

7-1-2001

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Recommended Citation

Richard T. Sahuc, *The Exception That Swallows the Rule: The Disparate Treatment of Federal Rule of Evidence 804(b)(3) as Interpreted in United States v. Williamson*, 55 U. Miami L. Rev. 867 (2001)
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The Exception That Swallows the Rule: The Disparate Treatment of Federal Rule of Evidence 804(b)(3) as Interpreted in *United States v. Williamson*

I. INTRODUCTION

Consider the following scenario: John, Bob, Stewart, and Sam are all members of a drug conspiracy. Sam is arrested with a large amount of heroin and enters into a plea agreement to testify against the others. John and Stewart are subsequently arrested and elect to go to trial. Bob, however, is nowhere to be found. The prosecutors who are trying the cases against John and Stewart discover that Bob told a bartender that he was leaving town. According to the bartender, Bob said that he, John, Stewart, and Sam had been selling heroin, but the cops were closing in on them. While the authorities search for Bob, the prosecutors attempt to admit the bartender's testimony in order to incriminate John and Stewart.

The bartender's testimony would clearly be hearsay.¹ In general, the Federal Rules of Evidence prohibit the admission of hearsay statements into evidence.² Bob's statement to the bartender, however, may be admissible under an exception for statements made against one's penal interest.³ According to the Federal Rules of Evidence, hearsay is admissible if the declarant is unavailable as a witness and the statement "at the time of its making . . . so far tended to subject [the declarant] to civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true."⁴ This exception is rooted in the assumption that people do not make damaging statements about themselves unless they believe the statements to be true.⁵ Therefore, such statements against penal interest are deemed sufficiently reliable to ease the regular concerns regarding hearsay testimony.

The hearsay analysis becomes problematic with respect to Bob's mention of John, Stewart, and Sam. While Bob's statement that he was selling drugs is clearly against his penal interest, his statements that

1. FED. R. EVID. 801(c).

2. FED. R. EVID. 802.

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

4. *Id.*

5. FED. R. EVID. 804(b)(3) advisory committee note (citing *Hileman v. Northwest Eng'g Co.*, 346 F.2d 668 (6th Cir. 1965)).

John, Stewart, and Sam were selling drugs are not necessarily against Bob's interest. The statements implicating the others in Bob's drug scheme are collateral to the statement against his interest. They are neutral or possibly beneficial to Bob's interest. Thus, courts view such collateral statements with suspicion.

Long before the Federal Rules of Evidence were adopted, there were differing opinions as to whether a hearsay exception for statements against interest should exist. In fact, as late as the early twentieth century, there was no such hearsay exception. As years went by, however, the exception gained support and, in 1975, the hearsay exception for statements against penal interest was included in the Federal Rules of Evidence as Rule 804(b)(3).

Yet, even after Congress adopted it, Rule 804(b)(3) received varied treatment by the federal courts with respect to collateral statements. Some courts allowed into evidence entire narratives containing self-serving statements inculcating the accused, so long as the narrative as a whole inculpated the declarant. Other courts excluded such collateral self-serving statements, admitting only those collateral statements that were disserving or neutral to the declarant's interest. Still, other courts admitted only collateral, disserving statements and excluded collateral statements that were self-serving or even neutral to the declarant's interest. Thus, the lower courts exercised great discretion in admitting collateral statements under the rule.

In 1994, the Supreme Court took it upon itself to resolve the disparate treatment of evidence under Rule 804(b)(3) by the lower courts. In *Williamson v. United States*,⁶ the Supreme Court, in an opinion written by Justice O'Connor, laid down what it figured to be a bright line rule determining the scope of the exception for statements against interest. Under *Williamson*, Bob's statements about John, Stewart, and Sam's involvement in the drug sales are inadmissible.

Now, seven years later, it seems as though Bob's statements implicating the others would probably be admitted in many federal courts, despite the fact that *Williamson* has not been overturned. The question remains, what happened to it? Apparently, some lower courts have simply disregarded it. Others have interpreted its language concerning whether a collateral statement is truly self-incriminating very broadly. Despite being controlling precedent handed down from the highest court in the land, federal courts have treated *Williamson* with seemingly conscious disregard. The problem, however, lies deeper.

6. 512 U.S. 594 (1994).

II. BACKGROUND

The Federal Rules of Evidence define hearsay as “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.”⁷ In general, admission of hearsay statements into evidence is prohibited.⁸ Hearsay evidence is not subject to cross-examination and deprives the fact finder of the opportunity to evaluate the perception, memory, and veracity of the declarant.⁹ In short, hearsay evidence escapes institutionalized procedures intended to ensure the reliability of evidence.

Yet some statements that are technically hearsay are admissible where they “display indicia of reliability sufficient to overcome the normal dangers of admitting hearsay evidence.”¹⁰ One well-established exception to the hearsay rule rooted in eighteenth century English common law allowed for admission of statements of facts against the declarant’s interest.¹¹ It was widely held that for such statements to be admissible they had to meet four requirements:

- (1) the declarant must be dead; (2) the declaration must be against the pecuniary or proprietary interest of the declarant; (3) the declaration must be of a fact or facts which were immediately cognizable by the declarant personally; and (4) the declarant must not have had a probable motive to falsify the fact declared.¹²

Until the twentieth century, the against interest hearsay exception was not allowed for statements against penal interest.

Statements against penal interest were traditionally viewed as unreliable for three reasons.¹³ First, the psychological premise, that a reasonable person would not make a statement against his penal interest unless the statement was true, is a generalization that may not apply to certain “unreasonable” individuals.¹⁴ Second, the declarant often has reasons to lie or stretch truths.¹⁵ For instance the declarant may be attempting to curry favor with authorities, shift or share blame for a

7. FED. R. EVID. 801(c).

8. See FED. R. EVID. 802.

9. See 5 WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1362, at 3 (James H. Chadbourne rev., 1974); see also Emily F. Duck, Note, *The Williamson Standard for the Exception to the Rule Against Hearsay Statements Against Penal Interest*, 85 J. CRIM. LAW & CRIMINOLOGY 1084, 1085 (1995).

10. Jay L. Hack, Note, *Declarations Against Penal Interest, Standards of Admissibility Under an Emerging Majority Rule*, 56 B.U. L. REV. 148, 148 (1976).

11. See, e.g., *Higham v. Ridgway*, 103 Eng. Rep. 717 (K.B. 1808).

12. Bernard S. Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 HARV. L. REV. 1, 1 (1944).

13. Andrew R. Keller, *Inculpatory Statements Against Penal Interest and the Confrontation Clause*, 83 COLUM. L. REV. 159, 163 (1983).

14. *Id.*

15. *Id.*

crime, exact revenge, divert attention from himself, or even boast.¹⁶ Finally, most statements inculcating a defendant are merely collateral and rarely directly contrary to the declarant's own penal interest, further weakening the reliability of the statement.¹⁷

The hypothetical in the introduction illustrates this. Bob is inculpated by saying that he was selling drugs and not by mentioning John, Stewart, and Sam's involvement. The mention of the other players in the scheme is merely collateral to Bob's inculpatory statement. The prosecution will seek to admit this collateral statement into John and Stewart's trials.

For these reasons, courts at common law were reluctant to admit such statements against penal interest into evidence.¹⁸ In fact, the admission of these statements against penal interest was rejected in the *Sussex Peerage Case*, which was recognized as controlling authority in the courts of England.¹⁹ The United States Supreme Court later adopted the English view in *Donnelly v. United States*.²⁰ In his famous dissent, Justice Holmes urged the use of common sense and logic, rather than English precedent, to determine the admissibility of hearsay statements against a declarant's penal interest.²¹ Apparently, courts and legislators took heed of Justice Holmes's words. In the years following *Donnelly*, court decisions, statutes, and evidentiary rules began to allow for the introduction of statements against penal interest.²²

Finally, in 1975, Congress enacted the Federal Rules of Evidence, and the hearsay exception for statements against penal interest was codified.²³ Rule 804(b)(3) provides a hearsay exception for "a statement which . . . at the time of its making . . . so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing

16. *Id.* at 163-64.

17. *Id.*

18. Duck, *supra* note 9, at 1086; *see also* Keller, *supra* note 13, at 163-64.

19. 8 Eng. Rep. 1034 (H.L. 1844).

20. 228 U.S. 243, 273 (1913).

21. Justice Holmes stated:

The English cases since the separation of the two countries do not bind us; the exception to the hearsay rule in the case of declarations against interest is well known; no other statement is so much against interest as a confession of murder; it is far more calculated to convince than dying declarations, which would be let in to hang a man; and when we surround the accused with so many safeguards, some of which to me *seem* excessive; I think we ought to give him a benefit of a fact that, if proved, commonly would have such weight.

Id. at 277-78 (citation omitted).

22. WIGMORE, *supra* note 9, § 1477, at 360 n.6-7.

23. For a discussion of the legislative history of the Federal Rules of Evidence, in particular Rule 804(b)(3), *see* Duck, *supra* note 9, at 1086-88.

it to be true.”²⁴ In 1978, the Fifth Circuit, in *United States v. Alvarez*,²⁵ simply restated the rule as a three-part test to determine the admissibility of hearsay statements under the exception. First, the declarant had to be unavailable.²⁶ Second, the statement had to subject the declarant to criminal liability such that a reasonable person in the declarant’s position would not have made it unless it were believed to be true.²⁷ Third, the statement had to be corroborated by circumstances clearly indicating its trustworthiness, but only if it is offered to exculpate the defendant.²⁸ Following the Fifth Circuit’s decision in *Alvarez*, other circuits began to apply the same three-part test. Some circuits even expanded the corroboration requirement of the third prong to cover statements offered to inculcate the defendant, even though Rule 804(b)(3) contains no such requirement.²⁹

Unfortunately, since the test mirrored Rule 804(b)(3), it ignored the greatest problem with this exception. Hearsay statements in this context that are offered to either inculcate or exculpate a defendant are usually collateral to the statement against the declarant’s interest. In fact, such statements are usually neutral, or even favorable, to the declarant’s interest. The text of Rule 804(b)(3), however, is silent with regard to collateral statements.³⁰ Thus, a problem arises when a declarant gives a statement that is generally against his penal interest yet contains collateral remarks inculcating the defendant.

This problem is hardly new and over the years there have traditionally been three approaches. The first approach was offered by John Henry Wigmore, who felt that in such circumstances the entire statement should be admitted.³¹ He reasoned that if a “statement is made under circumstances fairly indicating the declarant’s sincerity and accuracy, it is obvious that the situation indicates the correctness of whatever he may say under that influence.”³² Thus, “the statement may be accepted, not merely as to the specific fact against interest, but also as to *every fact contained in the same statement*.”³³ Using the hypothetical to illustrate Wigmore’s approach Bob told the bartender that he had been committing an illegal act by selling drugs. According to Wigmore, Bob would

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

25. 584 F.2d 694, 699 (5th Cir. 1978).

26. *Id.*

27. *Id.*

28. *Id.*

29. See, e.g., *United States v. Oliver*, 626 F.2d 254, 260 (2d Cir. 1980); *United States v. Riley*, 657 F.2d 1377, 1383 (8th Cir. 1981).

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

31. WIGMORE, *supra* note 9, § 1465, at 339.

32. *Id.*

33. *Id.*

not have related this information to the bartender had it not been true. Thus, Bob was in a truthful state of mind so his statement implicating John, Stewart, and Sam in the drug ring must be equally reliable and therefore admissible.

The second view, that of Charles T. McCormick, is more guarded concerning the admission collateral statements. He believed that the nature of the collateral statements themselves should be taken into account.³⁴ Those collateral statements that are disserving or neutral as to the declarant's interest should be admitted.³⁵ Those that are of a self-serving nature should be excluded.³⁶ Under this approach, the focus would be on the circumstances surrounding Bob's implication of the others in the drug ring. If circumstances indicate that Bob mentioned the others for a self-serving purpose, then the collateral statements would be inadmissible because Bob could have lied. If it is shown, however, that Bob had nothing to gain by implicating the others, or that the collateral statements were actually disserving, then the full statement would be admissible.

Bernard S. Jefferson advanced the third and narrowest approach.³⁷ Namely, that the use of statements against interest should be confined "to the proof of the fact which is against interest."³⁸ Disagreeing with the Model Code of Evidence "that a declaration against interest involves a truth-telling frame of mind" affecting all statements contained therein, Jefferson claimed that "the presence of the declaration against interest does not add to the trustworthiness of neutral and self-serving statements."³⁹ Thus, *only* the statements directly counter to the declarant's penal interest would be admissible. To use Bob's statement again, it is clear that his mention of John, Stewart, and Sam is not directly counter to Bob's self-interest. Thus, reference to the others would be redacted, if possible, or the entire statement could be deemed inadmissible.

While generally rejecting Wigmore's view that obviously self-serving statements were held inadmissible,⁴⁰ the federal courts were far from uniform in their approaches. The Second Circuit, in *United States v. Garriss*,⁴¹ adopted a sufficiently integrated test, rejecting the argument

34. See CHARLES T. MCCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 256 (1954).

35. *Id.* at 553.

36. *Id.*

37. Jefferson, *supra* note 12, at 57-63.

38. *Id.* at 62-63.

39. *Id.* at 62.

40. See, e.g., *United States v. Barrett*, 539 F.2d 244, 252 (1st Cir. 1976) (stating that the court did "not read [Rule 804(b)(3)] as incorporating the rather broad formulation put forth by Wigmore, who saw the against-interest exception as permitting reception not only of the 'specific fact against interest, but also . . . every fact contained in the same statement.'").

41. 616 F.2d 626, 630 (2d Cir. 1980).

that a remark taken out of a self-inculpatory declaration and standing alone must be against the declarant's interest to be admitted. According to the *Garris* court, "it suffices for admission under [Rule 804(b)(3)] that a remark which is itself neutral as to the declarant's interest be integral to a larger statement which is against the declarant's interest."⁴² In fact, the Second Circuit's approach was strikingly similar to that of Wigmore.

United States v. Lieberman followed the *Garris* court's lead.⁴³ In a case involving a conspiracy to sell marijuana, the Second Circuit held that the declarant's statement that he packaged dishpacks was clearly self-incriminating and admissible because the dishpacks contained marijuana.⁴⁴ The same declarant made a second statement that the defendant told him not to open the door for anyone, and this was also held to be self-incriminating, "since it was probative of [the declarant's] knowledge of the furtive nature of his activities."⁴⁵ The court, however, went further by stating that even if the second statement had been completely 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."⁴⁶

In yet another Second Circuit case, the court admitted a declarant's statement that he was dealing drugs with the defendant. Reasoning that the reference to the declarant's drug dealing was closely linked to the defendant's drug dealing, the court claimed that "the admission of the entire statement was clearly proper."⁴⁷ It is interesting to note that, while these cases all share a "Wigmorean" approach to collateral statements, none actually cite to him to support the proposition.

By contrast, other circuits have adopted Jefferson's narrower interpretation of Rule 804(b)(3).⁴⁸ *United States v. Lilley* involved a prosecution for forging a signature on an income tax refund.⁴⁹ Mrs. Lilley, the defendant, was implicated by her husband's statement admitting the forgery.⁵⁰ The Eighth Circuit held that "the small portion of Mr. Lil-

42. *Id.*

43. 637 F.2d 95 (2d Cir. 1980).

44. *Id.* at 103.

45. *Id.*

46. *Id.*

47. *United States v. Casamento*, 887 F.2d 1141, 1171 (2d Cir. 1989) ("Admitting the entire statement even though it contains a reference to others is particularly appropriate when that reference is closely connected to the reference to the declarant."). *Contra United States v. Williams*, 927 F.2d 95 (2d Cir. 1991) (admitting guilty pleas of coconspirators in a drug case under Rule 804(b)(3) only after all references to the defendants were severed and excluded).

48. See *United States v. Lilley*, 581 F.2d 182 (8th Cir. 1978). "To the extent that a statement is not against the declarant's interest, the guaranty of trustworthiness does not exist and that portion of the statement should be excluded." *Id.* at 188.

49. *Id.*

50. *Id.* at 186.

ley's statement which was against his interest should have been excluded absent severability from those portions of the statement inculcating the accused."⁵¹ This approach is directly counter to the "substantially integral" test in that it does not admit a declarant's inculpatory statements that include non-severable, collateral, neutral statements inculcating the defendant.

The Eighth Circuit received support when the Tenth Circuit later adopted the *Lilley* approach and held that "to the extent that a statement not against a declarant's interest is severable from other statements satisfying Rule 804(b)(3) . . . such statement should be excluded."⁵² The Tenth Circuit was unclear, however, as to whether such statements would be admissible if they were not severable.⁵³ Responding to the conflict among the lower federal circuits, in 1994 the United States Supreme Court accepted the opportunity to clear up the question of whether collateral statements are admissible under Rule 804(b)(3), and attempted to fashion a bright line rule.⁵⁴

III. *WILLIAMSON V. UNITED STATES*

A. *Facts*

While driving through Georgia, Reginald Harris was stopped by a deputy sheriff for weaving on the highway.⁵⁵ After Harris consented to a search of his vehicle, the deputy found nineteen kilograms of cocaine in two suitcases in the trunk and arrested Harris.⁵⁶ Shortly after his arrest, Harris was questioned by Special Agent Donald Walton of the Drug Enforcement Agency.⁵⁷ Harris claimed that he received the cocaine from an unidentified person in Fort Lauderdale and that he was to deliver it that night to a dumpster where it was to be picked up by Fredel Williamson, the owner of the cocaine.⁵⁸ When Walton informed Harris that he had arranged for a controlled delivery of the drugs, Harris suddenly changed his story.⁵⁹

According to Harris's new story, he was transporting the cocaine to

51. *Id.* at 188.

52. *United States v. Porter*, 881 F.2d 878, 883 (10th Cir. 1989).

53. *Id.*

54. *Williamson v. United States*, 510 U.S. 1039 (1994) (granting certiorari); For reported opinion following hearing, see *Williamson v. United States*, 512 U.S. 594 (1994).

55. *Williamson*, 512 U.S. at 596.

56. *Id.*

57. *Id.*

58. *Id.* In addition, other evidence further supported Williamson's connection to Harris: the two suitcases bore the initials of Williamson's sister; Williamson was listed as a driver on the car rental agreement; in the glove compartment were an envelope addressed to Williamson and a receipt bearing the address of Williamson's girlfriend were in the glove compartment. *Id.*

59. *Id.* at 596-97.

Atlanta for Williamson, and Williamson was riding in another car in front of him when he was pulled over.⁶⁰ Harris claimed that Williamson noticed that he had been stopped, turned around and drove past the location of the stop, and saw the open trunk.⁶¹ Thus, Williamson knew that the police had found the cocaine and that a controlled delivery by the government was now impossible.⁶²

Harris told Agent Walton that he had lied to Walton earlier because of his fear of Williamson.⁶³ While he freely implicated himself, Harris refused to have his story recorded, or even sign a written version of his statement.⁶⁴ Although Walton promised to report any cooperation to the Assistant United States Attorney, he subsequently testified that he did not promise Harris any reward or other benefit for cooperating.⁶⁵ At Williamson's trial, Harris was called to court but refused to testify despite an offer of use immunity from the prosecution and court order. He was eventually held in contempt.⁶⁶ As a result, the district court deemed Harris unavailable and admitted Walton's testimony as to Harris's statements under Rule 804(b)(3).⁶⁷

Williamson was eventually convicted of possessing cocaine with intent to distribute, conspiring to possess cocaine with intent to distribute, and traveling interstate to promote the distribution of cocaine.⁶⁸ Williamson appealed his conviction, claiming the admission of Harris's statements violated Rule 804(b)(3).⁶⁹ The Eleventh Circuit affirmed without opinion,⁷⁰ and the Supreme Court granted certiorari.⁷¹ The Supreme Court unanimously vacated the Eleventh Circuit's order admitting all of Harris's hearsay statements and remanded the case for further

60. *Id.* at 597.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* The Supreme Court quoted the district court's ruling:

The ruling of the Court is that the statements . . . are admissible under [Rule 804(b)(3)], which deals with statements against interest. First, defendant Harris's statements clearly implicated himself, and therefore, are against his penal interest. Second, defendant Harris, the declarant, is unavailable. And third, as I found yesterday, there are sufficient corroborating circumstances in this case to ensure the trustworthiness of his testimony. Therefore these statements by defendant Harris implicating [Williamson] are admissible.

Id. at 597-98 (citing *United States v. Harrell*, 788 F.2d 1524 (11th Cir. 1986)).

68. *Id.* at 597.

69. *Id.* at 598. Williamson also claimed that the admission of Harris's statements violated the Confrontation Clause of the Sixth Amendment. *Id.*

70. *United States v. Williamson*, 981 F.2d 1262 (11th Cir. 1992) (*per curiam*).

71. *Williamson v. United States*, 510 U.S. 1039 (1994).

proceedings.⁷² The Justices disagreed, however, on the test to determine the scope of Rule 804(b)(3) regarding the admissibility of collateral statements and on how such a test should be applied to the facts of the case.⁷³

B. *Justice O'Connor's Opinion*

In the majority opinion, Justice O'Connor concluded 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."⁷⁴ According to Justice O'Connor's narrow interpretation, "the most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory."⁷⁵ Thus, the question is whether each individual statement, viewed in light of all surrounding circumstances, is "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.'"⁷⁶

Justice O'Connor arrived at her conclusion by first having determined what the rule means by "statement."⁷⁷ After reviewing several definitions of the word, Justice O'Connor decided that the principle behind the rule that reasonable people would not make self-inculpatory statements unless the statements were true, required a narrow interpretation.⁷⁸ Justice O'Connor acknowledged that "one of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature."⁷⁹ Thus, in such an instance, admitting the entire narrative would admit false statements.

Justice Kennedy, however, pointed to the Advisory Committee's Note to Rule 804(b)(3) as endorsing his position that non-self-inculpatory parts of a narrative may be admissible if the entire narrative is self-

72. *Williamson*, 512 U.S. at 605.

73. The Court issued four opinions. Justice O'Connor announced the judgement of the Court and delivered the opinion of the Court with respect to Parts I, II-A, and II-B, in which Justices Blackmun, Stevens, Scalia, Souter, and Ginsburg joined, and an opinion with respect to Part II-C, in which Justice Scalia joined. Justice Scalia filed a concurring opinion. Justice Ginsburg filed an opinion concurring in part and concurring in the judgment, in which Justices Blackmun, Stevens and Souter joined. Justice Kennedy filed an opinion concurring in the judgment in which Chief Justice Rehnquist and Justice Thomas joined. *Id.* at 594-95.

74. *Id.* at 600.

75. *Id.* at 600-01.

76. *Id.* at 603-04 (quoting FED. R. EVID. 804(b)(3)).

77. *Id.* at 599-600.

78. *Id.* at 599.

79. *Id.* at 599-600.

inculpatory in the aggregate.⁸⁰ In rejecting Kennedy's argument, Justice O'Connor found that the language of the advisory committee note was "not particularly clear," and concluded that "the policy expressed in the Rule's text points clearly enough in one direction that it outweighs whatever force the Notes may have."⁸¹

Justice O'Connor rebutted another attack by Justice Kennedy in Part II-B of the Court's opinion. She disagreed with Justice Kennedy's claim that the narrow rule interpretation would deprive Rule 804(b)(3) of any meaningful effect.⁸² To illustrate her point, Justice O'Connor gave examples of how the Rule would still be able to have its desired effect. For instance, the statement, "Yes, I killed X," would be admissible if the defendant was being tried as an accomplice to the murder.⁸³ She also pointed out that a declarant's statement that he robbed a bank on Friday morning could be admitted and coupled with other direct testimony that the accused was seen with the declarant on Friday morning.⁸⁴

Justice O'Connor went even further, stating that "[e]ven [collateral] statements that are on their face neutral may actually be against the declarant's interest."⁸⁵ For instance, "I hid the gun in Joe's apartment" would be self-inculpatory if it helps the police to find a murder weapon.⁸⁶ Moreover, Justice O'Connor claimed that the statement, "Sam and I went to Joe's house," could conceivably be admissible "if a reasonable person in the declarant's shoes would realize that being linked to Joe and Sam would implicate the declarant in Joe and Sam's conspiracy."⁸⁷ It will become apparent that these words sowed the seeds

80. *Id.* at 614. The Advisory Committee Notes read, in relevant part:

[T]he third-party confession . . . may include statements implicating [the accused], and under the general theory of declarations against interest they would be admissible as related statements. . . . by no means require that all statements implicating another person be excluded from the category of declarations against interest. Whether a statement in fact is against interest must be determined by the circumstances of each case. Thus a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest. . . . On the other hand the same words spoken under different circumstances, e.g., to an acquaintance, would have no difficulty in qualifying. . . .

'The balancing of self-serving against dissenting [sic] aspects of a declaration is discussed in McCormick §256.

Id. at 601-02 (citing *Douglas v. Alabama*, 380 U.S. 415 (1965); *Bruton v. United States*, 319 U.S. 123 (1968)).

81. *Id.* at 602.

82. *Id.* at 602-03.

83. *Id.* at 603.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

of *Williamson's* own self-destruction.

In Part II-C of her opinion, which only Justice Scalia joined, Justice O'Connor concluded that some of Harris's statements, those inculcating only himself, would clearly have been admissible.⁸⁸ She was more skeptical, however, of those parts of Harris's confession implicating Williamson since they did not really subject Harris to any criminal liability.⁸⁹ In fact, a reasonable person in Harris's position might have even believe that implicating Williamson would be beneficial.⁹⁰ As a caveat, Justice O'Connor again emphasized that "this can be a fact-intensive inquiry, which would require careful examination of all the circumstances surrounding the criminal activity involved."⁹¹ Thus, the court remanded the case to the Eleventh Circuit with directions to conduct the inquiry.⁹²

C. *Justice Scalia's Concurrence*

In his concurring opinion, Justice Scalia generally agreed with Justice O'Connor.⁹³ He referred to the terms, "collateral neutral" and "collateral self-serving," as "manufactured categories" and concluded that the relevant inquiry "must always be whether the particular remark at issue (and not the extended narrative) meets the standard set forth in the Rule."⁹⁴ Predictably, Justice Scalia looked strictly to the text of Rule 804(b)(3) for guidance in reaching his conclusion.⁹⁵ Giving the example of a declarant implicating himself in a conspiracy, he also noted that a declarant's statement is not automatically inadmissible simply because it names or implicates another person.⁹⁶ Similarly, Justice Scalia claimed that admissible statements are not necessarily confined to the confession of a crime, but they may also include a description of events leading up to the crime.⁹⁷

88. *Id.* at 604. "[F]or instance, when he said he knew there was cocaine in the suitcase, he essentially forfeited his only possible defense to a charge of cocaine possession, lack of knowledge." *Id.*

89. *Id.*

90. "Small fish in a big conspiracy often get shorter sentences than people who are running the whole show, especially if the small fish are willing to help the authorities catch the big ones." *Id.* (citation omitted).

91. *Id.*

92. *Id.*

93. *See id.* at 605.

94. *Id.* at 607.

95. *Id.* at 605-06. "[T]he relevant inquiry must always be, as the text directs, whether the statement 'at the time of its making . . . so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.'" *Id.* (quoting FED. R. EVID. 804(b)(3)).

96. *Id.* at 606-07.

97. *Id.* at 606. Justice Scalia's example is as follows:

D. Justice Ginsburg's Concurrence

Like Justice Scalia, Justice Ginsburg agreed with the Court that Rule 804(b)(3) "excepts from the general rule that hearsay statements are inadmissible only 'those declarations or remarks within [a narrative] that are individually self-inculpatory.'"⁹⁸ Her main concern was the recognition of the untrustworthiness of statements implicating others, since "[a] person arrested in incriminating circumstances has a strong incentive to shift blame or downplay his role in comparison to others"⁹⁹ Justice Ginsburg's disagreement with Justice O'Connor comes from Ginsburg's belief that "Harris's arguably inculpatory statements are too closely intertwined with his self-serving declarations to be ranked as trustworthy."¹⁰⁰

For instance, Justice Ginsburg argued that Harris's acknowledgment of the drugs was not in fact against his penal interest.¹⁰¹ Since Harris was caught red-handed with nineteen kilos of cocaine, denying existence of the cocaine would have been futile.¹⁰² Instead, Harris claimed that he was merely transporting the drugs for the owner, who he identified as Williamson, thus decreasing Harris's role and shifting blame.¹⁰³ Furthermore, Justice Ginsburg pointed out that although Harris recanted his first story and admitted that he had lied, his second story still painted Williamson as the "big fish."¹⁰⁴

While Justice Ginsburg admitted that Harris's statements were incriminating, in her opinion they were only marginally so.¹⁰⁵ According to Justice Ginsburg, "[t]hey project[ed] an image of a person acting not against his penal interest but striving mightily to shift principal responsibility to someone else."¹⁰⁶ Thus, she concluded that she would hold none of Harris's hearsay statements admissible under Rule

Consider for example a declarant who stated: "On Friday morning I went into a gunshop [sic] and (lawfully) bought a particular type of handgun and a particular type of ammunition. I then drove my 1958 blue Edsel and parked in front of the First City Bank with the keys in the ignition and the driver's door ajar. I then went inside, robbed the bank, and shot the security guard." Although the declarant has not confessed to any element of a crime in the first two sentences, those statements in context are obviously against his penal interest, and I have no doubt that a trial judge could properly admit them.

Id.

98. *Id.* at 607.

99. *Id.* at 607-08.

100. *Id.* at 608.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 609.

105. *Id.*

106. *Id.*

804(b)(3).¹⁰⁷

E. Justice Kennedy's Concurrence

Justice Kennedy agreed with the judgment of the Court and the concurrences regarding the rationale behind Rule 804(b)(3).¹⁰⁸ He disagreed, however, with the Court's interpretation of the rule with respect to the treatment of collateral statements.¹⁰⁹ Noting the Rule's silence on the issue of collateral statements, Justice Kennedy was the only Justice to examine how legal scholars have historically approached the issue.¹¹⁰ After discussing the three different approaches of Wigmore, McCormick, and Jefferson, Justice Kennedy noted that the Court took an extreme approach in adopting Jefferson's opinion that no collateral statements should be admissible under Rule 804(b)(3).¹¹¹

As he understood the Court's reasoning, the basis for its decision not to admit any collateral statements was merely the Rule's silence on the issue.¹¹² Because the Rule does not speak to the issue, Congress must not have meant to include collateral statements given the underlying principle behind Rule 803(b)(3) is that reasonable people do not make statements against their interest unless they are telling the truth.¹¹³ As Justice Kennedy pointed out, the underlying principle has not resolved the debate over the issue.¹¹⁴ In fact, contrary to the Court's opinion, "to the extent the authorities come to any close consensus, they support the admission of some collateral statements."¹¹⁵ Therefore, it is incorrect to assume that the Rule's silence actually incorporates any one approach.¹¹⁶

Justice Kennedy looked to three sources other than the text of Rule itself to conclude that Rule 804(b)(3) allows the admission of some collateral statements.¹¹⁷ First, Justice Kennedy claimed that, absent guidance from Congress, the Court should assume that Congress intended the Federal Rules of Evidence to be applied consistent with their appli-

107. *Id.* at 610. Justice Ginsburg did add that because she had not reviewed the entire trial court record, she was unable to determine whether the erroneous admission of the hearsay evidence constituted harmless error. Thus, she agreed with the Court's decision to vacate and remand the case to the Eleventh Circuit. *Id.*

108. *Id.* at 611.

109. *Id.* at 613.

110. *See id.* at 611-13.

111. *Id.*

112. *Id.* at 612-13.

113. *Id.* at 613.

114. *Id.*

115. *Id.*

116. *Id.* at 613-14. "The Rule's silence no more incorporates Jefferson's position respecting collateral statements than it does McCormick's or Wigmore's." *Id.* at 613.

117. *See id.* at 614-17.

cation at common law.¹¹⁸ Interestingly, Justice Kennedy quoted Jefferson, the leading proponent of the approach excluding all collateral statements, who wrote, “[f]rom the very beginning of this exception, it has been held that a declaration against interest is admissible, not only to prove the disserving fact stated, but also to prove other facts contained in collateral statements connected with the disserving statement.”¹¹⁹ Noting that Congress legislated against a common law background, Justice Kennedy “would not assume that Congress gave the common-law rule a silent burial in Rule 804(b)(3).”¹²⁰

Second, he looked to the Advisory Committee’s Note 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.”¹²¹ According to Justice Kennedy, this language is a “forthright statement that collateral statements are admissible under Rule 804(b)(3).”¹²² In fact, the Advisory Committee’s Note makes mention of McCormick’s balancing approach.¹²³ Justice Kennedy concluded that, given the Rule’s silence on the issue, the Court should follow the guidance from the Advisory Committee’s Note.¹²⁴

Finally, Justice Kennedy noted the general assumption exists that Congress would not enact a statute unless they intended it to have a meaningful effect.¹²⁵ Commentators have recognized that most statements inculcating a defendant are collateral to those against the declarant’s interest, and the exclusion of collateral statements would exclude most inculpatory statements.¹²⁶ Thus, “the conclusion that no collateral statements are admissible—the conclusion reached by the Court today—would ‘eviscerate the against penal interest exception.’”¹²⁷ Although

118. *Id.* at 615.

119. *Id.* (citing Jefferson, *supra* note 12, at 57).

120. *Id.*

121. *Id.* at 614.

122. *Id.*

123. “The balancing of self-serving against disserving aspects of a declaration is discussed in McCormick § 256.” FED. R. EVID. 804(b)(3) advisory committee note (citing MCCORMICK, *supra* note 34, § 256).

124. “When as here the text of a Rule of Evidence does not answer a question that must be answered in order to apply the Rule, and when the Advisory Committee’s Note does answer the question, our practice indicates that we should pay attention to the Advisory Committee’s Note. We have referred often to those Notes in interpreting the Rules of Evidence, and I see no reason to jettison that practice here.” *Williamson*, 512 U.S. at 614-15.

125. *Id.* at 616.

126. *Id.*

127. *Id.* (quoting Michael D. Bergeisen, Comment, *Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest*, 66 CAL. L. REV. 1189, 1207 (1978)).

Justice Kennedy conceded that there are some situations where Rule 803(b)(3) under Justice O'Connor's interpretation would apply, it would be rare that the declarant's actual self-inculpatory words would also inculcate the defendant.¹²⁸ Justice Kennedy stated that he "would not presume that Congress intended the penal interest exception to the Rule to have so little effect with respect to statements that inculcate the accused."¹²⁹

While Justice Kennedy would hold that collateral statements are admissible under Rule 804(b)(3), he was careful to point out that not all collateral statements would be admissible.¹³⁰ Justice Kennedy's opinion, by reference to McCormick, was that the Advisory Committee's Note incorporated McCormick's middle-of-the-road approach, which "contemplates exclusion of a collateral self-serving statement [where severable from dis-serving ones], but admission of a collateral neutral statement."¹³¹

To illustrate the point, Justice Kennedy gave an example in which two masked gunmen rob a bank and one shoots a teller.¹³² If one of the robbers confesses but claims that the other robber was the triggerman, then that would be an instance of a self-serving statement that would be inadmissible.¹³³ If the same gunman, however, merely claims that he and the other robber robbed the bank together, then the statement would be considered a neutral collateral statement rather than self-serving.¹³⁴

Justice Kennedy noted a further limitation on statements given to authorities, since "[a] declarant may believe that a statement of guilt to authorities is in his interest to some extent."¹³⁵ In fact, the Advisory Committee's Note realized this possibility and cautioned courts to examine whether the circumstances indicate that "the statement was 'motivated by a desire to curry favor with the authorities.'"¹³⁶ In fact, the note seems to be "consistent with McCormick's recognition that 'even though a declaration may be against interest in one respect, if it appears that the declarant had some other motive whether of self-interest or otherwise, which was likely to lead him to misrepresent the facts, the declaration will be excluded.'"¹³⁷ Thus, Justice Kennedy's reliance on McCormick's approach in interpreting Rule 804(b)(3) is strengthened.

128. *Id.* at 617.

129. *Id.*

130. *See id.* at 617-21.

131. *Id.* at 617-18.

132. *Id.* at 618.

133. *Id.*

134. *Id.*

135. *Id.* at 619.

136. *Id.* (quoting FED. R. EVID. 804(b)(3) advisory committee note).

137. *Id.* (quoting MCCORMICK, *supra* note 34, § 256, at 553).

In conclusion, Justice Kennedy suggested the following procedure to determine the admissibility of statements against penal interest that inculcate the accused. A court should first make an initial determination as to whether a statement "contained a fact against penal interest."¹³⁸ Should the statement contain such a fact, "the court should admit all statements related to the precise statement against penal interest, subject to two limits."¹³⁹ First, "the court should exclude a collateral statement that is so self-serving as to render it unreliable."¹⁴⁰ Second, if the declarant made the statement under circumstances in which he had a "significant motivation to obtain favorable treatment, as when the government made an explicit offer of leniency in exchange for the declarant's admission of guilt, the entire statement should be inadmissible."¹⁴¹ Justice Kennedy further added that since this approach requires a fact intensive determination, trial court judges should be given "wide discretion to examine a particular statement to determine whether all or part of it should be admitted."¹⁴²

IV. FEDERAL TREATMENT OF *WILLIAMSON*

Shortly after *Williamson*, lower federal courts began to apply the new test. In some instances, like *United States v. Hazelett*,¹⁴³ application of the new standard for admissibility of collateral statements was easy. *Hazelett* involved facts almost identical to those in *Williamson*. Theresa King was travelling by bus from Los Angeles to St. Louis. During a routine stop in Springfield, Missouri a Drug Enforcement Agency agent boarded the bus momentarily, began speaking with King, and eventually requested to search her bag. King consented to the search and the agent found two kilograms of cocaine. King confessed that a man named Ricky in Los Angeles had given her money to transport the cocaine to St. Louis where she was to call a phone number and arrange for the package to be picked up at the St. Louis bus station. The authorities conducted a controlled delivery in St. Louis and apprehended Ricky Hazelett. King was subsequently released on her own recognizance and was never seen again. At Hazelett's trial, the court allowed the prosecution to admit King's hearsay statements inculcating Hazelett under Rule 804(b)(3). Hazelett was convicted of possessing more than 500 grams of cocaine with intent to distribute and subsequently appealed.¹⁴⁴

138. *Id.* at 620.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 621.

143. 32 F.3d 1313 (8th Cir. 1994).

144. *Id.* at 1314-16.

Citing the Supreme Court's opinion in *Williamson*, as well as Justice Ginsburg's concurrence, the Eighth Circuit noted the similarities between the two cases.¹⁴⁵ Like Harris, King made her statements after she was caught with two kilograms of cocaine.¹⁴⁶ "Once those drugs were discovered, . . . she had nothing to lose by confessing, and she certainly had nothing to lose by implicating another person, particularly someone more culpable."¹⁴⁷ Consequently, the Court held that "King's statements implicating Hazelett were not sufficiently against her interest, [and] they were not admissible under Rule 804(b)(3)."¹⁴⁸

The Eighth Circuit correctly applied *Williamson* again in *United States v. Mendoza*.¹⁴⁹ In that case, Martha Wheeler, the declarant, was arrested for selling methamphetamine and agreed to cooperate with the authorities.¹⁵⁰ She subsequently implicated Cirilo Mendoza, the defendant, in the scheme.¹⁵¹ In affirming the district court's exclusion of Wheeler's hearsay statements implicating Mendoza, the Eighth Circuit noted, "Wheeler agreed to cooperate with authorities after she was caught red-handed with \$16,000 in drug money. . . . At that point, she had nothing to lose by implicating him. Moreover, she may reasonably have believed that by implicating Mendoza she would curry favor with the authorities and lessen her own punishment."¹⁵²

Considering the Eighth Circuit's narrow approach to Rule 804(b)(3) prior to *Williamson*,¹⁵³ it is no surprise that *Hazelett* and *Mendoza* fall right in line. Furthermore, these were fairly easy calls. The thrust of *Williamson* was to narrow the scope of the Rule 804(b)(3) hearsay exception. Any court would be hard pressed to justify statements with such strong self-serving qualities as those in *Hazelett* and *Mendoza*. The true effects of *Williamson* would be felt when a declarant's collateral statement inculcates an accused and the collateral statement is not obviously self-serving. In such instances, under *Williamson*, the collateral statement should be excluded. This not always the case.

For instance, in *United States v. Barone*,¹⁵⁴ the First Circuit employed the language of *Williamson* to admit collateral hearsay statements implicating the defendant in a RICO conspiracy. The government

145. *Id.* at 1318-19.

146. *Id.* at 1318.

147. *Id.*

148. *Id.* at 1319.

149. 85 F.3d 1347 (8th Cir. 1996).

150. *Id.* at 1348-49.

151. *Id.* at 1349.

152. *Id.* at 1352 (citing *Williamson v. United States* 512 U.S. 594, 608 (1994) (Ginsburg, J. concurring)).

153. See *United States v. Lilley*, 581 F.2d 182 (8th Cir. 1978).

154. 114 F.3d 1284 (1st Cir. 1997).

sought to introduce statements made to his sister and cousin by Jimmy Limoli, a deceased declarant.¹⁵⁵ Limoli's statements, while generally self-inculpatory, contained numerous collateral statements implicating Pasquale "Patsy" Barone in two murders connected to racketeering operations.¹⁵⁶ Barone claimed that the statements were inadmissible under *Williamson* because they were not individually self-inculpatory.¹⁵⁷

The First Circuit disagreed with "Barone's contention that *Williamson* create[d] a per se bar to any and all statements against interest that also implicate another."¹⁵⁸ The court first noted that a "statement against penal interest is not rendered inadmissible 'merely because the declarant names another person or implicates a possible codefendant.'"¹⁵⁹ For further support, the Court pointed out that *Williamson* "used as an example of an admissible statement against penal interest 'Sam and I went to Joe's house,'"¹⁶⁰ where "a reasonable person in the declarant's shoes would realize that being linked to Joe and Sam would implicate the declarant in Joe and Sam's conspiracy."¹⁶¹

While this would have been enough to admit Limoli's statements, the court went further by analyzing the statements under a totality of circumstances test and found that "none of the challenged testimony shifts blame or exculpates" Limoli.¹⁶² Furthermore, the court found Limoli's statements to be even more trustworthy given "the fact that the statements were not made to law enforcement officials in a custodial setting, as in *Williamson* . . . , but to close relatives of the declarant."¹⁶³ Thus, the First Circuit applied the test set forth in *Williamson*, but contravened the intent of the Supreme Court by expanding its purposefully drawn narrow scope.¹⁶⁴

155. *Id.* at 1289-91.

156. *Id.*

157. *Id.* at 1291.

158. *Id.* at 1295.

159. *Id.*

160. *Id.* (quoting *Williamson*, 512 U.S. at 603).

161. *Id.* at 1295, n.5 (quoting *Williamson*, 512 U.S. at 603).

162. *Id.* at 1296. The First Circuit supports the totality of the circumstances test by pointing out that *Williamson* requires that a court look at the context and all surrounding circumstances in making a determination of admissibility. *Williamson*, 512 U.S. at 603-04.

163. *Barone*, 114 F.3d at 1296.

164. Other Courts have used similar conspiracy cases in the same way. For instance, in *United States v. Moses*, 148 F.3d 277 (3d Cir. 1998), the defendant was receiving kickbacks from Gaudelli, the declarant. The court could have stopped after admitting Gaudelli's hearsay statements implicating Moses in the kickback conspiracy stating, "[B]y naming Moses, as well as the place where he was meeting Moses to make payments, Gaudelli provided self-inculpatory information." *Id.* at 280-81. But, the Third Circuit further noted that "in the instant case, by contrast [to *Williamson*], Gaudelli made his statements to a friend during lunch conversations that took place long before Gaudelli was arrested. Under these circumstances, there is no reason to believe that Gaudelli was trying to avoid criminal consequences by passing blame to Moses." *Id.*

The Second Circuit is equally culpable. For example, in *United States v. Sasso*,¹⁶⁵ the court admitted collateral statements by a declarant, Armienti, who was involved in a gun-running conspiracy with the defendant. In reaching this conclusion, the court incorrectly relied on a totality of the circumstances test to determine the reliability of Armienti's statements.¹⁶⁶ First, the court noted that "Armienti's statements inculcating Sasso equally inculpated Armienti himself in the gun-running conspiracy."¹⁶⁷ Second, the court claimed that there was no reason for Armienti "to falsely bring Sasso into the picture."¹⁶⁸

Conspiracy cases like *Barone* and *Sasso* are prime examples of how collateral statements inculcating defendants are admissible. They are admissible because the mention of the defendant is the thing that inculcates the declarant. Under such reasoning, however, collateral statements will nearly always be admissible in conspiracy cases. Furthermore, anytime a declarant inculcates himself as well as a defendant in the same crime, a conspiracy can be found. Thus, such statements will always fall under the exception and the exception will swallow the rule.

Part II-B of Justice O'Connor's opinion sowed the seeds of such abuse by containing a conspiracy example. In fact, this example is quite perplexing. Justice O'Connor seemingly desired to lay down a bright line rule. Yet, she asserted that the statement, "Sam and I went to Joe's house," could be admissible "if a reasonable person in the declarant's shoes would realize that being linked to Joe and Sam would implicate the declarant in Joe and Sam's conspiracy."¹⁶⁹ In order to ascertain whether such a statement is truly self-inculpatory, a judge would have to look at the surrounding circumstances. Looking beyond the actual statement defeats the goal of having a bright line rule.

The expansion of the breadth of *Williamson* does not end with the conspiracy example as lower courts have managed to find even more fodder in Part II-B.¹⁷⁰ For instance, the Fourth Circuit deemed the fol-

See also *United States v. Tocco*, 200 F.3d 401, 415 (6th Cir. 2000) (quoting for support Justice Scalia's concurrence in *Williamson* regarding the admissibility of statements by a lieutenant in an organized crime organization that describe the organizations inner workings and names other actors/members); *United States v. Briones*, Nos. 97-10369, 97-10370, 97-10371, 97-10372, 1998 WL 863026, at *3 (9th Cir. Nov. 30, 1998) (admitting collateral statement of declarant that was "neutral on its face" because the "statement that [the declarant] hung around [the defendant] and company linked him to those involved in the conspiracy").

165. 59 F.3d 341 (2d Cir. 1995).

166. *Id.* at 350.

167. *Id.* at 349.

168. *Id.*

169. *Williamson v. United States*, 512 U.S. 594, 603 (1994).

170. See *United States v. Pabellon*, Nos. 98-4060, 98-4088, 1999 WL 305052 (4th Cir. May

lowing admissible in *United States v. Pabellon*:

X came to me in March of 1996 and asked me if I knew anyone that could have Samuel killed. I said no, but I could see. I contacted Darrell Young and asked Young. Young got back to me in a couple of months and said he had someone for the job. I went back to X, got the money, and gave the money to Darrell Young.¹⁷¹

While the trial court substituted “X” for the defendant’s name, it is obvious that the first and last sentences of the statement are collateral and tend to shift blame away from the declarant. It is someone other than the declarant who wants Samuel killed. The declarant is merely facilitating.

The Fourth Circuit cited *Williamson* only for the proposition that “[e]ven statements that are on their face neutral may actually be against the declarant’s interest.”¹⁷² The court continued its analysis by considering all five sentences as a whole contrary to *Williamson*.¹⁷³ It was noted that at the time the declarant made the statement to the authorities, he had not yet been implicated in the murder.¹⁷⁴ Further, the declarant approached the authorities on his own initiative without any offer of leniency or immunity in exchange for the statement.¹⁷⁵ Thus, the entire statement was held admissible because “at the time the statement was made, ‘a reasonable person in the declarant’s position would not have made the statement unless believing it to be true.’”¹⁷⁶

While the above examples are disturbing enough, other courts have blatantly ignored *Williamson*. In *United States v. In*, the Ninth Circuit declared hearsay testimony admissible from a declarant who implicated the defendants in his detailed description of his role in driver’s license fraud in connection with alien smuggling.¹⁷⁷ The court quoted *Williamson* in stating that “the Supreme Court explained that Rule 804(b)(3) ‘does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpa-

14, 1999); see also *United States v. Taylor*, Nos. 98-4517, 98-4518, 1999 WL 617896 (4th Cir. Aug. 16, 1999).

171. *Pabellon*, 1999 WL 305052 at *7.

172. *Id.* at *6 (quoting *Williamson*, 512 U.S. at 603). Yes, this quote is found in Part II-B of Justice O’Connor’s majority opinion.

173. *Id.* at *7.

174. *Id.*

175. *Id.*

176. *Id.* (quoting FED. R. EVID. 804(b)(3)). It should be noted that the court did point out in a footnote that admitting the statement without the first and last sentences presented a problem. To do so would “make it sound like [the declarant] was admitting he started this, when in essence his statement definitely implicates someone else as requesting the hit and bringing him the money.” *Id.* at *7 n.9. The declarant’s implication of someone else, however, is exactly what *Williamson* was attempting to avoid.

177. Nos. 96-10118, 96-10241, 1997 WL 189310, at *1 (9th Cir. Apr. 16, 1997).

tory.”¹⁷⁸ The court then completely ignored *Williamson*, and admitted the collateral statements in the same paragraph, reasoning that the declarant’s “own involvement in the driver’s license fraud was so intertwined with defendant In’s involvement, that it would [have been] impossible to parse out non-self-inculpatory statements.”¹⁷⁹ While *Williamson* does not directly resolve the issue of unseverable collateral statements, given its narrow scope, one would think it safer to err on the side of exclusion. Furthermore, the *In* court relies on nothing more than difficulties in parsing out collateral statements to justify their inclusion.

All of these examples show that *Williamson* has failed in its attempt to create uniformity. Some courts apply *Williamson* correctly.¹⁸⁰ Yet, others seem to rebel against it by expanding its breadth,¹⁸¹ citing it for propositions inconsistent with the Court’s opinion,¹⁸² and, in some instances, ignoring it outright.¹⁸³ Thus, while Justice Kennedy feared that the Court’s approach in *Williamson* would eviscerate Rule 804(b)(3), it appears as though it is *Williamson* that has been eviscerated, when not totally disregarded.

V. CONCLUSION

After reviewing the treatment of *Williamson*, it becomes clear that the opinion of the Court has a fatal flaw. What the Court desired to do was draw a line in the sand, by stating that collateral statements were no longer going to be admissible under Rule 804(b)(3). Before *Williamson*, courts were looking at all of the circumstances surrounding the remarks against interest to determine their reliability. Using a subjective test coupled with an abuse of discretion standard of review, however, basically allowed courts to admit virtually anything. Thus, the Supreme Court was attempting to take away much of the discretion previously afforded the lower courts. Indeed, Part II-A of the *Williamson* opinion does just that. It leaves a bright line rule that Rule 804(b)(3) “does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory.”¹⁸⁴ The Court could have stopped there, but it did not.

For reasons that may never be known, the Court was compelled to

178. *Id.*

179. *Id.*

180. See *United States v. Mendoza*, 85 F.3d 1347 (8th Cir. 1996); *United States v. Hazelett*, 32 F.3d 1313 (8th Cir. 1994).

181. See *United States v. Moses*, 148 F.3d 277 (3d Cir. 1998); *United States v. Barone*, 114 F.3d 1284 (1st Cir. 1997); *United States v. Sasso*, 59 F.3d 341 (2d Cir. 1995).

182. See sources cited *supra* note 170.

183. See *United States v. In*, Nos. 96-10118, 96-10241, 1997 WL 189310 (9th Cir. Apr. 16, 1997).

184. *Williamson*, 512 U.S. at 600-01.

write Part II-B, perhaps only to rebut Justice Kennedy's evisceration argument. In doing so, the Court left the door wide open for abuse. The simple fact that the Court left the door ajar, however, does not mean that federal courts should thrust it wide open. Yet that is what is happening. Furthermore, it seems to be deliberate. For instance, the Eighth Circuit has been correct in its implementation of *Williamson*. That circuit was also more exclusionary in its precedent prior to *Williamson*. In contrast, two of the main culprits in the misinterpretation of *Williamson* are the First and Second Circuits; both circuits readily admitted collateral, neutral statements prior to *Williamson*. It seems as though *Williamson* has changed nothing. Courts are simply going about business as usual, as if the Supreme Court never spoke out on the issue.

It appears that lower courts are consciously disregarding a Supreme Court decision, and ironically the Supreme Court gave the lower courts the ammunition necessary to do so. Yet, the question that remains is why. I suggest that the answer is that the Court was defending an impossible position. The Court was attempting to make a bright line rule out of an exception that is inherently discretionary.

To see this, one needs only to look at the language of the Rule 804(b)(3). Determining whether a statement "so far tended to subject [the declarant] to . . . criminal liability . . . , that a reasonable man *in his position* would not have made the statement unless he believed it to be true"¹⁸⁵ is an inherently subjective determination. Such determinations must be made on a case by case basis. Thus, Congress gave trial judges the discretion to determine the reliability and, therefore, the admissibility of statements against penal interest. Congress certainly must have known that, given such discretion, judges could use the exception liberally.

Justice Kennedy was correct in at least one respect. The rule set forth in *Williamson* does eviscerate the statute as it was passed by Congress. Yet in doing so, Justice O'Connor attempted to transform Rule 804(b)(3) into what it was supposed to be: an exception. The problem is that Justice O'Connor's hypothetical attempted to show that the exception was not eviscerated and inadvertently provided lower courts with opportunities to expand the rule.

Hearsay should not be easily admitted. Yet as long as we have an exception that affords judges broad discretion, those sharing Wigmore's view will continue to admit impermissible hearsay evidence and the exception will continue to swallow the rule.

RICHARD T. SAHUC

185. See FED. R. EVID. 804(b)(3) (emphasis added).