Because Harris was unavailable to testify,[46] the district court allowed Harris's confessions to come into evidence through the testimony of the drug agent as declarations against penal interest under Rule 804(b)(3).[47] The district court considered each confession as a whole and concluded that because the declarant was unavailable and clearly implicated himself in his confessions, and because corroborating circumstances indicated the trustworthiness of his statements, his confessions were admissible under the exception.[48] Williamson appealed, asserting that the testimony regarding Harris's out-of-court confessions did not fit within the hearsay exception for declarations against interest.[49] The Eleventh Circuit Court of Appeals affirmed Williamson's conviction.[50]

After granting certiorari, the Supreme Court held that only the clearly disserving remarks within Harris's confessions should be admitted.[51] Although the Court agreed to remand the case for reconsideration of the admissibility of Harris's confessions under Rule 804(b)(3), it was divided on the issue of whether third-party, out-of-court confessions should be separated into discrete remarks. The majority opinion, written by Justice O'Connor, concluded that the rule requires an examination of separate remarks within third-party confessions for individual disserving elements.[52] The Court indicated that parts of Harris's confessions clearly would be admissible under this approach, but other portions, especially

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46. *See* Fed. R. Evid. 804(a) for the situations in which a declarant is considered "unavailable to testify." Rule 804(a)(1), for example, defines a declarant as unavailable if the declarant is exempted from testifying on the ground of privilege concerning the subject matter of the declarant's statement.

47. *Williamson*, 114 S. Ct. at 2434.

48. *Id.*

49. *Id.* Williamson additionally claimed that admission of the confessions violated his right to confrontation under the Sixth Amendment.

50. United States v. Williamson, 981 F.2d 1262 (11th Cir. 1992), *aff'g* 792 F. Supp. 805 (M.D. Ga.), *vacated*, 114 S. Ct. 2431 (1994). The Court of Appeals affirmed without issuing an opinion.

51. *Williamson*, 114 S. Ct. at 2437. The Court explicitly avoided reaching Williamson's constitutional argument and based its decision solely on the rule for declarations against interest. The argument might be made, however, that *Williamson* has constitutional implications because of the frequent attempts in prior case law to "square" the rule for declarations against interest with the rights of defendants to confrontation and due process. *See* Karl B. Tegland, 77 *Litigation Today* 10 (July 1994). Washington courts' requirement that confessions admitted under the rule for declarations against interest have particularized guarantees of trustworthiness ensures that evidence admitted under this rule will be sufficiently reliable for the purposes of the hearsay exception and will stand up to challenge on constitutional grounds. *See supra* note 34 and accompanying text.

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

those incriminating Williamson, probably would be excluded.[53] Justice Kennedy's concurring opinion,[54] on the other hand, concluded that confessions should be considered as a whole, subject to certain limitations noted below.[55]

C. *The Majority's Opinion Requiring the Exclusion of All Non-Disserving Remarks from Third-Party Confessions*

In concluding that the word "statement" in Rule 804(b)(3)[56] should be read narrowly, the majority enumerated some of the dangers associated with admitting hearsay. The Court focused on hazards such as the potential for lying, misperception of events, inadequate memory, and misunderstanding by the listener.[57] Its decision to adopt the narrower definition of "statement" also was broadly premised on the notion that to lie effectively, people often mix truthful and untruthful remarks.[58] Against this backdrop, the Court determined that the underlying principle behind the rule, that people generally will not speak against their own interest unless they believe what they are saying is true, cannot justify admitting any non-disserving remarks.[59] The Court specifically asserted that any non-disserving remarks, even those not incriminating another person, are suspect because there is no assumption of truthfulness for statements that are not explicitly against one's interest.[60] The Court concluded that this underlying principle, discernible from the rule's text, required it to choose the narrower of two definitions of the word "statement" in "Webster's Dictionary."[61] The Court accepted the definition of "statement" as "a single declaration or remark" and rejected the definition "a report or narrative" as overly broad, implying that the

53. *Id.* at 2437. The Court suggested, for instance, that Harris's comment that he knew the suitcase contained cocaine would be admissible because it was against his penal interest. The Court acknowledged that its application of Rule 804(b)(3) to inculpatory confessions involved a fact-intensive inquiry but gave little advice as to the specifics of its application.

54. Justice Kennedy was joined in his opinion by Chief Justice Rehnquist and Justice Thomas.

55. *Williamson*, 114 S. Ct. at 2445 (Kennedy, J., concurring). Justices Scalia and Ginsburg filed separate concurring opinions as well.

56. *See supra* note 11 and accompanying text.

57. *Williamson*, 114 S. Ct. at 2434.

58. *Id.* at 2435.

59. *Id.*

60. *Id.*

61. *Id.*

latter fails to comport with the notion upon which Rule 804(b)(3) is based.[62]

The Court commented that Congress could have, but did not, make contemporaneous non-disserving remarks admissible under the rule.[63] Referring briefly to the rule's advisory committee note, it found the language of the note unclear on the issue of collateral remarks. However, the Court pointed out that the note's reference to Dean McCormick's treatise indicates that self-serving parts of longer narratives should be excluded.[64] In stating that the principle underlying the statutory text is clear enough on the issue, however, the Court refused to decide how much weight to give the advisory committee note.[65] In the Court's opinion, the principle behind the text of the rule outweighs whatever guidance may be offered by the advisory committee note.

D. *Justice Kennedy's Concurrence: Considering the Confession of a Third Party as a Whole*

In *Williamson*, although Justice Kennedy agreed with the majority's judgment that the case should be remanded, his interpretation of Rule 804(b)(3) differed significantly regarding the treatment of out-of-court confessions. Justice Kennedy concluded that contemporaneous non-disserving remarks in close proximity to disserving remarks in a longer narrative may be admissible under the rule for declarations against interest if certain conditions are met.[66] To reach this conclusion, Justice Kennedy relied on the advisory committee note, the interpretation of the exception at common law, and the potential evisceration of the rule's impact if all non-disserving remarks were severed.

Justice Kennedy rejected Justice O'Connor's argument that the principle expressed in the text of the rule clearly resolves the issue of whether the word "statement" should mean a declaration as a whole, or each separate remark within a declaration. He asserted that this principle does not answer this question, and that the Court should refer to the advisory committee note for further guidance.[67] Justice Kennedy found

62. *Id.* at 2434.

63. *Id.* at 2435.

64. *Id.* at 2436.

65. *Id.* The Court's discussion of the note was limited to citing its language and asserting that it was unclear, and possibly contradictory on the admissibility of collateral remarks. The Court failed to elaborate on these assertions.

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

67. *Id.* at 2442.

that according to the note at least some remarks collateral to those against interest would be admissible as "related statements."[68] He then reasoned that even if the legislative intent to include collateral remarks was not evident in the note, there was a presumption that Congress intended the rules of evidence to be applied as they had been under the common law.[69] Citing to several commentators, [70] Justice Kennedy indicated that the tendency under the common law hearsay exception for declarations against interest was to admit certain non-disserving remarks that were connected with disserving ones.[71]

Finally, Justice Kennedy asserted that the exclusion of collateral remarks would result in the exclusion of most inculpatory statements, because statements incriminating others rarely are directly against the declarant's own interest.[72] According to Justice Kennedy, this would eviscerate the exception for inculpatory declarations against penal interest, a result Congress did not intend.[73]

Although Justice Kennedy's interpretation of Rule 804(b)(3) allows for the admission of collateral remarks, he stated that the advisory committee note does not suggest that all collateral remarks should be admissible. He noted that McCormick's treatise, explicitly cited to by the note, advises severing clearly self-serving remarks from longer admissible narratives.[74] Justice Kennedy concluded his opinion, therefore, by recommending that courts admit remarks collateral to those against interest in a longer confession, subject to two limitations. First, where a collateral remark is so self-serving that it is unreliable, it should be excluded.[75] Second, where the circumstances surrounding the statement indicate that the declarant had a motive to fabricate, such as the existence of an opportunity to gain favor with authorities or shift blame to others, the entire statement should be excluded as unreliable.[76] Justice

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68. *Id.* Justice Kennedy quoted the advisory committee's note to Rule 804(b)(3) which states: "Ordinarily the third-party confession is thought of in terms of exculpating the accused, but this is by no means always or necessarily the case: it may include statements implicating him, and under the general theory of declarations against interest they would be admissible as related statements." *Id.*

69. *Id.*

70. *Id.* Justice Kennedy cited to Charles McCormick, *Law of Evidence* § 256 (1954); 5 John Wigmore, *Evidence* § 1465 (3d ed. 1940); Bernard S. Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 Harv. L. Rev. 1, 57 (1944).

71. *Id.* at 2442–43.

72. *Id.* at 2443.

73. *Id.*

74. *Id.* at 2444.

75. *Id.* at 2445.

76. *Id.*

Kennedy agreed that the case should be remanded, but maintained that it should be reconsidered according to this approach.

III. WASHINGTON SHOULD RETAIN ITS APPLICATION OF RULE 804(B)(3) TO INCULPATORY DECLARATIONS AND REJECT THE *WILLIAMSON* COURT'S APPROACH

Washington courts historically have interpreted Rule 804(b)(3) in a manner similar to the approach taken by Justice Kennedy in *Williamson.* Consistent with Justice Kennedy's proposal, Washington interprets Rule 804(b)(3) to allow non-disserving remarks to be admitted if they are a part of a longer narrative that is disserving as a whole.[77] Close analysis of *Williamson* points out the virtues of Justice Kennedy and Washington's approach to Rule 804(b)(3). Because of the fair balance under this approach between the policy against admitting hearsay and the need for reliable evidence, Washington should retain its current application of Rule 804(b)(3) to inculpatory declarations.

A. The Williamson *Court Strikes an Improper Balance Between the Concern with Admitting Hearsay and the Need for Reliable Evidence*

1. The Narrow Definition of "Statement" Proposed by the Majority Fails to Account Adequately for the Need for Relevant Evidence

The *Williamson* Court's interpretation of Rule 804(b)(3) over-emphasizes the policy against admitting hearsay, and fails to accommodate the critical need for meaningful evidence in criminal cases when sufficient protection can be afforded in a more balanced way. The Court reasoned that the principle behind the rule—that people generally do not speak against their own interest without believing that what they are saying is true—requires a narrower definition of "statement" when the admissibility of collateral remarks is at issue.[78] The Court specifically

77. *See* Tegland, *supra* note 9, at n.15. Under the Washington interpretation of the rule, even self-serving portions of a longer statement could be admitted if the statement was predominantly disserving. Washington courts have implied, however, that they might exclude easily severable, clearly self-serving remarks. *See, e.g.*, State v. Valladares, 31 Wash. App. 63, 639 P.2d 813 (1982), *aff'd in part, rev'd in part*, 99 Wash. 2d 663, 664 P.2d 508 (1983) (admitting statement as predominantly against interest, but noting that the admitted collateral portions were not truly self-serving, leaving open the question of whether clearly self-serving portions would be admissible).

78. *See supra* notes 61–62 and accompanying text.

stated that Rule 804(b)(3) does not extend to individual remarks that merely are collateral to those against interest.[79]

However, accepting the principle that people generally are honest when speaking against their own interest does not necessarily lead to the conclusion that non-disserving portions of a longer, generally disserving statement should be separated and excluded. In other words, the principle behind the rule does not resolve the issue of how narrowly the word "statement" should be read. Applying this principle, it is as logical to accept that a statement is reliable because it is disserving as a whole as it is to presume that only portions of a generally disserving statement are reliable. In deciding how narrowly "statement" should be defined, the principle underlying the rule should not be considered determinative and should not affect the balancing of the interests of excluding hearsay and admitting reliable evidence.

In arriving at its narrow reading of the word "statement," the Court focused on the policy against admitting hearsay and particularly on the suspicious nature of inculpatory declarations.[80] This suspicion and the Court's assumption that people mix falsehood with truth to lie effectively,[81] comports with the commentary of Bernard S. Jefferson, who considered any non-disserving portions of a declarant's longer narrative untrustworthy.[82] Professor Wigmore, on the other hand, asserted that all remarks within a longer narrative presumably are trustworthy because of the declarant's more generally disserving state of mind.[83] Both of these views are assumptions about the nature of human behavior and neither has been proven singularly correct. These assumptions, therefore, should not displace a balancing between the dangers of admitting hearsay and the need for reliable evidence.

The *Williamson* Court failed to consider the general policy behind hearsay exceptions, that is, the need for reliable evidence, as a counterpoint weighing toward a broader reading of the word

79. *Id.*

80. *Id.*

81. *Id.*

82. *See supra* note 18 and accompanying text.

83. *See supra* note 22 and accompanying text. Professor Wigmore asserted that against-interest elements in a longer statement indicated a trustworthy state of mind, which assured that the statement was trustworthy throughout, even without the requirement of corroborating circumstances. Wigmore's view has been considered by some courts as too broad, even where declarations are considered as a whole. *See* United States v. Barrett, 539 F.2d 244 (1st Cir. 1976) (admitting remarks collateral to those against interest in a longer statement but not accepting the "rather broad formulation" of Professor Wigmore).

"statement."[84] The broad policy behind the hearsay exceptions as a whole is that admitting less than ideal evidence is better than admitting no evidence at all.[85] The ideal conditions of having witnesses testify under oath, in the presence of the trier of fact, and subject to cross-examination, are not available for out-of-court declarations made by an unavailable declarant. Justifications for hearsay exceptions define areas where evidence, although not given under these ideal conditions, is considered trustworthy enough to be admissible. Thus, under Rule 804(b)(3), evidence is admissible because of the rule's underlying premise that people generally will not make statements contrary to their own interest without believing them to be true. While evidence admitted pursuant to a particular hearsay exception justifiably must fall within a particular category of targeted testimony, exceptions to the hearsay rule should be interpreted in light of the policy behind hearsay exceptions as a whole. The need for meaningful evidence, especially where non-hearsay evidence is unavailable, should not be overlooked in deciding how broadly to apply Rule 804(b)(3) to inculpatory declarations.[86]

2. *Other Safeguards Adequately Protect Defendants from Unreliable Hearsay*

Particularly where other mechanisms protect defendants' rights, the *Williamson* Court's bright-line rule unnecessarily excludes evidence. Although courts view declarations incriminating or exonerating a third

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84. Professor Wigmore explained that the reasons for admitting hearsay are "trustworthiness" and "necessity." *See* Wigmore, *supra* note 22, §§ 1420–22.

85. Introductory Note; The Hearsay Problem, which precedes the Federal Rules of Evidence states:

> [W]hen the choice is between evidence which is less than best and no evidence at all, only clear folly would dictate an across-the-board policy of doing without. The problem thus resolves itself into effecting a sensible accommodation between these considerations and the desirability of giving testimony under the ideal conditions.

See also Fed. R. Evid. 804(b) advisory committee note ("[T]estimony given on the stand in person is preferred over hearsay, and hearsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant.").

86. *See* Ohio v. Roberts, 448 U.S. 56, 64 (1980) (suggesting that competing public policy considerations, such as the interest in effective law enforcement, may sometimes outweigh the requirement of confrontation at trial). *See also* Jay L. Hack, Note, *Declarations Against Penal Interest: Standards of Admissibility Under an Emerging Majority Rule*, 56 B.U. L. Rev. 148, 166 (1976) ("[E]xcluding all collateral statements can lead to the arbitrary rejection of valuable evidence.").

party with suspicion,[87] the Washington approach is sufficiently effective in guaranteeing the admission of reliable statements only.[88] When a witness is unavailable, and cross-examination is thus impossible, a special effort must be made to guarantee a defendant's Sixth Amendment right to confrontation.[89] Washington courts require corroboration for both exculpatory and inculpatory declarations against interest. This requirement safeguards defendants' rights under the Confrontation Clause, despite the defendants' lack of opportunity to confront declarants at trial and conduct cross-examination. The corroboration requirement may be satisfied where circumstances surrounding the making of the statement indicate its reliability.[90] This requirement thus guarantees the presence of adequate indicia of a statement's trustworthiness and serves to protect defendants' rights.

If the Washington approach to Rule 804(b)(3) had been applied in *Williamson*, Williamson likely would have received protection from Harris's confessions equal to what he received under the *Williamson* Court's approach. A Washington court would have examined Harris's confessions for a predominantly disserving or non-disserving state of mind, and would have focused on the circumstances surrounding the statements for an indication of Harris's motives in confessing.[91] Applying this approach to the *Williamson* facts, a court likely would have found a predominantly non-disserving or self-serving motive behind Harris's confessions and excluded them in their entirety.

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87. *See, e.g.*, Lee v. Illinois, 476 U.S. 530, 541 (1986) (noting that arrest statements of co-defendants are viewed with greater suspicion than ordinary hearsay because of the motive to blame others and exonerate oneself).

88. By analogy, several federal courts have held hearsay statements admissible under the exception for business records, codified in Fed. R. Evid. 803(6), despite their suspicious nature from having been prepared in anticipation of litigation. These records have been held admissible because of sufficient indicia of reliability to guarantee the reports' trustworthiness. *See, e.g.*, Lewis v. Baker, 526 F.2d 470, 473 (2d Cir. 1975) (holding that accident reports were admissible, even though they had been prepared with litigation in mind, because the routine filing of such reports, and the existence of non-litigation purposes for which the reports were prepared, were adequate "earmarks of reliability"); *see also* Yates v. Bair Transp., Inc., 249 F. Supp. 681, 689–90 (S.D.N.Y. 1965) (holding that medical reports in a personal injury suit were admissible, even though prepared for litigation, because they were prepared by doctors hired by the defendant who would have no motive to lie in favor of the plaintiff).

89. The Confrontation Clause does not invariably require that defendants have the opportunity for confrontation at trial. The United States Supreme Court has found that a defendant's right to confrontation under the Sixth Amendment may be satisfied where there are sufficient indicia of reliability to protect the defendant from false statements. *See Roberts*, 448 U.S. 56; Dutton v. Evans, 400 U.S. 74 (1970).

90. *See supra* note 34 and accompanying text.

91. *See supra* notes 34–39 and accompanying text.

Specifically, the court likely would have noted that Harris had confessed to the authorities while in custody and had trivialized his own role as one of merely transporting the drugs, while attributing a more substantial role to Williamson as the owner.[92] In *Williamson*, on the other hand, the Court indicated that parts of Harris's confessions would be admissible against Williamson.[93] Although segments of the confessions would be admissible as declarations against interest under the Court's approach, it is unlikely that any remarks would seriously implicate Williamson because any individual portions not against Harris's interest would be excluded.[94] Only if an individual remark implicated both Harris and Williamson would a remark incriminating Williamson be admissible under this application of the rule.

B. *Rejection of the Advisory Committee Note to Assist Interpretation of Rule 804(b)(3) Was Inappropriate Where the Rule Itself Provides No Guidance*

The *Williamson* Court briefly discussed the advisory committee's note to Rule 804(b)(3) in order to dismiss Justice Kennedy's assertion that the note compelled the Court to interpret the rule as allowing for the admission of some collateral remarks.[95] Finding that the note's language was unclear and even contradictory regarding the admissibility of collateral remarks, the Court concluded that it was not necessary to decide how much weight to give the note because the principle expressed in the statutory text provided sufficient direction.[96] However, because the principle behind the rule does not resolve the issue[97] and the rule itself is silent, the Court's rejection of the guidance offered in the note regarding the admissibility of collateral remarks was unwarranted.

The Washington application of Rule 804(b)(3) to inculpatory declarations is more reasonable than that of the *Williamson* Court when

92. *See supra* notes 40–45 and accompanying text. *See also* Tegland, *supra* note 9, at 275–76 ("Statements made in custody . . . are particularly suspect . . . and seldom qualify as statements against penal interest."); Williamson v. United States, 114 S. Ct. 2431, 2437 (1994) (noting that "[s]mall fish in a big conspiracy often get shorter sentences than people who are running the whole show").

93. *See supra* note 53 and accompanying text.

94. *Williamson*, 114 S. Ct. at 2437. The Court noted that the portions of Harris's confessions that incriminated Williamson did not also subject Harris to criminal liability.

95. *Id.* at 2435–36.

96. *Id.* at 2436.

97. *See supra* notes 78–79 and accompanying text.

considered in light of the guidance offered by the advisory committee. The committee's note does not dictate how narrowly the word "statement" should be defined. The note does suggest, however, that some remarks incriminating the accused are sufficiently trustworthy to be admissible, as determined by circumstances surrounding the declaration. As Justice Kennedy pointed out in his concurrence, the advisory committee note refers to statements within a third-party declaration that implicate the accused and indicates that they are admissible as "related" remarks.[98] Because most individual remarks incriminating a third party are collateral to remarks against the declarant's interest,[99] the note implies, through its acceptance of "related" remarks, that some collateral remarks are admissible.

Although the note's mention of "related" remarks suggests that remarks incriminating a third party, which often are collateral to remarks against interest, may be admissible, the reference to Dean McCormick's treatise slightly narrows the rule's application to such remarks.[100] McCormick's approach is to admit non-disserving remarks that are not clearly self-serving and to sever portions that are so self-serving as to be considered unreliable.[101] In acknowledging the direction of both the text of the note and the reference to McCormick, Justice Kennedy's suggestions for admitting declarations as a whole, except for clearly self-serving portions,[102] closely comport with the guidance offered by the advisory committee. Similarly, the Washington application of Rule 804(b)(3) conforms to the note's direction and should be retained.[103]

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98. *Williamson*, 114 S. Ct. at 2442 (Kennedy, J., concurring) (asserting that the advisory committee's reference to "related" remarks "seems a forthright statement that collateral statements are admissible" under the rule). *See also supra* note 68 and accompanying text.

99. The *Williamson* Court implied, for example, that the portions of Harris's confessions incriminating Williamson were only collateral to the portions against Harris's interest. *Williamson*, 114 S. Ct. at 2437.

100. The advisory committee's note to Rule 804(b)(3) refers to Charles McCormick, *Law of Evidence* § 256 (1954) for a discussion of the balancing of self-serving and disserving aspects of a declaration.

101. *See supra* note 18 and accompanying text.

102. *See supra* notes 67–68 and accompanying text.

103. Although Washington courts conceivably might admit clearly self-serving remarks within a predominantly disserving statement, courts have implied that easily severable, truly self-serving remarks might be excluded. *See supra* note 77.

C. Williamson *Strips Rule 804(b)(3) of Its Effect on the Admissibility of Inculpatory Declarations*

By requiring that any non-disserving remark be excluded from a longer declaration, the *Williamson* Court limited the effect of Rule 804(b)(3) to the extent that it will no longer be effective in many cases involving inculpatory declarations.[104] As previously noted, courts generally understand that Congress intended inculpatory statements to fall within the scope of the rule.[105] Commentators have observed that most remarks incriminating another person are not directly against the declarant's own interest. [106] In most cases, remarks incriminating the accused will be collateral to the remarks disserving to the declarant[107] and, under the majority's interpretation, these remarks would be inadmissible.

The Court's interpretation thus deprives the rule of much of its ability to reach evidence not already admissible under another hearsay exception. Individual remarks against the declarant's own interest will often be incriminating—and therefore useful as evidence against a defendant—only where other evidence connects the declarant and the defendant in a conspiracy or joint action. In a case with evidence of joint action, however, the co-conspirator exception to the hearsay rule[108] likely would already apply. In *Williamson*, the Court listed instances where remarks incriminating the accused still would be admissible as declarations against interest, in order to refute Justice Kennedy's assertion that its interpretation eviscerated the rule's effect.[109] In each of the Court's examples, however, the accused would be incriminated only if there was some other evidence of a conspiracy or joint action between

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104. As Justice Kennedy noted, there are rare cases where a single remark can be against the declarant's interest while incriminating another, such as where one admits to stealing property, and the defendant is being prosecuted for receipt of that property. Williamson v. United States, 114 S. Ct. 2431, 2443 (1994) (Kennedy, J., concurring).

105. *See supra* note 15.

106. *See* Andrew R. Keller, Note, *Inculpatory Statements Against Penal Interest and the Confrontation Clause*, 83 Colum. L. Rev. 159, 163 (1983); *see also* Bergeisen, *supra* note 15, at 1207.

107. *See supra* note 104.

108. Fed. R. Evid. 801(d)(2)(E). Co-conspirator statements, made "by a coconspirator of a party during the course and in furtherance of the conspiracy," technically are considered "not hearsay." *Id.* Like admissions of a party, *see supra* note 2, co-conspirator statements are exempt from hearsay treatment even though they meet the definition of hearsay.

109. Williamson v. United States, 114 S. Ct. 2431, 2436–37 (1994).

the accused and the declarant.[110] Under the Court's approach, the application of Rule 804(b)(3) to declarations incriminating the accused is limited to these narrow circumstances. If the rule is to have any force regarding the admissibility of incriminating remarks beyond that already existing in other rules,[111] the Court's interpretation should be rejected.

IV. THE PRACTICAL ADVANTAGE OF THE WASHINGTON APPROACH OVER THAT OF THE *WILLIAMSON* COURT

The problem of stripping Rule 804(b)(3) of its effect regarding inculpatory declarations as well as the potential practical difficulties of applying the *Williamson* Court's interpretation of the rule are best illustrated through the use of a hypothetical confession. In the following hypothetical it should be assumed that the declarant's confession is being sought as evidence against the declarant's boyfriend, John, in a trial for his own participation in the crime. It should also be assumed that the declarant, Jane Doe, has been found "unavailable" under Rule 804(a).

Statement of Jane Doe:

> My boyfriend John was at my house and overheard my mom and me fighting in the kitchen. John came in to intervene and my mom got out of control. I went to my room to get a gun that I keep for protection. When I returned, my mom had pushed John to the ground and was standing over him with a butcher knife. I threw him the gun and he ended up shooting her. When I realized she was still conscious, I grabbed the gun and shot her again.

The approach of the *Williamson* Court to this scenario would require the exclusion of all non-disserving remarks, including all comments

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110. For example, Justice O'Connor described a situation where the phrase, "'I was robbing the bank on Friday morning,'" would be admissible against a defendant as an inculpatory confession. It is clearly against the declarant's penal interest, but only incriminates another person in the robbery if other evidence establishes the other's connection to the crime. *Id.* at 2436. Justice O'Connor acknowledged that her examples of accomplice statements also might be admissible under other sections of Rules 801–804. *Id.* at 2437.

111. The Washington interpretation of Rule 804(b)(3), under which declarations may be admitted as a whole, is not an improper end around Rule 801(d)(2)(E), the rule relating to co-conspirator statements. Evidence is admitted under the two rules on fundamentally different theories. Evidence falling under Rule 801(d)(2)(E) is considered "not hearsay," *see supra* note 108, and no additional indicia of reliability are required. The rule only places policy-based limits on when parties will be estopped from asserting that statements made by those with whom they have acted jointly, or in conspiracy, are inadmissible as hearsay. Evidence falling under Rules 803 or 804, on the other hand, is considered hearsay but is admissible based on circumstantial evidence indicating reliability.

incriminating John, because none of the individual inculpatory remarks in this example are also against the declarant's own penal interest. Because only those remarks that incriminate Jane would be admissible under *Williamson*, any references to John's participation presumably would be excluded, even if they were not self-serving to Jane.[112] The portions of Jane's confession admissible under *Williamson*'s application of Rule 804(b)(3) would consist of a series of phrases against Jane's own interest, such as her actions to get the gun and her own participation in the shooting. This approach would leave a string of remarks without context, purely against Jane's interest, that would be useless against John in his trial unless other evidence established a conspiracy or joint action between Jane and John.

Under the current Washington approach, on the other hand, Jane's confession would be examined as a whole, with consideration of the circumstances surrounding the confession to determine whether adequate indicia of reliability existed.[113] For example, if Jane confessed while in police custody, this would suggest inadmissibility because of suspicion that the confession was made to shift blame from Jane to John. Washington courts also would likely find a motive to curry favor with the authorities if evidence indicated that Jane was offered leniency for cooperation. The spontaneity and timing of the confession would be another factor considered. If Jane confessed shortly after the shooting and was emotionally responding to the situation, her confession probably would be considered more trustworthy; whereas, if she confessed after turning herself in to the police a week after the incident, the confession would be considered less reliable because of her opportunity to concoct a false confession. Jane's role in the shooting—passing her boyfriend the gun and firing the shot that resulted in her mother's death—reveals that she was an active participant in the crime and suggests greater reliability because she did not appear to attribute an inconsequential role to herself.[114] In Washington, the admissibility of the confession as a whole would depend upon a balance of such factors.

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112. In an explanation of the various approaches to the admissibility of collateral remarks, Justice Kennedy noted that in the example, "'John and I robbed the bank,'" "'John and'" is non-disserving. The only admissible portion under the *Williamson* Court's approach would be, "I robbed the bank." *See Williamson*, 114 S. Ct. at 2441 (Kennedy, J., concurring) (citing Charles McCormick, *Law of Evidence* § 256, at 552–53 (1954)).

113. In an examination of a confession for particularized guarantees of trustworthiness, the courts would refer to several factors. *See supra* note 34.

114. *See supra* note 92.

1. *The Potential Evisceration of Rule 804(b)(3) with Regard to Inculpatory Remarks Under* Williamson

The Supreme Court's approach in *Williamson*, as applied to third-party inculpatory declarations, seriously undermines the rule's ability to reach reliable evidence against a defendant incriminated by another's declaration. The *Williamson* Court required the exclusion of individual remarks incriminating a third-party defendant unless they also were disserving to the declarant's own interest. When taken separately, the individual remarks within Jane's confession that incriminate her do not also implicate John. It is likely that none of the portions of Jane's confession admissible under the *Williamson* approach would serve as meaningful evidence against John, because all references to John's participation in the crime presumably would be edited out. In the event that other evidence established that the declarant and her boyfriend had conspired, or acted jointly, to kill her mother, the remaining, edited version of Jane's confession would be useful, but presumably could be admitted under the co-conspirator exception alone.[115]

2. *The Practical Difficulties in Determining the Admissibility of Inculpatory Declarations Are Greater Under the* Williamson *Approach*

Although admitting third-party declarations under Rule 804(b)(3) requires a fact-intensive examination of the circumstances surrounding the declarations under either *Williamson* or Washington's approach, the *Williamson* Court's requirement of severing all non-disserving remarks from a third-party declaration is subject to greater practical complications. The approach taken by Washington courts calls for judging, from the circumstances, whether the predominant purpose behind the declaration as a whole was self-serving or disserving. Although this approach may be difficult for the courts,[116] the Washington method has an advantage in speed and efficiency over the *Williamson* approach, which requires the time-consuming task of evaluating whether each individual remark within a declaration is disserving or non-disserving. Even though it is more easily applied, the Washington rule, which requires corroboration for both exculpatory and inculpatory

115. *See supra* note 108 and accompanying text.

116. *See* Tegland, *supra* note 9, at 269–70 (noting that Washington's test based on a statement's predominant purpose may require some assumptions about facts, but seems preferable to other approaches).

declarations and an examination of the context surrounding the declaration, does not sacrifice reliability and adequately guarantees the protection of defendants' Sixth Amendment rights.[117]

In addition, courts applying the *Williamson* rule to Rule 804(b)(3) may confront difficulties in making determinations of whether each portion of a longer confession contains a disserving element. While it is unclear from *Williamson* whether individual words must be scrutinized separately, the suggestion is that in some cases, individual words, such as a reference to the defendant, will be severed from a single phrase.[118] Although there may be some differences among courts as to how much to divide declarations into individual portions, *Williamson* fails to provide any clear guidance.

Furthermore, in excluding all non-disserving portions of a longer declaration, these courts risk the possibility of ending up admitting only a chain of remarks without context. Non-disserving remarks may serve to hold a declaration together logically, and severing these remarks may destroy its coherence. In the hypothetical, severing non-disserving portions of Jane's confession would not only leave no useful evidence against John, unless other evidence suggested joint action between Jane and John, but also would leave a string of comments that would leave the incorrect impression that Jane acted alone. For instance, the court might consider the admissible portion of Jane's confession to be: "I went to my room to get a gun . . . . I threw . . . the gun . . . . When I realized she was still conscious, I grabbed the gun and shot her again." Severing collateral remarks that give the confession context and provide insight into the declarant's frame of mind may leave the confession ungrounded, or worse, may give the trier of fact an incorrect impression regarding the facts of the case.[119]

V. CONCLUSION

In *Williamson v. United States*, the United States Supreme Court significantly narrowed the scope of Federal Rule of Evidence 804(b)(3). As applied in *Williamson*, the rule provides for the admissibility of only those individual remarks within a longer confession that are clearly

117. *See* discussion *supra* part III.A.2.

118. *See supra* note 112.

119. *See* 4 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 501, at 832 (2d ed. 1994) (noting that the rule for declarations against interest might apply to collateral remarks where there is a "close logical connection" with a remark against interest and where "omitting the reference would leave the statement vague and ungrounded").

against the declarant's interest. Neither the rule itself, nor the principle underlying the text of the rule, however, compel this interpretation. In its application of the rule for declarations against interest, the Court failed to adequately consider the direction of the rule's advisory committee note and improperly balanced the concern with admitting hearsay against the need for reliable evidence.

As currently applied in Washington, Rule 804(b)(3), which is identical to the federal rule, allows for the admissibility of inculpatory declarations as a whole as long as the declaration is predominantly against the declarant's interest. This is a more practical application of the rule than that in *Williamson* because it does not require the court to analyze every remark for an "against-interest" element and it preserves the context of such declarations. Moreover, if Washington chooses to follow the Supreme Court in its interpretation of Rule 804(b)(3) in *Williamson*, the rule will be rendered virtually ineffective with regard to inculpatory declarations, which is contrary to the apparent legislative intent to include such statements within the scope of the rule. Although declarations by an unavailable declarant implicating a third party in a crime are by nature suspicious, Washington courts employ adequate safeguards in their application of Rule 804(b)(3) to such declarations. The approach taken by Washington courts sufficiently guarantees the trustworthiness of admitted declarations for purposes of the hearsay exception for declarations against interest and also, if challenged, would pass constitutional muster. Consequently, it is advisable for Washington to retain its application of Rule 804(b)(3) to inculpatory declarations and to reject the Supreme Court's approach in *Williamson*.