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NONTESTIMONIAL DECLARATIONS AGAINST PENAL INTEREST: ESCHEWING THE CORROBORATION REQUIREMENT FOR INCULPATORY STATEMENTS AFTER *CRAWFORD*

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I. INTRODUCTION

The relationship between the Confrontation Clause of the Sixth Amendment[1] and the many hearsay exceptions codified in American law has evolved substantially over time. Courts have struggled to define the precise boundaries of the relationship, in particular, the meaning of the Sixth Amendment. Recently, the Supreme Court redrew these boundaries between a defendant's Sixth Amendment protections and the various hearsay exceptions under the Federal Rules of Evidence. The lower courts must now apply these hearsay exceptions in a manner comporting with the standards of the nation's highest court.

Reshaping the approach to confrontation issues has had a direct impact on the declaration against penal interest exception to the hearsay rule. This exception will undoubtedly be the subject of many criminal cases that require an analysis of the Court's newly minted Confrontation Clause jurisprudence. Previously, the Court has chosen not to decide certain issues regarding this particular exception, permitting conflicting standards among the circuit courts to exist. Recent decisions by the Court, however, provide new answers to old questions. The uncertainty over unresolved issues, such as those left undecided by the Court in *Williamson v. United States*,[2] should no longer be problematic for the lower courts.[3]

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1. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI.

2. 512 U.S. 594 (1994).

3. *See id.* at 605 (leaving open the questions of whether the statement against interest exception is firmly rooted and whether corroborating circumstances are required to admit inculpatory statements against the

This Comment argues that courts should apply the particularized guarantees of trustworthiness test to nontestimonial statements against penal interest. Part II of this Comment outlines the relationship between the statements against penal interest exception and the Confrontation Clause. Part III-A analyzes the corroboration requirement for statements against interest that inculpate the accused. Part III-B discusses how *Crawford v. Washington*[4] has led courts to implicitly reject the corroboration requirement for nontestimonial statements in favor of the test outlined in *Ohio v. Roberts*.[5] Finally, Part IV proposes that the correct approach for analyzing nontestimonial inculpatory statements is to determine whether the statement bears particularized guarantees of trustworthiness - namely, the second part of the *Roberts* test.

II. BACKGROUND

A. Federal Rule of Evidence 804(b)(3): Statements Against Interest

Hearsay is defined as any out of court statement offered to prove the truth of the matter asserted.[6] If a statement is in fact hearsay, it is inadmissible as evidence, unless it falls under one of the many exceptions.[7] One exception recognized at common law, as well as under the Federal Rules of Evidence, is the statements against interest exception.[8]

In order to satifsy the statements against interest hearsay exception, the Federal Rules require that the declarant be unavailable[9] and that the declarant's statement be:

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accused under the declarations against interest hearsay exception).

4. 541 U.S. 36 (2004).

5. 448 U.S. 56 (1980).

6. FED. R. EVID. 801.

7. FED. R. EVID. 802.

8. Keith Miles Aurzada, Case Note, *Evidence, FRE 804(b)(3): The Williamson Decision Establishes A Bright-Line Rule That Invites Injustice and Cripples The Hearsay Exception For Statements Against Penal Interest.* Williamson v. United States, *114 S. Ct. 2431 (1994)*, 30 LAND & WATER L. REV. 591, 595 (1995). In 1844, the House of Lords, in the *Sussex Peerage Case*, held that the defendant could not offer evidence of a confession to the crime made by another person who was unavailable to testify. *Id.* The *Sussex Peerage Case* limited the admissibility of statements against interest to situations where the interest was proprietary or pecuniary. *Id.* The American courts followed this line of reasoning in order to prevent the admission of fabricated self-inculpatory statements made in order to exculpate the accused. *Id.* Justice Holmes, in his dissenting opinion in *Donnelly v. United States*, expressed doubt regarding the indiscriminate rejection of all such evidence. 228 U.S. 243, 277 (1913). In 1975, Congress enacted the Federal Rules of Evidence and codified the "against interest" exception in the United States Federal Courts. FED. R. EVID. 804(b)(3).

9. FED. R. EVID. 804(b); *see also* FED. R. EVID. 804(a) (defining situations in which a declarant would be unavailable).

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true.[10]

On its face, the rule is equally applicable to criminal and civil cases. In criminal cases, however, declarations against penal interest must also satisfy the second sentence of 804(b)(3). That sentence requires that "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."[11]

Thus, to come under the exception, three elements must be satisfied. First, the declarant must be unavailable. Second, the statement must subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made unless the declarant believed it to be true. Finally, if offered to exculpate the accused, the statement must be corroborated by circumstances clearly indicating its trustworthiness.[12]

The third element is *per se* limited to only those statements, presumably offered by the accused, that would exculpate the accused. This element leaves open the question of what additional requirements are necessary to admit a statement which inculpates the accused.[13] The immediate answer to this question is that the Confrontation Clause of the Sixth Amendment must be satisfied.[14]

Courts struggled with this issue and reached different conclusions as to what the appropriate standard should be for admitting statements inculpating the accused. Some courts decided to require corroboration for both exculpatory and inculpatory statements,[15] while others chose not to answer the

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

11. *Id.*

12. United States v. Alvarez, 584 F.2d 694, 699 (5th Cir. 1978).

13. *See id.* at 700 (noting that no express provision safeguards declarations against a defendant).

14. *See id.* (recognizing that the central underpinning safeguard for inculpatory statements admitted against the defendant must be the Confrontation Clause of the United States Constitution).

15. *See id.* at 701 (holding that the admissibility of inculpatory declarations against interest requires corroborating circumstances that "clearly indicate the trustworthiness of the statement"); United States v. Taggart, 944 F.2d 837, 840 (11th Cir. 1991) (following the holding of *Alvarez*); United States v. Riley, 657 F.2d 1377, 1383 (8th Cir. 1981) (approving, in general, the three-pronged test for admissibility of inculpatory declarations against interest developed in *Alvarez*); United States v. Casamento, 887 F.2d 1141, 1170 (2d Cir. 1989) (requiring corroborating circumstances even when the statement is offered to inculpate the accused); Am. Auto. Accessories, Inc. v. Fishman, 175 F.3d 534, 541 (7th Cir. 1999) (choosing to utilize a unitary standard for applying Rule 804(b)(3) to statements offered both to exculpate and to

question.[16]

B. The Confrontation Clause of the Sixth Amendment

The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."[17] *Mattox v. United States*[18] is the foundation for modern Confrontation Clause jurisprudence.[19] The Court in *Mattox* held, as a general rule, that witnesses who accuse the defendant of wrongdoing must appear in court to offer testimony and be cross-examined in order to satisfy the clause.[20] The Supreme Court refined the application and meaning of the Sixth Amendment in a series of cases decided between 1965 and 1972;[21] however, the test enunciated in *Ohio v. Roberts*[22] provided

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inculpate a defendant); *see also* United States v. Barone, 114 F.3d 1284, 1300 (1st Cir. 1997) (finding that even though the court has not expressly extended the corroboration requirement to statements that inculpate the accused, it has applied the rule as if corroboration were required for such statements); United States v. Palumbo, 639 F.2d 123, 131 (3d Cir. 1981)(Adams, J., concurring opinion) (agreeing with the majority opinion that 804(b)(3) can be used to admit inculpatory statements against the accused but only when it is demonstrated that "corroborating circumstances clearly indicate the trustworthiness of the statement"). *But see* Harrison v. Chandler, NO. 97-5511 / 97-5544, 1998 U.S. App. LEXIS 27744, at **20-21 (6th Cir. Oct. 26, 1998) (refusing to apply the corroboration requirement to an inculpatory statement admitted by the government in an unpublished opinion in which the issue was not briefed).

16. United States v. Williams, 989 F.2d 1061, 1068 (9th Cir. 1993) (noting that the Ninth Circuit had yet to resolve whether the rule requiring corroborating evidence applies to inculpatory statements).

17. U.S. CONST. amend. VI. In *Pointer v. Texas*, the Supreme Court held that "the Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment." 380 U.S. 400, 403 (1965).

18. 156 U.S. 237 (1895).

19. Thomas J. Reed, Crawford v. Washington *and the Irretrievable Breakdown of a Union: Separating the Confrontation Clause from the Hearsay Rule*, 56 S.C. L. REV. 185, 192 (2004).

20. *Mattox*, 156 U.S. at 243. In *Mattox*, two witnesses who previously testified against the defendant during Mattox's first trial died before the second trial. *Id.* at 240. Even though Mattox cross-examined the witnesses at the first trial, he argued that he had been denied his right to confront the witnesses against him. *Id.* at 240-44. The Court rejected this argument holding that the Framers did not intend rigid construction of basic constitutional rights. *Id.* The Court found that while the clause was primarily designed to protect criminal defendants from being tried on depositions and *ex parte* affidavits, there are some situations which warrant the admission of certain statements from unavailable witnesses, despite the defendant's constitutional right. *Id.* The general rule "must occasionally give way to considerations of public policy and the necessities of the case." *Id.* at 243.

21. *See, e.g.*, Douglas v. Alabama, 380 U.S. 415 (1965) (holding that the admission of an accomplice's statement violated the Confrontation Clause because the defendant had no opportunity to cross-examine the declarant in order to determine if the statement was made and if it was true); *Pointer*, 380

a more definitive outline.

In *Ohio v. Roberts*, the Court established the framework for analyzing hearsay under the Confrontation Clause. The Court was called upon to consider once again the relationship between the Confrontation Clause and the hearsay rule with its many exceptions.[23] Justice Blackmun, writing for the majority, reiterated the Court's position that a literal and rigid interpretation of the clause would "abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme."[24] The majority, however, found that the clause was intended to exclude some hearsay.[25]

The Court decided that a judicial determination of reliability could substitute for actual confrontation in the form of cross-examination.[26] The majority determined that the statements of unavailable declarants were admissible so long as they bore adequate indicia of reliability.[27] The *Roberts* reliability test is satisfied if the hearsay statement: 1) falls under a firmly rooted hearsay exception; or 2) if the statement bears particularized guarantees of trustworthiness such that adversarial testing would be expected to add little, if anything, to the statement's

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U.S. at 404 (stating that "the decisions of this Court and other courts throughout the years have constantly emphasized the necessity for cross-examination as a protection for defendants in criminal cases."). In *Pointer*, the defendant was not represented by counsel at his preliminary hearing when the State called Phillips as a witness. *Id.* at 401-02. Phillips identified Pointer as the man who robbed him at gunpoint. *Id.* The State introduced the transcript of Phillips's testimony at trial because he was unavailable. *Id.* Justice Black, writing for the Court, concluded that Pointer did not confront his accuser because he was denied the right to counsel at the hearing. *Id.* at 406-07; *see also* Bruton v. United States, 391 U.S. 123, 136 (1968) (determining that confessions by accomplices and codefendants are unreliable unless they are tested by cross-examination). The *Bruton* Court was concerned that admitting an accomplice's confession without corroborating evidence would be harmful and violative of the Confrontation Clause. *Id.* at 136-37. *See generally* California v. Green, 399 U.S. 149, 159 (1970) (reasoning that the Confrontation Clause mandates only that an opportunity to cross examine be given, rejecting the notion that the clause requires an *effective* cross-examination); Mancusi v. Stubbs, 408 U.S. 204, 216 (1972) (concluding that the defendant had an adequate opportunity to cross-examine the witnesses at his first trial and no Confrontation Clause violation occurred when the transcript of the witness's testimony was admitted at the second trial).

22. *See Roberts*, 448 U.S. at 66 (holding that statements by unavailable declarants are only admissible when the statement bears "adequate indicia of reliability").

23. *Id.* at 62. Justice Blackmun noted that the many hearsay exceptions resemble "an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists." *Id.*

24. *Id.* at 63.

25. *Id.*

26. *Id.* at 66.

27. *Id.*

reliability.[28]

C. *The Supreme Court's Decision in* Williamson

In *Williamson*, the Court narrowed the scope of Federal Rule of Evidence 804(b)(3) and held that only the individual portions of such statements that are against the declarant's interest are admissible.[29] In other words, the rule does not allow the admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory.[30]

In *Williamson*, the defendant, Fredel Williamson, appealed his conviction on the grounds that the admission of his accomplice's confession violated Rule 804(b)(3) and the Confrontation Clause.[31] Writing for the Court, Justice O'Connor opined that the statement against penal interest exception protects against the traditional risks of admitting hearsay because people do not subject themselves to criminal liability unless they believe the statements are true.[32] The exception, nonetheless, leaves open the possibility that an accomplice may make false-inculpatory statements to shift blame to the defendant.[33]

Therefore, the Court concluded that the rule should be interpreted narrowly to allow only those declarations or remarks within the confession that are individually self-inculpatory.[34] The case was remanded by the Court to determine which statements in

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28. Lilly v. Virginia, 527 U.S. 116, 124-25 (1999) (plurality opinion) (citing *Roberts*, 448 U.S. at 66).

29. *Williamson*, 512 U.S. at 599. Justice Kennedy concurred in judgment but argued in his opinion for a broader reading of Rule 804(b)(3). *Id.* at 611. Joined by Chief Justice Rehnquist and Justice Thomas, Justice Kennedy argued that the rule can be read as expressing a policy that collateral statements are admissible. *Id.* at 612. Kennedy based this proposition on the fact that since 804(b)(3) is silent on the issue of collateral statements, the Court should determine if there are other authoritative guides on the question. *Id.* at 613-14. Justice Kennedy concluded that the "Advisory Committee's Note, the common law of the hearsay exception for statements against interest, and the general presumption that Congress does not enact statutes that have almost no effect" all demonstrate that Rule 804(b)(3) allows the admission of some collateral statements. *Id.* at 614.

30. *Id.* at 600-01.

31. *Id.* at 598. The accomplice, Reginald Harris, made statements to a DEA Agent that inculpated both Harris and Williamson. *Id.* at 597. At trial, Harris refused to testify and the district court allowed the agent to testify as to what Harris told him. *Id.* The Supreme Court granted certiorari to clarify the scope of the statement against penal interest exception. *Id.* at 596.

32. *Id.* at 599.

33. *Id.* Justice O'Connor noted that "[o]ne 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." *Id.* at 599-600.

34. *Id.* at 599.

the accomplice's confession were truly self-inculpatory.[35] As a result of the Court's disposition, the Court did not reach the merits of Confrontation Clause issue.[36]

The *Williamson* Court also chose not to decide other questions involving Rule 804(b)(3). First, the Court opted not to decide the question of whether the statement against interest exception was firmly rooted.[37] The Court also chose not resolve the circuit split regarding the corroboration requirement[38] when evaluating statements that inculpate the accused.[39] The decision by the Court in *Williamson* to leave these questions open prolonged the disagreement among the circuit courts as to how the rule should be applied.[40]

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35. *Id.* at 604. The inquiry is fact-intensive and requires a "careful examination of all the circumstances surrounding the criminal activity" involved in each particular case. *Id.*

36. "[W]e need not address Williamson's claim that the statements were also made inadmissible by the Confrontation Clause . . . ." *Id.* at 605.

37. "[W]e need not decide whether the hearsay exception for declarations against interest is 'firmly rooted' for Confrontation Clause purposes." *Id.* At the time *Williamson* was decided several, circuit courts had addressed the question of whether the exception is "firmly rooted." *Compare* United States v. Seeley, 892 F.2d 1 (1st Cir. 1989) (holding that the exception is firmly rooted), *with* United States v. Flores, 985 F.2d 770 (5th Cir. 1993) (stating that the exception for statements against penal interest not firmly rooted), *and* Olson v. Green, 668 F.2d 421, 428 (8th Cir. 1982) (custodial statements implicating a third party do not fall within firmly rooted exception). The *Flores* court concluded that the exception for declarations against penal interest is not firmly rooted because of its controversial history and because the Supreme Court indicated that statements against penal interest which also inculpate a third party are often suspect. 985 F.2d at 777-80. *See generally supra* note 21 (discussing the Supreme Court cases which find confessions by accomplices and codefendants to be unreliable absent the opportunity to cross-examine).

38. *See supra* note 15 (citing cases which require corroboration); *supra* note 16 (citing those cases which do not require corroboration).

39. "We also need not decide, whether, as some Courts of Appeals have held, the second sentence of Rule 804(b)(3) . . . also requires that statements inculpating the accused be supported by corroborating circumstances." *Williamson*, 512 U.S. at 605; *see also* John J. Capowski, *Statements Against Interest, Reliability, and the Confrontation Clause*, 28 SETON HALL L. REV. 471, 509 (1997) (discussing the failure of the Court to address this issue).

40. Capowski, *supra* note 39, at 509. Capowski points out that "[d]ue process and equal protection principles argue strongly for symmetrical application of the corroboration requirement, but such a reading is contrary to the plain meaning of the rule." *Id.* The decision by the *Williamson* Court to balk at the opportunity to decide this issue "has left courts and practitioners to define their own solutions." *Id.*

D. The Court's Confrontation Clause Jurisprudence Post-Williamson

1. The Firmly Rooted Question

In *Lilly v. Virginia*,[41] a plurality of the Court held that the statements against interest exception is not firmly rooted.[42] Writing for the plurality, Justice Stevens outlined three principal situations where statements against penal interest are offered into evidence.[43] The first category consists of voluntary admissions against the declarant.[44] The second category consists of statements of an unavailable declarant confessing to the commission of a crime offered by the defendant to support a claim

41. 527 U.S. 116 (1999). In *Lilly*, the defendant was convicted of murder after the state introduced his accomplice's tape-recorded confession under the statements against penal interest exception. *Id.* at 122. The Supreme Court of Virginia upheld the admission on the grounds that the exception is firmly rooted under the state's hearsay law. *Id.*

42. The Court made clear that "accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence." *Id.* at 134. Justice Stevens supported this conclusion by asserting that the holdings in *Bruton*, *Cruz v. New York*, *Gray v. Maryland*, and *Lee v. Illinois*, (citations omitted) "were all premised, explicitly or implicitly, on the principle that accomplice confessions that inculpate a criminal defendant are not *per se* admissible (and thus necessarily fall outside a firmly rooted hearsay exception), no matter how much those statements also incriminate the accomplice." *Lilly*, 527 U.S. at 134 n.5.

Justice Stevens was joined by Justices Souter, Ginsburg, and Breyer in holding the statement against interest exception is not firmly rooted. *Id.* at 119. Justice Scalia and Justice Thomas both concurred in part and concurred in the judgment, though neither concurring opinion explicitly disagreed with the plurality's conclusion that the exception is not firmly rooted. *Id.* at 143-44. However, Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy, saw "no reason to foreclose the possibility that . . . statements . . . that inculpate a codefendant may fall under a firmly rooted hearsay exception." *Id.* at 147.

Justice Breyer wrote a separate concurring opinion to discuss the problems with the test enunciated in *Roberts*. *Id.* at 140; *see also* White v. Illinois, 502 U.S. 346, 358 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment) (suggesting that the Court's "Confrontation Clause jurisprudence has evolved in a manner that is perhaps inconsistent with the text and history of the Clause itself.").
Justice Breyer noted how the current hearsay-based Confrontation Clause test is arguably too narrow and too broad. *Lilly*, 527 U.S. at 141-42. However, since the statements at issue in *Lilly* violated the Clause regardless, there was no need to reexamine the link between the Confrontation Clause and the hearsay rule. *Id.* at 142. Although Justice Breyer did not argue that the Court should reevaluate the *Roberts* test, he did allude to the idea that he would "leave the question open for another day." *Id.* at 143; *see also Crawford*, 541 U.S. at 68 (overruling the *Roberts* test).

43. *Lilly*, 527 U.S. at 127.

44. *Id.* Statements in the first category do not violate the Confrontation Clause and are routinely admitted. *Id.*

that the declarant actually committed the crime.[45] The third category consists of statements offered by the prosecution to establish the guilt of the declarant's accomplice.[46]

Statements in the third category, the type at issue in *Lilly*, were found to be presumptively unreliable and thus fall outside a firmly rooted hearsay exception.[47] The Court found the statements in *Lilly* did not satisfy both prongs of the *Roberts* test and remanded the case to determine if the Confrontation Clause violation was harmless error.[48]

2. *The Court Rethinks the Roberts Approach*

In *Crawford v. Washington*, the United States Supreme Court overruled *Roberts* to the extent that it governs testimonial statements.[49] In *Crawford*, Sylvia Crawford made statements to police officers during an interrogation at the station which inculpated herself and her husband Michael in the stabbing of Kenneth Lee.[50] The court admitted Sylvia's tape recorded confession at trial after Michael invoked the spousal privilege to keep his wife from testifying.[51] Michael was convicted and

45. *Id.* at 129-30; *see also* Chambers v. Mississippi, 410 U.S. 284, 300 (1973) (establishing that statements in the second category should be routinely admitted because they are exculpatory and implicate the defendant's right to conduct a meaningful defense).

46. *Lilly*, 527 U.S. at 130. The plurality found that the third category encompasses statements that are inherently unreliable. *Id.*

47. *Id.* at 134. Justice Stevens asserted that the Court has "spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants." *Id.* at 131. The plurality's reasoning is based on the Court's *Bruton* line of cases which illustrate the common principle that "when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination." *Id.* at 132.

Chief Justice Rehnquist criticized the "plurality's blanket ban on the government's use of accomplice statements that incriminate a defendant. . . ." *Id.* at 147. The plurality's response to this criticism was that the Confrontation Clause does not place a *per se* ban on the government using accomplice confessions at trial; rather it simply means the Government must satisfy the second prong of the *Roberts* test. *Id.* at 134.

48. *Lilly*, 527 U.S. at 139-40.

49. *Crawford*, 541 U.S. at 68. The Court held that in order to admit a testimonial hearsay statement, the Confrontation Clause requires the declarant be unavailable and that there was a prior opportunity to cross-examine the declarant. *Id.* With regard to nontestimonial hearsay, the Court acknowledges that *Roberts* may be used. *Id.*

50. *Id.* at 39-40. The prosecution charged the defendant with attempted murder and assault. *Id.* at 40. Michael claimed self-defense at trial. *Id.* Sylvia's statements were against her interest because they implicated her as an accomplice. *Id.* at 39-40. Her statements also inculpated Michael because they indicated that Lee did not have a weapon when Michael stabbed him. *Id.*

51. *Id.* Washington's marital privilege generally bars a spouse from testifying without the other spouse's consent. *Id.* However, the privilege does

appealed arguing that the State violated his Sixth Amendment right to confront the witnesses against him.[52]

In the majority opinion, Justice Scalia looked to the history of the Confrontation Clause to support two inferences about the meaning of the Sixth Amendment.[53] First, the "principal evil at which the Confrontation Clause was directed was the . . . use of *ex parte* examinations as evidence against the accused."[54] Second, the "[f]ramers would not have allowed the admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."[55] Therefore, the Court held that a testimonial statement could not be admitted unless the declarant was unavailable and the defendant had a prior opportunity to cross-examine the declarant.[56]

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not extend to a spouse's out-of-court statements admissible under a hearsay exception. *Id.* The court allowed the tape to be played and admitted it into evidence under the State's declaration against interest exception. *Id.*

52. *Id.* at 40.

53. *Id.* at 42-54.

54. *Id.* at 50. As Scalia explained, this was the "civil-law mode of criminal procedure . . . ." *Id.*

55. *Id.* at 53-54. The Court's interpretation of historical sources led them to conclude that a prior opportunity to cross-examine is a "necessary" condition for admissibility of testimonial statements. *Id.* at 55. Justice Scalia further supported this conclusions by pointing out that the results in the Court's prior decisions were consistent with these propositions. *Id.* at 57. However, the Court's rationales for deciding previous cases were not faithful to the original meaning of the Confrontation Clause. *Id.* at 60. Therefore, the Court overruled the *Roberts* framework to the extent that it governs testimonial statements. *Id.* at 68.

56. *Id.* The Court chose to leave for another day any effort to spell out a comprehensive definition of "testimonial." *Id.* The Court did note, however, that a formal statement to a government officer qualifies as testimonial, while a casual remark to an acquaintance is nontestimonial. *Id.* at 51. Additionally, Justice Scalia concluded that whatever else the term "testimonial" covers, it applies at a minimum to prior testimony at a preliminary hearing and to statements made before a grand jury, at a former trial, or during police interrogations. *Id.* at 68.

In his concurring opinion, joined by Justice O'Connor, Chief Justice Rehnquist opposed overruling *Roberts*. *Id.* at 69. One of his concerns was that the Court's refusal to define what "testimonial" means will undoubtedly cause confusion and uncertainty for "thousands of federal prosecutors and tens of thousands of state prosecutors" who need answers to specific kinds of testimony covered by the new rule. *Id.* at 75.

Justice Scalia responded to this particular concern by saying that the interim uncertainty "can hardly be any worse than the status quo." *Id.* at 68. Thus, while acknowledging that courts and practitioners will have difficulty determining what is testimonial at least for the time being, Scalia pointed out that "the *Roberts* test is inherently, and therefore permanently, unpredictable." *Id.*

Recently, the consolidated case of *Davis v. Washington*, did not permit the Court to indulge in the luxury of indecision in determining what the Court meant by "testimonial." 547 U.S. 813 (2006). Specifically, the Court had to

The Court found that Sylvia's statements were testimonial and that she was unavailable, but Michael never had an opportunity to cross examine her. Accordingly, the Court reversed the Washington State Supreme Court's decision and remanded the case.[57]

III. ANALYSIS

A. *The Corroboration Requirement*

1. *Congress Drafts the Rule, But Leaves the Rest Up to the Courts*

In 1975, the drafters of the Federal Rules of Evidence debated placing a provision which would codify the Supreme Court's then current interpretation of the Confrontation Clause espoused in

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decide what is meant by "police interrogations." *Id.* at 823. In *Davis*, the issue was whether an interrogation during the course of a 911 call produced testimonial statements. *Id.* Writing for the Court once again, Justice Scalia elaborated on *Crawford's* placement of police interrogations in the class of testimonial hearsay. *Id.* at 826. Scalia explained that interrogations solely directed at establishing the facts of a past crime in order to provide evidence to convict or identify the perpetrator was what the Court had in mind in *Crawford*. *Id.* In contrast to this, Justice Scalia wrote, a 911 call is ordinarily not designed primarily to establish or prove some past fact. *Id.* at 827. Instead, 911 calls describe current circumstances requiring police assistance. *Id.*

The *Davis* Court concluded that statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. *Id.* at 822. Therefore, the Court found the statements made during the 911 call to be nontestimonial and thus properly admitted. *Id.* at 828.

Along with *Davis*, the Court granted certiorari to the Indiana Supreme Court in *Hammon v. Indiana*, 829 N.E.2d 444 (Ind. 2005). *Davis*, 547 U.S. at 819. In *Hammon*, officers responded to a domestic disturbance between Amy and Hershel Hammon. *Id.* The officers interrogated Amy outside the presence of her husband and instructed Amy to fill out a battery affidavit. *Id.* at 820. At Hershel's trial for domestic battery and a probation violation, Amy refused to testify. *Id.* The officer who took Amy's statement testified, over defense counsel's objection, to what Amy said and authenticated her affidavit. *Id.*

The Supreme Court reversed the judgment of the Indiana Supreme Court and remanded the case after concluding that all of Amy's statements were testimonial. *Id.* at 834. The Court likened Amy's statements to Sylvia's statements in *Crawford*. *Id.* at 829. In both cases, there was no emergency in progress and the primary purpose of the interrogations was to investigate "what happened" (a past fact); rather than "what was happening" (as in *Davis*). *Id.* Therefore, the Court held that statements are "testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 822.

57. *Crawford*, 541 U.S. at 68-69.

Bruton v. United States.[58] The Court in *Bruton* held that the admission of an extrajudicial hearsay statement of one codefendant inculpating a second codefendant violated the Confrontation Clause.[59] The legislative history explains why this provision was never added to the rule. It explained, as follows:

> The committee decided to delete this provision because the basic approach of the rules is to avoid codifying, or attempting to codify, constitutional evidentiary principles, such as the Fifth Amendment's right against self-incrimination and the Sixth Amendment's right of confrontation. Codification of a constitutional principle is unnecessary and, where the principle is under development, often unwise.[60]

Thus, while specifically addressing exculpatory statements, the draftsmen of the new rules left the task of delineating prerequisites to the admissibility of inculpatory against-interest hearsay to the courts.

2. *The Lower Federal Courts Have Divided on the Issue*

a. The Fifth Circuit's Pre-*Roberts* Analysis

The first case to fully confront the question of whether the corroboration requirement for exculpatory statements extends to inculpatory declarations was *United States v. Alvarez*.[61] In *Alvarez*, the court examined the Supreme Court's Confrontation Clause jurisprudence in order to determine the requirements which were omitted by the drafters. The Fifth Circuit concluded in *Alvarez*, according to the reasoning of *Dutton v. Evans*,[62] that the central feature of Confrontation Clause analysis is whether inculpatory hearsay is reliable.[63] The court held that the

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58. S. REP. NO. 93-1277, at 7068 (1974) (Conf. Rep.).

59. *Bruton*, 391 U.S. at 132.

60. S. REP. NO. 93-1277, at 7068.

61. 584 F.2d 694, 700-01 (5th Cir. 1978). The court traced the legislative history of the exception to determine the appropriate standard for inculpatory statements. *Id.*

62. 400 U.S. 74 (1970).

63. *Alvarez*, 584 F.2d at 700-01. In *Dutton v. Evans*, an accomplice (Williams) made a statement to his cellmate (Shaw) which inculpated the accused (Evans). 400 U.S. at 77-78. The testimony of Shaw relating to what Williams had told him was admitted. *Id.* at 78. Evans argued that his murder conviction should be set aside because of the admission of Shaw's testimony. *Id.* at 79. The Court rejected the defendant's argument because the circumstances provided several indicia of reliability surrounding the statement. *Id.* at 89.

In *Dutton*, the Court also reiterated its stance on the relationship between the Clause and hearsay. The Court stated:

> [T]he decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that the

admissibility of inculpatory declarations against interest requires corroborating circumstances that clearly indicate the trustworthiness of the statement.[64]

The *Alvarez* court reasoned that requiring corroboration for both exculpatory and inculpatory statements satisfied the Court's directive in *Dutton v. Evans*, avoiding the "constitutional difficulties that Congress acknowledged but deferred to the judiciary for resolution."[65] Moreover, the court reasoned that a unitary standard for both types of statements offers the most workable basis for applying the rule.[66]

b. The Federal Courts' Response to *Alvarez*

The majority of the circuits chose to follow *Alvarez*, explicitly or implicitly.[67] In *United States v. Garcia*,[68] a case decided after *Roberts*, the Seventh Circuit adopted the test enunciated in *Alvarez*.[69] The *Garcia* court focused on the requirements of 804(b)(3) separately from the Confrontation Clause issue.[70] The court found corroborating circumstances which indicated that the

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trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.

Id.

The *Alvarez* court determined that *Dutton* required that the statements must be reliable to be properly admitted. *Alvarez*, 584 F.2d at 701. When *Ohio v. Roberts* was decided in 1980, the mandate of reliability was not significantly altered, but more clearly defined by the Court. *See Roberts*, 448 U.S. at 66 (requiring that hearsay statements must bear adequate "indicia of reliability"). Thus, courts continued to apply the *Alvarez* holding in the post-*Roberts* era because it comported with the Court's Confrontation Clause jurisprudence. *See* United States v. Garcia, 897 F.2d 1413, 1421 (7th Cir. 1990) (deciding that the corroborating circumstances requirement satisfies the second part of the *Roberts* test).

64. *Alvarez*, 584 F.2d at 701.

65. *Id.*

66. *Id.*

67. *See Garcia*, 897 F.2d at 1420 (explicitly deciding to follow *Alvarez*); *Casamento*, 887 F.2d at 1170 (following *Alvarez* implicitly and explaining that "this Circuit requires corroborating circumstances even when the statement is offered . . . to *inculpate* the accused."); *see also supra* note 15 (citing cases that follow the *Alvarez* approach explicitly or implicitly).

Notably, the Ninth Circuit has been confronted with this issue several times and has chosen each time to leave the question undecided. *See* United States v. Layton, 720 F.2d 548, 559 (9th Cir. 1983) (stating that "[w]e need not reach the question here because we conclude that the third, as well as the first two requirements [of Rule 804(b)(3)] have been met"); United States v. Nazemian, 948 F.2d 522, 531 (9th Cir. 1991) (reaching the same result by concluding that "[w]e likewise need not decide the question here, because even assuming the corroborating circumstances requirement applies, we find that it is met in this case").

68. 897 F.2d 1413 (7th Cir. 1990).

69. *Garcia*, 897 F.2d at 1420 (stating that "[w]e believe this is a useful test to be used in such an analysis and we adopt it here").

70. *Id.* at 1420-21.

statements at issue were trustworthy.[71] In regards to the defendant's Sixth Amendment claim, the court applied the second part of the *Roberts* test and stated:

> [W]e have previously determined that the statements were properly admitted as statements against interest under Rule 804(b)(3). As such, we concluded that the statements were supported by sufficient corroborating evidence. That evidence also satisfies the required indicia of reliability for confrontation clause purposes.[72]

Therefore, the court applied the unitary standard as well as the second prong of the *Roberts* test in upholding the admission of the inculpatory statements at trial.[73] While the Seventh Circuit's approach appears to side-step the firmly rooted question by directly moving to the second prong, the Seventh Circuit in *United States v. York*[74] pointed out that implicit in *Garcia* is the premise that the exception is firmly rooted.[75]

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71. *Id.* at 1420.

72. *Id.* at 1421. After *Garcia*, the Seventh Circuit in *United States v. York* held that for an inculpatory statement "[t]o be admissible under rule 804(b)(3)... the inculpatory portion of a statement against interest must be sufficiently reliable to satisfy the confrontation clause." 933 F.2d 1343, 1361 (7th Cir. 1991). In regards to application of the unitary standard and the second part of the *Roberts* test, the court said that "[t]here seems little reason to treat the requirement of reliability differently in each context. Such an approach would be needlessly complex, requiring two bodies of case law where one will do." *Id.*

In *York*, the statement at issue involved an accomplice's statement to two associates. *Id.* at 1360. The court found the declarations against penal interest exception to be firmly rooted. *Id.* at 1363. The court admitted the statement under 804(b)(3) after finding corroborating circumstances that clearly indicated the trustworthiness of statement, in accordance with the *Garcia* standard, and holding there was no Confrontation Clause violation. *Id.* at 1364.

The Seventh Circuit, therefore, follows the rule that "where testimony passes the 804(b)(3) test it normally will pass Sixth Amendment Confrontation Clause analysis as well." *United States v. Sims*, 879 F. Supp. 828, 831 (N.D. Ill. 1995). This approach, of course, would not comply with the demands of *Crawford*. *See Crawford*, 541 U.S. at 68 (holding that "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination.").

Under *Crawford*, the corroborating circumstances test becomes irrelevant for Confrontation Clause purposes because the crucial inquiry is whether the statement is "testimonial." *Id.* If the statement is nontestimonial, the Sixth Amendment problem is avoided. *Id.* It remains unclear, however, if the second part of the *Roberts* test or the corroborating circumstances requirement should be applied to nontestimonial statements (against penal interest) that inculpate the defendant. *See id.* (allowing flexibility in hearsay law for nontestimonial statements).

73. *Garcia*, 897 F.2d at 1420-21.

74. 933 F.2d 1343 (7th Cir. 1991).

75. *Id.* at 1363. The court in *York* explained:

> In *Garcia* we . . . rejected a claim that admission of an inculpatory hearsay statement under rule 804(b)(3) violated the defendant's sixth

c. The First Part of the *Roberts* Test: Firmly Rooted Hearsay Exception

In 1986, the Court provided some guidance on the question of whether the statement against interest exception was firmly rooted in *Lee v. Illinois*.[76] In *Lee*, a majority of the Court held that confessions by an accomplice inculpating the accused are presumptively unreliable.[77] This presumption, however, could be overcome if the statement bears "particularized guarantees of trustworthiness."[78] In *Lilly*, Justice Stevens relied on the holding in *Lee* in determining that the statement against penal interest exception is not firmly rooted.[79]

After *Lilly*, even though only a plurality of the Court found the exception not to be firmly rooted, the federal courts chose not to diverge from this conclusion.[80] As a result, courts consistently

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> amendment right to confront witnesses against him. While we did not expressly state that the statement against penal interest exception to the hearsay rule is "firmly rooted," we observed that the reliability of the inculpatory statement at issue in that case had been adequately established for purposes of the evidentiary rule, thereby satisfying the requirements of the confrontation clause as well. Our holding in *Garcia* was tantamount to saying that the exception is well-rooted within the meaning of *Roberts* . . . and we affirm that view today.

Id.

76. 476 U.S. 530 (1986).

77. *Lee*, 476 U.S. at 539. In *Lee*, two defendants (Lee and Thomas) were tried jointly in bench trial. *Id.* at 531. While neither defendant testified at trial, the trial judge expressly relied on Thomas' confession to the police as substantive evidence against Lee. *Id.* Lee argued that the trial judge's reliance on Thomas's statement violated her Sixth Amendment right to confront the witnesses against her. *Id.*
The Court held that a codefendant's confession inculpating the accused is inherently unreliable and thus, convictions supported by such evidence violate the constitutional right of confrontation. *Id.* at 546.

78. *Id.* at 543.

79. *Lilly*, 527 U.S. at 134.

80. *See* United States v. Shea, 211 F.3d 658, 669 (1st Cir. 2000) (distinguishing *Lilly*, but not disagreeing with the plurality's conclusion that the exception is not firmly rooted); United States v. Moskowitz, 215 F.3d 265, 269 (2nd Cir. 2000) (declining to decide whether the declaration against interest exception is firmly rooted); United States v. Moses, 148 F.3d 277, 281 (3d Cir. 1998) (declining to address the issue before *Lilly* was decided); United States v. Taylor, No. 98-4517, No. 98-4518, 1999 U.S. App. LEXIS 19239, at *30 (4th Cir. August 16, 1999) (deciding not to answer the question); United States v. Bell, 367 F.3d 452, 466 (5th Cir. 2004) (following *Lilly* and prior precedent); Vincent v. Seabold, 226 F.3d 681, 688 (6th Cir. 2000) (stating that "both *Williamson* and *Lilly* instruct that . . . we must evaluate the indicia of reliability associated with each individual remark or declaration"); United States v. Robbins, 197 F.3d 829, 839 (7th Cir. 1999) (following *Lilly*); United States v. Chapman, 345 F.3d 630, 634-35 (8th Cir. 2003) (accepting that *Lilly* controls the admissibility of statements in the instant case); Forn v. Hornung, 343 F.3d 990, 995 (9th Cir. 2003) (stating that "[a]lthough *Lilly* is a plurality decision, we have consistently viewed the case as binding precedent"); United States v. Gomez, 191 F.3d 1214, 1220-21 (10th Cir. 1999) (holding that the

applied the second prong of the *Roberts* reliability test to determine if the admission of a statement against interest, which inculpated the accused, was proper under the Confrontation Clause.[81] Since *Crawford* overruled *Roberts*, the application of the reliability test has changed.

B. Crawford Reshapes the Mode of Analysis

1. Testimonial Statements and the Confrontation Clause

In the wake of *Crawford*, the test for admitting statements against interest which inculpate the accused significantly changed. The starting point for Confrontation Clause analysis, as in all hearsay statements admitted against the accused, is to first determine if the statement is testimonial.[82]

If the declarant is unavailable and the statement is testimonial, then it is admissible if there was a prior opportunity to cross-examine.[83] However, if there was no prior opportunity to cross-examine, then the statement is inadmissible because the Sixth Amendment demands actual confrontation.[84] The test for nontestimonial statements, however, is not as clear.

2. Nontestimonial Statements and the Confrontation Clause

Inculpatory statements that are nontestimonial do not have the same Confrontation Clause implications as testimonial statements. Justice Scalia explained in *Crawford* that "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers's design to afford the States flexibility in their development of hearsay law — as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether."[85]

As a result, states have more leeway in developing their own

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exception is not firmly rooted under *Lee*, *Lilly*, *Williamson*, and Tenth Circuit precedent); United States v. Francois, 295 F. Supp. 2d 60, 70 (D.C. Cir. 2003) (choosing not to tackle the firmly rooted question and deciding instead to focus on whether 'accused's statement bears sufficient indicia of reliability to merit its admissibility).

81. *See* United States v. McCleskey, 228 F.3d 640, 644 (6th Cir. 2000) (stating that "Confrontation Clause jurisprudence does not permit the introduction of hearsay declarations uttered by accomplices in law enforcement custody that inculpate a defendant, absent further 'particularized guarantees' of the declaration's trustworthiness.").

82. *See Crawford*, 541 U.S. at 68 (stating that the Sixth Amendment demands that admission of testimonial evidence requires unavailability and prior opportunity to cross-examine).

83. *Id.*

84. *See id.* at 69 (stating that "the only indicium of reliability sufficient to satisfy the constitutional demands is the one the Constitution actually prescribes: confrontation.").

85. *Id.* at 68.

rules of evidence their own rules for nontestimonial statements.[86] They may choose to apply *Roberts* or to exempt the statements from any sort of Confrontation Clause analysis.[87] The federal courts have applied the *Roberts* reliability test when analyzing nontestimonial statements.[88]

a. Applying *Roberts* to Nontestimonial Statements Post-*Crawford*

Because there is ample authority indicating that the statement against interest exception is not firmly rooted, the federal courts tend to rely on the second prong of the *Roberts* test for nontestimonial statements.[89] Courts look for particularized guarantees of trustworthiness in order to determine if the statement is reliable.[90]

As noted by the court in *Garcia*, this test is remarkably similar to the corroborating circumstances requirement 804(b)(3).[91] Thus, nontestimonial inculpatory statements receive the same treatment under either the second part of the *Roberts* test or the application of the unitary standard enunciated in *Alvarez*. Which is the correct approach, however, is an unanswered question.[92]

b. The Federal Courts Application of *Roberts* to Nontestimonial Statements

Today, the federal courts reject the option to exempt statements from Confrontation Clause scrutiny altogether.[93] Instead, the courts apply the *Roberts* test and guide their decisions

86. *Id.*

87. *Id.*

88. *See* Hammond v. United States, No. 97-CF-624, No. 97-CF-791, 2005 D.C. App. LEXIS 414, at *81 (D.C. Cir. August 11, 2005) (stating that "*Crawford* did not alter the application of *Roberts* to non-testimonial statements; therefore, we accept the continued viability of *Roberts*").

89. *See Lee*, 476 U.S. at 539 (holding that accomplice confessions inculpating the accused are presumptively unreliable); *Lilly*, 527 U.S. at 134 (holding that a confession by an accomplice that inculpates a criminal defendant is not within a firmly rooted exception); *see also supra* note 80 (citing federal circuit court cases that either follow *Lilly* or decline to decide the question).

90. *See Roberts*, 448 U.S. at 66 (holding that if the exception is not firmly rooted, then "the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.").

91. *See Garcia*, 897 F.2d at 1420-21 (explaining that the corroboration requirement satisfies the second part of the *Roberts* test).

92. *See Crawford*, 541 U.S. at 68 (deferring to the states and inferior federal courts to decide the proper level of scrutiny to analyze nontestimonial statements).

93. *See* United States v. Taylor, 328 F. Supp. 2d 915, 920 (N.D. Ind. 2004) (applying *Roberts* to nontestimonial statements); United States v. Savoca, 335 F. Supp. 2d 385 (S.D.N.Y. 2004) (giving states room to construct their own hearsay law when dealing with nontestimonial statements).

by precedent prior to *Crawford*.[94] While courts do not discuss the unitary standard, by applying the second part of the *Roberts* test, courts implicitly reject its application.[95]

In *United States v. Taylor*,[96] the government sought to admit an inculpatory statement made by the defendant to his accomplice under 804(b)(3).[97] The district court did not state that the statement was nontestimonial; however, the court applied the second part of the *Roberts* test.[98] Following the Seventh Circuit, the court found "that [the defendant's] statement against penal interest to [his accomplice] is inherently trustworthy because the circumstances surrounding the statement afford it a particularized guarantee of trustworthiness."[99]

Under *Garcia*, it is debatable whether the court should have applied the corroborating circumstances requirement. The fact that the court did not thoroughly discuss whether the statement was testimonial did not help clarify the issue. The court, however, applied *Roberts* for purposes of satisfying the Confrontation Clause.[100] In doing so, the court implicitly rejected the option of exempting the statements from Confrontation Clause analysis.[101] This also has the implied effect of rejecting the unitary standard approach.[102]

Similarly, in *United States v. Savoca*,[103] the United States District Court for the Southern District of New York confronted the question of what the proper analysis should be for

94. *Savoca*, 335 F. Supp. 2d at 393.

95. This principle is demonstrated in *Savoca*, where the court does not mention the corroboration requirement and uses the second part of the *Roberts* test, implicitly indicating that the unitary standard is rejected because both tests serve essentially the same purpose. *Id.*; *see also Garcia*, 897 F.2d at 1420-21 (determining that the unitary standard satisfies the second part of the *Roberts* test for confrontation clause purposes); *Williamson*, 512 U.S. at 605 (noting 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.").

96. 328 F. Supp. 2d 915 (N.D. Ind. 2004).

97. *Id.* at 919.

98. *Id.* at 923. The court did state that they would utilize the "framework of *Roberts*, *Lilly*, and *Crawford*." *Id.* The court, however, did not expressly indicate that the statement was nontestimonial; instead, the court proceeded directly to the *Roberts* test. *Id.*

99. *Id.* at 926.

100. *Id.* at 923. The court stated that "the statement must also survive analysis under the Confrontation Clause." *Id.* The court then applied the *Roberts* test. *Id.*

101. *See supra* note 92 (noting that *Crawford* deferred to the lower courts as to whether to exempt nontestimonial statements from Confrontation Clause scrutiny).

102. *See Taylor*, 328 F. Supp. 2d at 923 (proceeding directly to the *Roberts* test impliedly rejects the unitary standard).

103. 335 F. Supp. 2d 385 (S.D.N.Y. 2004).

nontestimonial inculpatory hearsay statements offered by the government under 804(b)(3).[104] The court, following *Crawford*, categorized the defendant's statements as nontestimonial because the defendant made the statements to an acquaintance who had no connection to any law enforcement official or proceeding; further the statements were not formal statements to a government official.[105]

As a result, the court reasoned that it could either follow the *Roberts* inquiry or exempt the statements from Confrontation Clause analysis.[106] The court decided to perform an analysis consistent with the Supreme Court's Confrontation Clause jurisprudence and Second Circuit case law prior to *Crawford*.[107] The court applied the second prong of the *Roberts* test and rejected the option to exempt the statements from constitutional scrutiny.[108]

The court admitted the statements under 804(b)(3) because they had sufficient particularized guarantees of trustworthiness.[109] In its analysis, however, the court did not acknowledge that the Second Circuit requires corroborating circumstances when the statement is offered, under 804(b)(3), to inculpate the accused.[110] Because the court analyzed the statements under *Roberts* in order to comport with the Confrontation Clause, the court, as in *Taylor*, implicitly rejected the unitary standard.[111]

IV. PROPOSAL

A. The Problem: How Should a Court Analyze Nontestimonial Inculpatory Statements Against Penal Interest?

Once a court determines that an inculpatory hearsay statement is nontestimonial and that it falls under the 804(b)(3)

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104. *Id.* at 393.
105. *Id.* at 392.
106. *Id.* at 393.
107. *Id.*
108. *See id.* at 394 (noting that "[a]lthough the Second Circuit has not yet opined as to whether hearsay statements admissible under Rule 804(b)(3). . . fall within a firmly rooted exception to the hearsay rule, the Second Circuit has relied on the second category and discussed what constitutes particularized guarantees of trustworthiness."). The court then applied the second part of the *Roberts* test and decided not to exempt the statements from constitutional scrutiny altogether. *Id.*
109. *Id.* at 400.
110. *See Casamento*, 887 F.2d at 1170 (explaining that the Second Circuit requires corroborating circumstances when the statement is offered to inculpate the accused).
111. *See supra* note 95 (explaining that using the *Roberts* test without consideration of the corroboration requirement implies a rejection of the unitary standard).

exception, the court has several options from which to choose to complete its analysis.[112]

1. Three Possible Modes of Analysis

First, a court can simply decide to exempt the statement from any Confrontation Clause scrutiny altogether.[113] Second, the court may choose to apply the unitary standard by requiring corroborating circumstances which clearly indicate the trustworthiness of the statement.[114] Finally, the court could evaluate the statement under the *Roberts* test and examine the statement for particularized guarantees of trustworthiness.[115]

a. Exempting the Statements Altogether

In *Crawford*, the majority opinion explicitly allows state courts and the lower courts the option of exempting nontestimonial statements from any sort of Confrontation Clause analysis.[116] As of yet, courts have not chosen to embrace this option as the proper method.

If courts were to do this for statements admitted under 804(b)(3), then questions of due process and fairness would arise from the disproportionate treatment given to exculpatory statements offered by the accused.[117] This would, without

112. Theoretically, a state or federal court has more options than the three possibilities discussed in this Comment. *Crawford* gave substantial deference to the lower courts to determine the proper analysis for nontestimonial statements. *See Crawford*, 541 U.S. at 68 (allowing flexibility for nontestimonial statements). Whichever option is chosen by a court, uniformity among the federal courts should certainly be a consideration. Since this uniformity was never fully achieved with the unitary standard, it stands to reason that the *Roberts* test is the only approach capable of achieving consistent application in each jurisdiction.

113. *Crawford*, 541 U.S. at 68.

114. *Alvarez*, 584 F.2d at 701.

115. *See Savoca*, 335 F. Supp. 2d at 393 (choosing to apply the *Roberts* test to nontestimonial inculpatory statements sought to be admitted under 804(b)(3)). Today, the question of whether the statement against penal interest exception is firmly rooted should be considered closed. *See supra* note 80 (citing cases that either follow *Lilly* or chose not to decide the issue and apply the second part of the *Roberts* test). The *Roberts* test, therefore, is simply shorthand for describing the particularized guarantees of trustworthiness standard contained in the second part of the *Roberts* framework. While courts could choose to analyze the firmly rooted question, it is more logical to move directly to the second part of the test. Thus, this Comment argues that the particularized guarantees of trustworthiness standard should always be applied to nontestimonial inculpatory 804(b)(3) statements. *See* Daniel J. Capra, *Essay: Amending the Hearsay Exception for Declarations Against Penal Interest in the Wake of* Crawford, 105 COLUM. L. REV 2409, 2446 (2005) (arguing that the particularized guarantees of trustworthiness standard should be applied to nontestimonial inculpatory statements).

116. *Crawford*, 541 U.S. at 68.

117. *See supra* note 40 (explaining the argument that due process and equal

question, undercut the reasoning of *Alvarez* and those courts that have followed the rationale of the unitary standard.[118] While exempting the statements would certainly be consistent with the plain meaning of 804(b)(3), this option would no doubt lead to a complex debate regarding the proper way to amend the rule.[119] Surely, courts could apply an alternative scheme that would not necessitate an act of Congress.[120]

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protection principles strongly argue for inculpatory statements to be held to a similar standard as exculpatory statements).

118. The issue for the *Alvarez* court was how the reliability of inculpatory statements should be analyzed. *Alvarez*, 584 F.2d at 701. The court chose to apply the exact same standard for inculpatory statements as Congress chose to provide for exculpatory statements. *Id.* This indicates that the *Alvarez* court, and the courts that follow this approach, believe that this is a fair way of filling in the gaps of 804(b)(3).

119. *See* Capra, *supra* note 115, at 2444-45 (proposing that 804(b)(3) should be amended). Capra suggests that the proposed amendment might look like this:

> (3) Statement against interest. - A statement which that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. But in a criminal case, a A [sic] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless under this subdivision in the following circumstances only:
>
> (A) if offered to exculpate an accused, it is supported by corroborating circumstances that clearly indicate the [sic] its trustworthiness, or of the statement
>
> (B) if offered to inculpate an accused, it is supported by particularized guarantees of trustworthiness and is made other than in the course of interrogation by one or more law enforcement officers.

Id. Capra thus endorses codifying *Roberts* and the constitutional principles of *Crawford* into the rule. *Id.* Placing a provision in the rule that is designed to comport with *Crawford*, however, contradicts the original intent of Congress to avoid codifying constitutional principles. *See* S. REP. NO. 93-1277, at 7068 (stating that "the basic approach of the [federal] rules is to avoid codifying, or attempting to codify, constitutional evidentiary principles"). Moreover, *Davis* indicates the term "testimonial" is an evolving concept. *See Davis*, 547 U.S. at 821-24 (explaining how the "primary purpose" test determines whether a statement to law enforcement is testimonial). Capra's proposed amendment would only apply the *Roberts* test to those statements "made other than in the course of interrogation by one or more law enforcement officers." Capra, *supra* note 115, at 2445. Under this rule, 911 calls would likely be considered "testimonial." The Supreme Court, however, has recently declared that at least some 911 calls are nontestimonial. *Davis*, 547 U.S. at 827. Therefore, it may be more sensible to continue allowing courts to interpret the rule, as *Crawford* and its progeny continue to develop Confrontation Clause jurisprudence.

120. Congress determined when they first drafted 804(b)(3) to leave this decision to the courts. S. REP. NO. 93-1277, at 7068. Additionally, Justice Scalia deferred the decision on the proper mode of analysis for nontestimonial hearsay to the States and lower courts. Thus, the courts should determine the

b. Applying the Unitary Standard

One alternative mode of analysis is to require corroborating circumstances for both exculpatory and inculpatory statements. This would be a fair and logical approach to the problem for two reasons.[121] First, the unitary standard has been widely accepted by the federal appellate courts over the years.[122] This indicates that the *Alvarez* approach is sound in its reasoning and useful in its application.[123] Second, this approach is pragmatic because it decreases confusion among judges and practitioners by establishing a uniform requirement for all statements admitted under 804(b)(3).[124]

This approach, however, is not the best solution to the problem.[125] The case law endorsing and applying the unitary standard is sporadic and inconsistent.[126] While the vast majority of courts have accepted the unitary standard,[127] some jurisdictions have either not decided the question or have never been presented

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proper standard to evaluate nontestimonial inculpatory statements against penal interest.

121. *See Alvarez*, 584 F.2d at 701 (explaining why the unitary standard is a sound approach).

122. *See supra* note 15 (citing cases that follow *Alvarez* explicitly or implicitly).

123. *See supra* note 69 (noting that the Seventh Circuit in *Garcia* adopted the "useful test" enunciated in *Alvarez*).

124. *See Alvarez*, 584 F.2d at 701 (arguing that a uniform standard is the best approach).

125. *See* Capra, *supra* note 115, at 2446 (arguing that the particularized guarantees of trustworthiness standard should be applied and not the corroborating circumstances requirement). Capra explains that "[t]he difference between the two standards is that 'corroborating circumstances' requires or permits the use of independent corroborating evidence, whereas the 'particularized guarantees of trustworthiness' requirement can be satisfied only by reference to the circumstantial guarantees of reliability under which the hearsay statement was made." *Id.* Therefore, the *Roberts* test focuses on the reliability of the statement itself, as opposed to extrinsic evidence offered to show the statement is trustworthy. *Id.*

Capra criticizes the unitary standard by explaining that:

> [t]he problem with the corroborating circumstances requirement as applied to statements offered by the prosecution is that it does not satisfy the *Roberts* test .... This would not be an important point if there were no constitutional limitations on nontestimonial hearsay after *Crawford*... [t]herefore, it remains prudent to retain the 'particularized guarantees of trustworthiness' test, so as to comport with constitutional standards until the Supreme Court tells us otherwise.

Id. at 2446-47. Capra's endorsement of the *Roberts* test indicates that *Roberts* is not only still applicable to nontestimonial hearsay, but is also the preferred mode of analysis. *Id.*

126. *See Williamson*, 512 U.S. at 605 (acknowledging the circuit split on whether the unitary standard should be applied).

127. *See supra* note 15 (citing the majority of circuits that apply the unitary standard).

the opportunity to do so.[128] Furthermore, because the case law is limited and underdeveloped, relying on the unitary standard would undoubtedly cause uncertainty in the lower courts as to what particular circumstances corroborated a statement and which did not. Moreover, courts today instinctively turn to the *Roberts* test once a statement is found to be nontestimonial.[129] Indeed, as indicated in *Taylor* and *Savoca*, courts do not even acknowledge the unitary standard as an option in analyzing 804(b)(3) statements.[130] The unitary standard, therefore, is not a viable and workable solution.

c. Applying the *Roberts* Test

Since *Crawford*, lower courts have continually looked to the *Roberts* test to analyze nontestimonial statements.[131] Even though the test was overruled, Justice Scalia acknowledged the continued viability of *Roberts* in the majority opinion of *Crawford*.[132] While Justice Saclia did not explicitly endorse using the test, he certainly viewed *Roberts* as a better option than exemption or the unitary standard.[133]

B. The Solution: Requiring Nontestimonial Inculpatory Statements Against Penal Interest to Have Particularized Guarantees of Trustworthiness

Courts should avoid the shortcomings of the other options by applying the *Roberts* test. The *Roberts* test avoids the questions of due process and fairness that would arise from exempting the statements from any kind of constitutional scrutiny.[134] Additionally, "[the] 'particularized guarantees of trustworthiness' [standard] is well-defined in the case law and provides a solid protection against the use of unreliable declarations against

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128. *See Williams*, 989 F.2d at 1068 (pointing out that the Ninth Circuit has repeatedly decided not to answer the question). The Fourth, Tenth, D.C., and Federal Court of Appeals have not addressed whether the unitary standard is the correct approach.

129. *See* Capra, *supra* note 115, at 2446 (explaining that since "*Crawford* failed to implement the fatal blow to *Roberts* . . . [the] lower courts . . . apply the *Roberts* reliability test to nontestimonial hearsay.").

130. *See* Part III (discussing both *Taylor* and *Savoca*).

131. *See* Part III (demonstrating that *Taylor* and *Savoca* both applied *Roberts* as if it were the default test for nontestimonial statements).

132. *Crawford*, 541 U.S. at 68.

133. *See supra* note 125 (explaining why the *Roberts* test is superior to the unitary standard and to an approach that does not inquire into the reliability of nontestimonial statements).

134. The reliability of the *Roberts* test is superior to the unitary standard and avoids the problem of a nontestimonial statement being admitted under 804(b)(3) without any inquiry into its reliability. *See supra* note 125 (arguing the particularized guarantees of trustworthiness standard is preferred to the corroborating circumstances requirement).

interest in criminal cases."[135] This permits judges and practitioners to rely on a wide variety of precedent for guidance.[136] Furthermore, as indicated above, courts have almost a Pavlovian response to follow the *Roberts* test after a statement is found to be nontestimonial.

1. The Roberts Test Ensures Fair and Equal Treatment for 804(b)(3) Inculpatory Statements

The legislative history indicates that Congress did not intend for the federal courts to evaluate exculpatory statements under a higher standard than inculpatory statements.[137] Instead, it deferred to the courts to determine the proper standard for admitting inculpatory statements.[138] The *Alvarez* court was the first of many courts to decide that inculpatory statements should be given equal treatment in determining their reliability.[139]

Exempting nontestimonial statements, while constitutionally permissible,[140] is unworkable because it treats exculpatory statements different from those that inculpate the accused.[141] Even though the inculpatory statements are nontestimonial, courts should not admit incriminating hearsay without some inquiry into its reliability.[142] The *Roberts* test provides a viable mode of analysis to conduct this inquiry.[143]

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135. Capra, *supra* note 115, at 2449.

136. *See Savoca*, 335 F. Supp. 2d at 393 (relying on "case law established by the Supreme Court and the Second Circuit prior to the recent *Crawford* decision" for nontestimonial statements against interest).

137. *See* S. REP. NO. 93-1277, at 7068 (explaining that Congress chose to leave the prerequisites for admitting inculpatory statements to the federal courts).

138. *Id.*

139. *See supra* note 15 (listing decisions that follow *Alvarez* explicitly or implicitly).

140. *See Crawford*, 541 U.S. at 68 (noting that it is constitutional for courts to exempt nontestimonial statements from any Confrontation Clause analysis).

141. *See Alvarez*, 584 F.2d at 701 (explaining that the standard for exculpatory statements should be the same for inculpatory statements).

142. *See* Capra, *supra* note 115, at 2412 (arguing that "even certain constitutional applications of the existing rule can result in unreliable hearsay being admitted against an accused."). Capra explains that nontestimonial hearsay can be admitted under 804(b)(3) without any inquiry into the reliability of the statement. *Id.* Under *Crawford*, admitting the statement would also be constitutional. *Id.* Capra argues, therefore, that "rulemaking is necessary to provide for evidentiary protections where the Constitution does not apply." *Id.* Capra's proposed amendment, however, would be inconsistent with the Supreme Court's decision in *Davis*. *See supra* note 119 (explaining how the nontestimonial 911 call in *Davis* would be considered testimonial under Capra's amendment). Therefore, the courts should determine which mode of analysis to apply to nontestimonial inculpatory statements admitted under 804(b)(3) against the accused.

143. *See supra* note 125 (explaining that the particularized guarantees of

2. Abandoning the Unitary Standard

The *Alvarez* approach offers courts a uniform, symmetrical, and fair method to analyze inculpatory statements.[144] The unitary standard, however, is no longer necessary because *Crawford's* testimonial framework properly protects the defendant from Confrontation Clause violations.[145] Thus, with regard to testimonial statements, *Crawford* answered the question left open by Congress.[146] The standard for nontestimonial statements, however, was left open for the lower courts to decide.[147]

Courts should apply the *Roberts* test because the indicia of reliability framework has been developed and expounded upon since 1980, leaving behind an immense body of case law.[148] The unitary standard was not consistently followed[149] and the cases applying this method do not compare to the sheer volume of cases applying *Roberts*. The unitary standard should be abandoned.[150]

3. The Natural Tendency to Fallback to Roberts

Courts have a long history of relying on the *Roberts* test. *Roberts* laid the foundation for the Court to develop a comprehensive approach to analyzing the relationship between hearsay and the Confrontation Clause for almost twenty-five years. Over that period of time, the Court issued many opinions which lower courts continually relied upon to determine the scope of the confrontation rights of the accused.

It comes as no surprise that courts now have an instinctual and immediate tendency to return to the *Roberts* test once they determine that an 804(b)(3) statement is nontestimonial. Because lower courts are very familiar with *Roberts* and its progeny, judges

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trustworthiness standard is the most logical and practical mode of analysis to examine nontestimonial statements after *Crawford*).

144. *See supra* note 15 (citing cases that follow *Alvarez*).

145. *See Crawford*, 541 U.S. at 69 (stating that the Confrontation Clause requires actual confrontation in order to admit testimonial statements).

146. *See id.* at 68 (explaining the meaning of the Sixth Amendment and what the Constitution specifically requires to admit a statement against the accused). Thus, courts should answer the constitutional question, deferred by the drafters, of what the Sixth Amendment requires to admit an 804(b)(3) statement by following *Crawford*.

147. *Id.* Congress left for the courts to decide how to constitutionally admit an inculpatory statement. *Alvarez*, 584 F.2d at 701. The Supreme Court answered this question for testimonial statements and then deferred to the lower courts to decide the standard, if any, for nontestimonial statements. *Crawford*, 541 U.S. at 68.

148. *See* Capra, *supra* note 115, at 2449 (noting that the case law applying *Roberts* is "well defined").

149. *See supra* note 68 (citing Ninth Circuit cases that have consistently refused to decide this issue).

150. *See supra* note 125 (arguing that the particularized guarantees of trustworthiness standard is preferred to the unitary standard).

tend to have little hesitation in applying the reliability test to nontestimonial statements. Furthermore, a return to *Roberts* is the logical choice because *Crawford* only overruled *Roberts* to the extent that it governs testimonial statements.[151] Thus, courts should continue to apply the *Roberts* test.

IV. CONCLUSION

While the debate over amending 804(b)(3) is likely to continue, federal courts can avoid the uncertainty surrounding the rule's proper application by utilizing the following approach. First, courts should apply the plain meaning of the rule to determine if an inculpatory statement comports with the explicit requirements. Second, courts should then determine if the statement is testimonial.[152] If the statement is nontestimonial, the court should eschew the corroborating circumstances test and apply the *Roberts* test to determine the reliability of the statement.

This approach is consistent with the rule itself, as well as the Supreme Court's Confrontation Clause jurisprudence. In *Crawford*, the Court partially answered the question left open by the drafters of the rule by providing a clear standard for admitting testimonial inculpatory statements. In doing so, the Court delegated the responsibility for determining the proper standard for nontestimonial inculpatory statements to lower federal courts.

Uniform application of the *Roberts* test by the federal judiciary to nontestimonial statements against penal interest avoids the fairness problems that have plagued the rule since its inception. Moreover, the confusion surrounding the corroborating circumstances test is eliminated by the application of the more practical and familiar *Roberts* test. The adoption of this approach by federal courts also disposes of the need to redraft or amend the rule. Accordingly, the *Roberts* test provides the appropriate framework for dealing with nontestimonial statements against penal interest.

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151. *Crawford*, 541 U.S. at 68. Recently, in *Whorton v. Bockting*, the Court unanimously ruled that *Crawford* "announced a 'new rule' of criminal procedure" and should not be applied retroactively. *Whorton*, 127 S. Ct. 1173, 1184 (2007). Thus, *Roberts* and its progeny continues to apply, and those defendants may not assert that their right to confrontation was violated under *Crawford*.

152. If the statement is testimonial, then *Crawford* requires a prior opportunity to cross-examine. *Crawford*, 541 U.S. at 68. If there was no prior opportunity to cross-examine, the statement is inadmissible. *Id.*