

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES  
WASHINGTON, D.C. 20544

**Agenda E-18 (Appendix C)**  
**Rules**  
**September 2003**

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**TO:           Honorable Anthony J. Scirica, Chair**  
**Standing Committee on Rules of Practice**  
**and Procedure**

**FROM:       Honorable Jerry E. Smith, Chair**  
**Advisory Committee on Evidence Rules**

**DATE:       May 5, 2003**

**RE:           Report of the Advisory Committee on Evidence**  
**Rules**

## **I. Introduction**

The Advisory Committee on Evidence Rules (the "Committee") met on April 25, 2003, in Washington, D.C. At the meeting the Committee approved a proposed amendment to Evidence Rule 804(b)(3), with the unanimous recommendation that the Standing Committee approve the proposed amendment and forward it to the Judicial Conference. Part II of this Report summarizes the discussion of this proposed amendment. An attachment to this Report includes the text, Committee Note, statement of changes made after public comment, and summary of public comment for the proposed amendment to Rule 804(b)(3).

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## II. Action Item

### **Recommendation To Forward the Proposed Amendment to Evidence Rule 804(b)(3) to the Judicial Conference**

The Evidence Rules Committee has voted unanimously to propose an amendment to Rule 804(b)(3) in order to correct the potential unconstitutionality of that Rule in cases where declarations against penal interest are offered against a criminal defendant. The amendment is made necessary by Supreme Court decisions analyzing the relationship between the Confrontation Clause and hearsay admitted against an accused under a hearsay exception. Specifically, in *Lilly v. Virginia*, 527 U.S. 116 (1999), the Supreme Court declared that the hearsay exception for declarations against penal interest is not “firmly rooted” and therefore the Confrontation Clause is not satisfied simply because a hearsay statement fits within that exception. Furthermore, under *Lilly* and *Idaho v. Wright*, 497 U.S. 805 (1990), a statement offered under a hearsay exception that is not firmly-rooted will satisfy the Confrontation Clause only when it bears “particularized guarantees of trustworthiness.” And the *Lilly* Court held that this standard of “particularized guarantees” would not be satisfied simply because the statement was disserving to the declarant’s penal interest. To satisfy the Confrontation Clause, the government must show particularized guarantees of trustworthiness beyond the fact that the statement is disserving. Yet Rule 804(b)(3) as written requires only that the prosecution show that the statement is disserving to the declarant’s penal interest. It does not impose any additional evidentiary requirement.

Thus, after *Lilly*, Rule 804(b)(3) as written is not consistent with constitutional standards. To the Committee's knowledge, no other categorical hearsay exception has the potential of being applied to admit evidence that would violate the accused's right to confrontation. Other categorical hearsay exceptions, such as those for dying declarations, excited utterances and business records, have been found firmly-rooted.

The Evidence Rules Committee has determined that codifying constitutional doctrine provides a protection for defendants against an inadvertent waiver of the reliability requirements imposed by the Confrontation Clause. A defense counsel might be under the impression that the hearsay exceptions as written comport with the Constitution. Indeed, this is a justifiable assumption for all the other categorical hearsay exceptions in the Federal Rules of Evidence, which have been found "firmly rooted"—the exception being Rule 804(b)(3). A minimally competent defense lawyer might object to a hearsay statement as inadmissible under Rule 804(b)(3), thinking that an additional, more specific objection on constitutional grounds would be unnecessary. If the hearsay exception and the Confrontation Clause are congruent, then the risk of inadvertent waiver of the constitutional reliability requirements would be eliminated. See, e.g., *United States v. Shukri*, 207 F.3d 412 (7<sup>th</sup> Cir. 2000) (court considers only admissibility under Rule 804(b)(3) because defense counsel never objected to the hearsay on constitutional grounds).

The language added to the amendment concerning "particularized guarantees of trustworthiness" is carefully chosen to track the language used by the Supreme Court in its Confrontation Clause jurisprudence. The addition of this language would guarantee that the Rule would comport with the Constitution in criminal cases,

without imposing on the government any evidentiary requirement that it is not already required to bear.

The Evidence Rules Committee carefully considered the public comment on the proposed amendment and held a public hearing on the amendment as part of its Spring 2003 meeting. While the comments received generally were favorable, the Committee agreed with two important suggestions for improvement to the proposed amendment:

1. The proposal released for public comment would have extended the corroborating circumstances requirement to declarations against penal interest offered in civil cases. The Committee has deleted this language in response to public comment indicating that it would make it unreasonably difficult to present some important evidence in certain civil cases, and reasoning that the extension was not supported by the original intent of Rule 804(b)(3).

2. The proposal released for public comment did not attempt to provide guidance on the difference between the two evidentiary standards set forth in the Rule, i.e., "corroborating circumstances" (applicable to statements against penal interest offered by the accused) and "particularized guarantees of trustworthiness" (applicable to statements against penal interest offered by the prosecution). The Committee has added a paragraph to the Committee Note that distinguishes the two standards, in response to public comment suggesting the need for more guidance to courts and litigants.

The proposed amendment to Rule 804(b)(3) is set forth as an attachment to this Report.

***Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 804(b)(3), as modified following publication, be approved and forwarded to the Judicial Conference.***

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16 admissible ~~unless~~ under this subdivision in the following  
17 circumstances only:

18 (A) if offered to exculpate an accused, it is supported  
19 by corroborating circumstances that clearly indicate  
20 the its trustworthiness, or of the statement

21 (B) if offered to inculcate an accused, it is supported  
22 by particularized guarantees of trustworthiness.

23 \* \* \* \* \*

**COMMITTEE NOTE**

The Rule has been amended to confirm the requirement that the prosecution must provide a showing of “particularized guarantees of trustworthiness” when a declaration against penal interest is offered against an accused in a criminal case. This standard is intended to assure that the exception meets constitutional requirements, and to guard against the inadvertent waiver of constitutional protections. *See Lilly v. Virginia*, 527 U.S. 116, 134-138 (1999) (holding that the hearsay exception for declarations against penal interest is not “firmly-rooted” and requiring a finding that hearsay admitted under a non-firmly-rooted exception must bear “particularized guarantees of trustworthiness” to be admissible under the Confrontation Clause).

The amendment distinguishes “corroborating circumstances that clearly indicate” trustworthiness (the standard applicable to statements offered by the accused) from “particularized guarantees of

trustworthiness” (the standard applicable to statements offered by the government). The reason for this differentiation lies in the guarantees of the Confrontation Clause that are applicable to statements against penal interest offered against the accused. The “particularized guarantees” requirement cannot be met by a showing that independent corroborating evidence indicates that the declarant’s statement might be true. This is because under current Supreme Court Confrontation Clause jurisprudence, the hearsay exception for declarations against penal interest is not considered a “firmly rooted” exception (*see Lilly v. Virginia, supra*) and a hearsay statement admitted under an exception that is not “firmly rooted” must “possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.” *Idaho v. Wright*, 497 U.S. 805, 822 (1990). In contrast, “corroborating circumstances” can be found, at least in part, by a reference to independent corroborating evidence that indicates the statement is true.

The “particularized guarantees” requirement assumes that the court has already found that the hearsay statement is genuinely disserving of the declarant’s penal interest. *See Williamson v. United States*, 512 U.S. 594, 603 (1994) (statement must be “squarely self-inculpatory” to be admissible under Rule 804(b)(3)). “Particularized guarantees” therefore must be independent from the fact that the statement tends to subject the declarant to criminal liability. The “against penal interest” factor should not be double-counted as a particularized guarantee. *See Lilly v. Virginia, supra*, 527 U.S. at 138 (the fact that the hearsay statement may have been disserving to the declarant’s interest does not establish particularized guarantees of trustworthiness because it “merely restates the fact that portions of his statements were technically against penal interest”).

The amendment does not affect the existing requirement that the accused provide corroborating circumstances for exculpatory

statements. The case law identifies some factors that may be useful to consider in determining whether corroborating circumstances clearly indicate the trustworthiness of the statement. Those factors include (*see, e.g., United States v. Hall*, 165 F.3d 1095 (7<sup>th</sup> Cir. 1999)):

- (1) the timing and circumstances under which the statement was made;
- (2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie;
- (3) whether the declarant repeated the statement and did so consistently, even under different circumstances;
- (4) the party or parties to whom the statement was made;
- (5) the relationship between the declarant and the opponent of the evidence; and
- (6) the nature and strength of independent evidence relevant to the conduct in question.

Other factors may be pertinent under the circumstances. The credibility of the witness who relates the statement in court is not, however, a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the credibility of the witness would usurp the jury's role in assessing the credibility of testifying witnesses.

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Changes Made After Publication and Comments. The proposed amendment as issued for public comment would have extended the corroborating circumstances requirement to statements against penal interest offered in civil cases. The Committee withdrew this language in response to public comment, thus retaining the existing rule that corroborating circumstances are not required for declarations against interest offered in civil cases.

A paragraph was added to the Committee Note to clarify the distinction between “corroborating circumstances” (the standard applicable to statements against penal interest offered by the accused) and “particularized guarantees of trustworthiness” (the standard applicable to statements against penal interest offered against the accused).

### SUMMARY OF PUBLIC COMMENTS

**Robert E. Leake, Jr., Esq. (02-EV-001)** would apply the “particularized guarantees of trustworthiness” requirement to “exculpatory as well as incriminating matter.”

**G. Daniel Carney, Esq. (02-EV-002)** approves of the proposed amendment.

**Jack E. Horsley, Esq. (02-EV-003)** endorses the proposed change to Rule 804(b)(3).

**The General Accounting Office (02-EV-004)** has no comments to offer with respect to the proposed amendment.

**The Commercial and Federal Litigation Section of the New York State Bar Association (02-EV-005)** supports the proposed changes to Rule 804(b)(3) and advocates further analysis of other possible changes to the Rule. The Section notes that the text of the Rule is “misleading” in two respects. First, “in civil cases recent federal cases have held that an out-of-court statement against penal interest must be supported by corroborating circumstances to be admissible” – even though that requirement is not imposed by the text of the Rule. Second, where such statements are offered in a criminal case to inculcate the accused, the Confrontation Clause requires a showing of “particularized guarantees of trustworthiness” – a requirement that does not exist in the current text of the Rule. The Section notes that the proposed amendment would incorporate these two “judicial glosses” into the text of the Rule. The section supports the proposed amendment “as a useful codification of current law.” But it urges the Advisory Committee to address two further questions: 1) whether the standard of “particularized guarantees of trustworthiness” should be applied to statements against penal interest offered in civil cases; and 2) whether the “particularized guarantees of trustworthiness” requirement should be applied to declarations against penal interest offered by an accused.

**Professor Richard Friedman (02-EV-006)**, appreciates and applauds “at least much of the impetus” behind the proposed amendment. But he fears that the proposed amendment may cause confusion and that it “foregoes the opportunity to make more significant improvements in the operation of Rule 804(b)(3).” He advocates the elimination of the corroborating circumstances requirement as applied to hearsay statements offered by an accused. Professor Friedman also opposes an extension of the corroborating circumstances requirement to statement against penal interest offered in civil cases. He concludes that the Rule should provide that a statement made to law enforcement personnel “shall not be admissible against the accused.” He also suggests that the proposed amendment should be changed to add language that would reject the Supreme Court’s analysis in *Williamson v. United States*, 512 U.S. 594 (1994), by providing that a non-adverse statement that is part of a broader inculpatory statement would be admissible if “it appears likely that the declarant would make the statement in question only if believing it to be true.” Finally, Professor Friedman suggests that the

text of the Rule include language (currently in the proposed Committee Note) providing that the credibility of the in-court witness is irrelevant to the reliability of the hearsay statement.

**David Romine, Esq. (02-EV-007)**, opposes the extension of the corroborating circumstances requirement to civil cases. He contends that the extra evidentiary requirement will have a deleterious effect on the prosecution of civil antitrust cases. He states that the “relatively easy ways in which the corroborating circumstance requirement is satisfied by defendants in criminal cases will usually not be available to antitrust plaintiffs.” Mr. Romine concludes that the “Committee should not endorse a revision that will have the perverse effect of making it harder to introduce such evidence in a private antitrust case than to exculpate the accused in a criminal case.”

**The Federal Magistrate Judges Association (02-EV-008)** supports the proposed amendment to Rule 804(b)(3), as an appropriate revision in light of the Supreme Court’s decision in *Lilly v. Virginia*, 527 U.S. 116 (1999).

**Professor Roger Kirst (02-EV-009)** opposes the amendment on the ground that it is “not possible to anticipate the evolving contours of confrontation doctrine for the hearsay exception in this Rule.” He recommends that if the Rule is to be amended on other topics, “a caution about the right to confrontation should be included only in an Advisory Committee Note without attempting to define what the Sixth Amendment requires.”

**The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers (02-EV-010)** agrees with the proposed amendment “insofar as it articulates the constitutional requirement that a declaration against penal interest, offered to inculcate a defendant in a criminal case, be supported by particularized guarantees of trustworthiness.” The Committee states that “[i]ncorporating the ‘particularized guarantees’ language into the rule does not change the law; it simply carries on the mission of the Rules of Evidence of codifying court-made evidentiary law and making it more accessible.” However, the Committee disagrees with the proposal “insofar as it would import into the law of civil evidence

the ‘corroborating circumstances’ requirement that traditionally has been thought to apply only to declarations against penal interest offered in criminal cases.” Extension of the corroborating circumstances requirement to civil cases would, in the Committee’s view, “move a difficult aspect of the criminal procedural law into the civil procedural law, without any compelling reason to do so.”

**Professor Clifford Fishman (02-EV-011)**, complains that “the proposal’s language provides no explanation as to why different standards are imposed in the first place and offers no guidance as to what the different standards mean.” Professor Fishman suggests that the text of the Rule be expanded to clarify that “corroborating circumstances” requires the court to consider the nature or strength of independent evidence that tends to corroborate the hearsay statement, while “particularized guarantees of trustworthiness” prohibits consideration of corroborating evidence.

**The Federal Bar Association (02-EV-012)**, “supports the substance of the proposed amendment” but “recommends a change in format to provide additional clarity.” The Association’s proposal would place statements against penal interest offered by the prosecution into a separate subdivision. The Association “also agrees with the Committee’s recommendation that the specific factors to be considered in assessing whether a proffered statement meets the applicable requirement be left to the Committee Note and to case law rather than being specified in the text of the Rule.”

**The Committee on Federal Courts of the California State Bar (02-EV-013)**, supports the proposed amendment to Rule 804(b)(3).

**The National Association of Criminal Defense Lawyers (02-EV-014)**, opposes the amendment and argues that “‘corroborating circumstances’ should be required, and not merely ‘particularized guarantees of trustworthiness’, before the prosecution is allowed to obtain admission of hearsay statements on the basis of their having been made against the declarant’s penal interest.”