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## A Response to Professor Mueller

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## A Response to Professor Mueller

Professor Mueller would find more room to admit confessions made to family members and friends because the motive to curry favor is not present, although there may be incentives to shift blame. I argue in my Comment that although the incentive to curry favor with prosecutors may not exist when a declarant confesses to a family member or friend, other incentives may influence a declarant's statements. The variety of incentives or motives that may influence a declarant whose is confessing to a family member or friend are as broad as the entire spectrum of human relationships. For example, the following incentives could motivate a declarant to shift blame when confessing to a loved one: love; shame; anger; fear; or betrayal. An accomplice may have incentive to minimize his participation or conversely some declarants may aggrandize their participation in order to brag.<sup>1</sup>

I am not advocating a subjective test that would lead courts to inquire into the state of mind of the declarant. Rather, I argue that accomplice confessions to family and friends should be treated the same as confessions to the police. A vision that confessions to family members or friends are qualitatively different and therefore more reliable than confessions to police underestimates the complexity of human relationships. If the justification for treating custodial confessions differently from confessions to family members or friends is based upon a vision of the power dynamic between the investigator and the suspect, then the distinction is open to attack because the power dynamics between a declarant and his family member or friend are in many cases infinitely more complicated. I assert that accomplice confessions are suspicious because the accomplice, no matter who the confession is made to, has an incentive to shift blame and characterize the events to their benefit. Thus, courts are justified in inquiring into the reliability of these confessions in order to prevent prejudicial and potentially inaccurate information from reaching the jury, regardless to whom the confession is made.

Furthermore, the family member or friend acts as a filter in bringing the confession to the jury. The family member or friend probably will not write down or record the declarant's confession soon after the

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1. See *United States v. Gonzales*, 989 P.2d 419, 424 (N.M. 1999). A defendant unsuccessfully argued that the declarant's confession to a friend that inculcated a defendant may be unreliable because as a gang member the declarant may have had an incentive to aggrandize his participation in a crime or to fabricate his participation in a crime.

confession occurred. Police, on the other hand, are more likely to accurately record the confession. As discussed in my Comment, although a family member or friend may be available for cross-examination as to bias, an accomplice confession is so prejudicial that courts are justified in acting as a gatekeeper. An approach that treats personal relationships as somehow more inherently reliable also underestimates the difficulty in defining the terms “family member” or “friend.” In an increasingly complicated world, family relationships include step-parents, half-brothers, foster children, and adopted siblings. The nature of friendship is no less complicated.<sup>2</sup> Additionally, an approach that finds that confessions to family members or friends are inherently reliable does not address the possibility that police and prosecutors may work in conjunction with a family member or friend.<sup>3</sup>

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2. For example, a friend could be a childhood acquaintance, however, a friend could also be someone whom you met last week, but with whom you established an intimate and lasting connection. It is unclear if a casual acquaintance or someone you just met at a party is a “friend.”

3. See *United States v. Boone*, 229 F.3d 1231 (9th Cir. 2000).