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HEADLINE: Trimming the Hearsay Exception For Statements Against Interest

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THE U.S. Supreme Court's recent opinion narrowing the hearsay exception for statements against interest dramatically alters Second Circuit law and provides bad news for federal prosecutors.

In *Williamson v. U.S.*,[1] the Supreme Court, in a majority opinion and three concurring opinions, strictly limited the hearsay exception for statements against penal interest to the particular portions of a statement that run against the declarant's penal interest.

The Court held that when Rule 804(b)(3) of the Federal Rules of Evidence refers to a "statement" against the declarant's interest, it refers to only those parts of a narrative that specifically inculpate the declarant. The Court held that other remarks within a generally self-inculpatory narrative are not admissible, whether they are deemed "collateral," "neutral," "non-self-incriminatory" or otherwise.

Rule 804(b)(3) allows admission of a "statement which . . . 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."

Prior to *Williamson*, courts and commentators had clashed over how broadly to interpret the term "statement" and whether collateral remarks within a generally self-inculpatory narrative should be admissible.

The *Williamson* case involved the admission of statements by the declarant Reginald Harris, who later refused to testify at defendant Williamson's federal trial on cocaine charges. The district court had ruled that, under Fed. R. Evid. 804(b)(3)'s hearsay exception for statements against penal interest, a DEA agent could recount two post-arrest interviews in which Mr. Harris had freely confessed to receiving and transporting the drugs in question, but also had implicated Mr. Williamson as the owner of the drugs. Mr. Williamson was convicted at trial, and the Eleventh Circuit affirmed without opinion.[2]

The facts were simple. Mr. Harris was driving a car in which the police found 19 kilograms of cocaine. In post-arrest questioning, he stated that he had gotten the cocaine from Florida; that the cocaine belonged to Mr. Williamson; and that it was to be delivered that night to a particular dumpster.[3] When the agents prepared a controlled delivery of the cocaine in order to snare Mr. Williamson and other possible conspirators, Mr. Harris admitted that he had made up much of the story.

The real story, he said, was that he was transporting the cocaine for Mr. Williamson; that Mr. Williamson was traveling in front of him in another rental car; and that after Mr. Harris's car was stopped, Mr. Williamson turned around and drove past the location of the stop, where he could

[1] 62 U.S.L.W. 4639 (U.S. June 27, 1994).

[2] 981 F.2d 1262 (11th Cir. 1992).

[3] 62 U.S.L.W. at 4640.

see Mr. Harris's car with its trunk open. Since Mr. Williamson had seen the police search the car, Mr. Harris explained that a controlled delivery would be futile.[4]

Limiting Rule 804(b)(3)

Justice Sandra Day O'Connor, joined for the most part by five other justices, wrote the opinion for the Court. She began her analysis by stating, "To decide whether Harris' confession is made admissible by Rule 804(b)(3), we must first determine what the Rule means by 'statement,' which Federal Rule of Evidence 801(a)(1) defines as an oral or written assertion.'"

The broader definition of "statement" would include the self-inculpatory and non-self-inculpatory parts of an entire narrative. The more limited definition would permit the Rule to cover only those particular remarks within the narrative that are themselves self-inculpatory.[5] The opinion continued:

> Although the text of the Rule does not directly resolve the matter, the principle behind the Rule, so far as it is discernible from the text, points clearly to the narrower reading. Rule 804(b)(3) is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true. This notion simply does not extend to the broader definition of statement. The fact that a person is making a broadly self-inculpatory confession does not make more credible confession's non-self-inculpatory parts.

The majority opinion then ventured into social psychology by asserting, "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."[6] The Court found the policy expressed in the statutory text sufficient to override the portions of the Advisory Committee Notes to Rule 804(b)(3) that appear to endorse a broader interpretation of the term "statement."[7]

The Remedy

Justice O'Connor garnered only one vote, from Justice Antonin Scalia, for a remedy for the error below. Justice O'Connor favored a remand to the Eleventh Circuit to determine which part of Mr. Harris's confession was strictly self-inculpatory.

Justice Ruth Bader Ginsburg, joined by Justices Harry A. Blackmun, John Paul Stevens, and David H. Souter, agreed with Justice O'Connor's reading of the Rule, but disagreed with her suggested remedy.

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[4] *Id.*

[5] *Id.* at 4641.

[6] *Id.*

[7] *Id.* at 4641-42.

The Ginsburg group of four justices would have found that Mr. Harris's statements do not fit, even in part, within the Rule 804(b)(3) exception, because Mr. Harris's arguably inculpatory statements were too closely intertwined with his self-serving declarations to be trustworthy.

Justice Ginsburg noted that Mr. Harris had been caught red-handed with 19 kilos of cocaine, enough to subject even a first-time offender to a minimum of 12 1/2 years' imprisonment under the Federal Sentencing Guidelines.[8]

Justice Ginsburg's prominent reference to the effect of the guidelines on the decisionmaking calculus of an arrested defendant suggests that the enactment of the guidelines may now be affecting the Court's interpretation of the Federal Rules of Evidence.

The guidelines obviously provide a huge incentive for defendants, particularly drug defendants, to cooperate with the government by making self-inculpatory and non-self-inculpatory statements that incriminate others in order to escape from the harsh sentencing regimen.[9] Justice Ginsburg in effect found that the guidelines create an incentive structure that calls into question the underlying assumption of Rule 804(b)(3), namely, that a reasonable declarant does not make incriminating statements unless the declarant believes those statements to be true.

Justice Anthony Kennedy, concurring and joined by Chief Justice William H. Rehnquist and Justice Clarence Thomas, urged a broader reading of "statement." Relying on the well-known evidence treatises as well as on other commentators, he developed an interpretation of Rule 804(b)(3) that was significantly more intricate than that of the majority.

He concluded that a trial court should admit all statements related to the declarant's precise statement against interest, subject to two limiting rules: first, the court should exclude a collateral statement that is so self-serving as to render it unreliable; and second, the entire statement should be inadmissible if it was made under circumstances where it is likely that the declarant had a significant motive to obtain favorable treatment, such as when the declarant is undergoing custodial interrogation and facing a potentially long sentence.[10]

Williamson will change the Second Circuit's law for admission of statements against interest. The case supersedes the circuit's broader interpretation of the term "statement" in Rule 804(b)(3).

Further, since only genuinely self-inculpatory statements are now admissible under Rule 804(b)(3), the Second Circuit may well abandon the pre-*Williamson* safeguards it required for statements against interest under Rule 804(b)(3). In any event, prosecutors who have often offered redacted pleas of non-testifying co-conspirators may no longer find this practice helpful, because the portions that would incriminate the defendant on trial will probably not be admissible.

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[8] *Id.* at 4643 (Ginsburg, J., concurring in part and concurring in the judgment) (citing United States Sentencing Guidelines Section 2D1.1(c); *id.* Chapter 5, part A (sentencing table)).

[9] *See, e.g.*, U.S.S.G. §5K1.1 (downward departure for substantial cooperation with government).

[10] *Id.* at 4647 (Kennedy, J., concurring in the judgment).

The Second Circuit's prior practice of admitting so-called collateral or contextual statements that were not themselves self-inculpatory, but which were part of a narrative confession,[11] is no longer good law.

For instance, the circuit's reasoning in the affirmance of defendant Frank Castronovo's conviction in the Pizza Connection case is no longer valid.[12] The trial court had admitted out-of-court statements by the declarant, Castronovo's cousin, who had admitted to a testifying witness that he (the cousin) dealt drugs with Castronovo and that Castronovo used pizza restaurants as a front for his drug trafficking.

On appeal, Castronovo's argument was entirely consistent with Justice O'Connor's opinion in *Williamson*. He argued that only the portion of the cousin's statement relating to the cousin's drug dealing was against the declarant's penal interest and, therefore, only that portion of the statement and not the entire statement was admissible under Rule 804(b)(3). Relying on settled precedent, however, the Second Circuit disagreed and approved the admission of the entire statement.[13]

The second portion of the Second Circuit's Rule 804(b)(3) jurisprudence that may go by the boards after *Williamson* is the requirement that a statement offered to inculpate the accused have circumstantial guarantees of trustworthiness.[14]

This additional requirement, not contained in the text of the Rule, was added as a counterbalance to the circuit's broad interpretation of the term "statement" and as a safeguard against a potential Confrontation Clause violation.[15] The circuit may find that this additional hurdle is no longer necessary now that the Rule has been significantly tightened.

While the Court in *Williamson* did not reach the defendant's Confrontation Clause claim, it noted that the very fact that a statement is genuinely self-inculpatory, which our reading of Rule 804(b)(3) requires, is itself one of the particularized guarantees of trustworthiness' that makes a statement admissible under the Confrontation Clause.[16]

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[11] *See, e.g.*, *United States v. Cruz*, 797 F.2d 90, 97 (2d Cir. 1986); *United States v. Garris*, 616 F.2d 626, 630 (2d Cir.), *cert. denied*, 447 U.S. 926 (1980); *United States v. Lieberman*, 637 F.2d 95, 103 (2d Cir. 1980). Many other circuits similarly adopted this broad reading of Rule 804(b)(3). *See, e.g.*, *United States v. Barrett*, 539 F.2d 244, 251 (1st Cir. 1976); *United States v. Alvarez*, 584 F.2d 694, 699 (5th Cir. 1978); *United States v. York*, 933 F.2d 1343, 1364 (7th Cir.), *cert. denied*, 112 S. Ct. 321 (1991).

[12] *United States v. Casamento*, 887 F.2d 1141, 1171 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990).

[13] *Id.* at 1171. The reversal of this evidentiary ruling may not have saved the day for defendant Castronovo, given that the statement may have been admissible co-conspirator hearsay (Rule 801(d)(2)(E)) or the admission of the statement may have been harmless error in the context of the case.

[14] *See, e.g.*, *United States v. Casamento*, 887 F.2d at 1170; *United States v. Stratton*, 779 F.2d 820, 828 n.7 (2d Cir. 1985), *cert. denied*, 476 U.S. 1162 (1986).

[15] *See United States v. Garris*, 616 F.2d 626, 631 (2d Cir.), *cert. denied*, 447 U.S. 926 (1980); *United States v. Katsougrakis*, 715 F.2d 769, 775 (2d Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

[16] 62 U.S.L.W. at 4642.

Similarly, for admission under Rule 804(b)(3), the Second Circuit may no longer require a heightened standard of reliability for statements "crucial" to the government's case.[17] Under *Williamson*'s narrow reading of Rule 804(b)(3), the Second Circuit may well not subject a genuinely self-inculpatory statement to further scrutiny even if the statement is considered "crucial."

Finally, prior to *Williamson*, federal prosecutors in the Second Circuit could, and often did, offer the transcripts of the guilty plea of a non-testifying co-conspirator who was not on trial with the defendant(s).[18] To remain within the confines of the Second Circuit's pre-*Williamson* view of Rule 804(b)(3) and to avoid possible Confrontation Clause problems, prosecutors had to redact specific references to the defendant(s) from the guilty plea transcript.

The admission of guilty pleas, particularly in conspiracy cases, worked a double whammy on defendants: proof of the existence of the conspiracy was admitted through statements that could not be cross-examined; in addition, the redaction led the jury to believe that the out-of-court declarant was not only part of a conspiracy, but was also trying to protect the defendant.

If the guilty plea transcript read, "I robbed the bank with Joe Smith," the trial jury heard the redacted phrase, "I robbed the bank with (some other guy)." After *Williamson*, the jury should hear only, "I robbed the bank." Such a truncated statement may be of little or no use to the government, so the government may not even bother to offer it.

[17] *See, e.g.*, *United States v. Stratton*, 779 F.2d at 830; *United States v. Winley*, 638 F.2d 560, 562 (2d Cir. 1981), *cert. denied*, 455 U.S. 959 (1982).

[18] *E.g.*, *United States v. Winley*, 638 F.2d 560 (2d Cir. 1981), *cert. denied*, 455 U.S. 959 (1982).