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Hearsay Evidence: Inculpatory Declarations against Penal Interest and Federal Rule of Evidence 804(b)(3)

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NOTES

HEARSAY EVIDENCE: INCULPATORY DECLARATIONS AGAINST PENAL INTEREST AND FEDERAL RULE OF EVIDENCE 804(b)(3)—*United States v. Sarmiento-Perez*, 633 F.2d 1092 (5th Cir. 1981).

INTRODUCTION

Hearsay[1] statements have traditionally been regarded as inadmissible evidence[2] because of their unreliability.[3] Exceptions have developed,[4] however, which allow particular hearsay declarations to be admitted in evidence provided they possess sufficient guarantees of trustworthiness.[5]

Declarations against interest are one such exception. This exception, which originated in the early 1800's,[6] formerly encompassed

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1. Hearsay is defined in FED. R. EVID. 801(c) as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *See also* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 246 (2d ed. 1972) [hereinafter cited as MCCORMICK]; 5 J. WIGMORE, EVIDENCE § 1361 (rev. ed. J. CHADBOURN 1974) [hereinafter cited as WIGMORE]. For a comprehensive examination of the definition of hearsay under the Federal Rules of Evidence see *Symposium—Hearsay Under the Proposed Federal Rules: A Discretionary Approach*, 15 WAYNE L. REV. 1077, 1086-101 (1969).

2. For an extensive review of the development of the hearsay rule see WIGMORE, *supra* note 1, § 1364.

3. Generally, hearsay statements are viewed as unreliable because the out-of-court declarant making the assertions is not under oath, the demeanor of the declarant cannot be observed by the trier of fact, and the declarant cannot be subjected to cross-examination. MCCORMICK, *supra* note 1, § 245; 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 800[01] [hereinafter cited as WEINSTEIN]; WIGMORE, *supra* note 1, § 1362. The above stated reasons have also been noted in case law. *E.g.*, Chambers v. Mississippi, 410 U.S. 284, 298 (1973); Donnelly v. United States, 228 U.S. 243, 273 (1913). For other, less accepted theories *see* WIGMORE, *supra* note 1, § 1363 (risk of incorrect transmission, hearsay is intrinsically weak, hearsay is merely an anonymous statement or rumor).

4. *See generally* note 2 *supra*.

5. Wigmore describes this requirement as the "circumstantial probability of trustworthiness." WIGMORE, *supra* note 1, § 1420 at 251. The realiability of the statement is usually ascertained through the statement's content or by an examination of the context in which it was made. Comment, *Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest*, 66 CALIF. L. REV. 1189 (1978). The need to facilitate proof of material facts has also been recognized as a factor contributing to the development of hearsay exceptions. WIGMORE, *supra* note 1, §§ 1420-21.

6. For a complete history of the development of the against-interest exception see WIGMORE, *supra* note 1, § 1476.

statements against pecuniary or proprietary interest, but not statements against penal interest.[7] A lack of sound reasoning for this materialistic restriction[8] provided the motivation for a painfully slow trend toward sanctioning the use of extrajudicial statements against penal interest in American courts.[9]

Promulgation of the Federal Rules of Evidence in 1975 enhanced this movement.[10] Rule 804(b)(3) codifies the against-interest exception including within its defintion those hearsay declarations which are adverse to the declarant's penal interest.[11] Although it enlarges the scope of the against-interest exception, rule 804(b)(3) fails to provide

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7. This distinction originated in 1844 with the Sussex Peerge Case, 8 Eng. Rep. 1034 (1844). In this case the House of Lords, ignoring precedent, determined a statement which subjected the declarant to criminal liability was not encompassed within the against-interest rule. MCCORMICK, *supra* note 1, § 278; WIGMORE, *supra* note 1, § 1476.

In the United States, most courts blindly followed the distinction developed in the Sussex Peerage Case. *E.g.*, Donnelly v. United States, 228 U.S. 243 (1913); Siple v. State, 154 Ind. 647, 57 N.E. 544 (1900).

8. Several justifications have been forwarded for this distinction. Brennan v. State, 151 Md. 265, 134 A. 148 (1926) (fear that defendants would be tempted to introduce perjured testimony); State v. Fletcher, 24 Or. 295, 33 P. 575 (1893) (admissibility may lead to investigation of collateral matters and divert the jury from the real issue involved); Tom Love Co. v. Maryland Cas. Co., 166 Tenn. 275, 61 S.W.2d 672 (1933) (declaration, if true, would render the declarant morally incompetent to testify). Courts and commentators have, however, generally condemned the arbitrary limitation placed upon the use of against-penal-interest hearsay. *E.g.*, Donnely v. United States, 228 U.S. 243, 277 (1913) (Holmes, J. dissenting); WIGMORE, *supra* note 1, § 1477; Morgan, *Declarations Against Interest*, 5 VAND. L. REV. 451, 463 (1952). Many courts, rather than oppose this distinction, have displayed amazing ingenuity in discovering an acceptable against-interest element. *See, e.g.*, Weber v. Chicago, R. I. & P. Ry. Co., 175 Iowa 358, 151 N.W. 852 (1915) (criminal conviction exposes declarant to civil liability); Aetna Life Ins. Co. v. Strauch, 179 Okla. 617, 67 P.2d 452 (1937) (confession of murder cancels declarant's right to collect life insurance proceeds), *overruled on other grounds*, Howard v. Jessup, 519 P.2d 913 (Okla. 1973).

9. *See* Sutter v. Easterly, 354 Mo. 282, 189 S.W.2d 284 (1945); *See also* MCCORMICK, *supra* note 1, § 278.

10. 28 U.S.C. (1975).

11. FED. R. EVID. 804(b)(3) provides:

(b) *Hearsay exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(3) *Statement against interest.* 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 him to criminal or civil liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. 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.

For an extensive examination of the legislative history of rule 804(b)(3) *see* notes 36-44 and accompanying text *infra*.

courts with any guidance when they are confronted with a particularly troublesome type of declaration against interest: the inculpatory statement against the penal interest of the declarant.[12] This ambiguity created a vacuum which, until the decision by the United States Court of Appeals for the Fifth Circuit in *United States v. Sarmiento-Perez*,[13] the federal courts had failed to adequately address.[14]

This note will focus upon the holding and implications of the *Sarmiento-Perez* decision. Toward that goal, special attention will be given to the attempt by the *Sarmiento-Perez* court to balance the seemingly irreconcilable conflict between the confrontation clause of the sixth amendment[15] and the admission of inculpatory hearsay declarations.

FACTS OF THE CASE

Luis Oscar Sarmiento-Perez was indicted, along with three coconspirators, for allegedly participating in a narcotics (cocaine) transaction with two undercover Drug Enforcement Agency (D.E.A.) Agents.[16] At Sarmiento-Perez's trial the prosecution was permitted to introduce in evidence the custodial, handwritten confession of a nontestifying, separately-tried codefendant named Roberto Aguilar.[17]

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12. *Inculpatory statements* are declarations which implicate both the declarant and the defendant in criminal activity and which are admitted in evidence against the latter. Comment, *Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest*, 66 CALIF. L. REV. 1189, 1190 n.7 (1978). *Exculpatory statements* are declarations against the declarant's interest which tend to exonerate the defendant. *Id.*

13. 633 F.2d 1092 (5th Cir. 1981).

14. Several lower federal courts confronted with the question of the admissibility of inculpatory extrajudicial declarations under rule 804(b)(3) have been evasive or unclear. *E.g.*, United States v. White, 553 F.2d 310 (2d Cir.), *cert. denied*, 431 U.S. 972 (1977) (court concluded it did not have to reach the issue of admissibility because the admission of the statement was harmless error "if error at all. . . ." *Id.* at 314.); United States v. Alvarez, 584 F.2d 694 (5th Cir. 1978) (court assumed without adequate justification that inculpatory statements were included within the scope of rule 804(b)(3)). A few federal courts have, however, directly addressed the inculpatory hearsay problem but their conclusions were always dictum. United States v. Barrett, 539 F.2d 244 (1st Cir. 1976) (the court, considering the admissibility of an exculpatory declaration, traced the history of rule 804(b)(3) and concluded "subject to sixth amendment and other constraints, a third party's out of court statement against penal interest may now be used against . . . an accused." *Id.* at 250.)

15. The sixth amendment to the United States Constitution provides in part, "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." U.S. CONST. amend. VI.

16. United States v. Sarmiento-Perez, 633 F.2d 1092, 1096 (5th Cir. 1981).

17. *Id.* at 1097. It is interesting to note that Aguilar's confession was the only direct evidence connecting Sarmiento-Perez to the crime. *Id.* at 1104. The only other incriminating evidence offered at trial was the observations of D.E.A. surveillance

Aguilar's confession outlined Sarmiento-Perez's involvement in the narcotics transaction and identified him as the source of the cocaine.[18]

Sarmiento-Perez was ultimately convicted on one count of conspiring to possess with intent to distribute, and two counts of distributing, cocaine, in violation of 21 U.S.C. §§ 846 and 841(A)(1).[19] On appeal, Sarmiento-Perez challenged the admission into evidence of Aguilar's confession under both the Federal Rules of Evidence and the confrontation clause of the sixth amendment.[20]

The government countered by arguing the confession was admissible as a declaration against Aguilar's penal interest under Federal Rule of Evidence 804(b)(3);[21] consequently, its admission would neither offend the defendant's confrontation rights nor violate the hearsay rule. In addition, the government argued that even if the admission of the confession was error, the error was harmless.[22]

DECISION OF THE COURT

After an exhaustive review of the legislative history of rule 804(b)(3), the *Sarmiento-Perez* court concluded that although the rule does not provide specific references to inculpatory extrajudicial declarations, their admission, under appropriate circumstances, was clearly contemplated by the rule.[23]

Citing an earlier fifth circuit decision, *United States v. Alvarez*,[24] as controlling authority, the *Sarmiento-Perez* court concluded the general corroboration requirement which rule 804(b)(3) explicitly imposes upon exculpatory statements[25] must also be satisfied for in-

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agents who reportedly saw Sarmiento-Perez associating with other codefendants and driving a car from whose trunk the codefendants had retrieved a box later found to contain cocaine. No evidence existed, other than Aguilar's confession, to prove Sarmiento-Perez placed the box in the trunk or knew of its contents. *Id.* at 1097.

18. *Id.*

19. *Id.* at 1096.

20. *Id.* at 1097.

21. The court noted Aguilar's confession was not admissible as a coconspirator's statement because the confession was made after the conspiracy had been terminated by the arrests and, therefore, it did not qualify as a nonhearsay coconspirator's statement as defined in FED. R. EVID. 801(d)(2)(E). *Id.* at n.3.

22. *Id.* at 1098.

23. *Id.* For a comprehensive review of the legislative history of rule 804(b)(3) *see* notes 36-44 and accompanying text *infra*.

24. 584 F.2d 694 (5th Cir. 1978).

25. Rule 804(b)(3) states in part; "A statement tending to expose the declarant to criminal liability and offered to *exculpate* the accused is not admissible unless corrobrating circumstances clearly indicate the trustworthiness of the statement." FED. R. EVID. 804(b)(3) (emphasis added).

culpatory statements.[26] This determination prompted the *Sarmiento-Perez* court to adopt a general test, first delineated in *Alvarez*, for determining the admissibility of inculpatory hearsay under rule 804(b)(3). The test consists of three parts:

(1) The declarant must be unavailable;
(2) the statement must so far tend to subject the declarant to criminal liability that a reasonable person in his position would not have made the statement unless he believed it to be true; and
(3) the statement must be corrobrated by circumstances clearly indicating its trustworthiness.[27]

Although the three elements of the test correspond identically with the prerequisites for the admission of exculpatory hearsay set forth by rule 804(b)(3), the *Sarmiento-Perez* court was emphatic that the admission of inculpatory hearsay presented special confrontation problems which would necessarily affect the test's method of application.[28]

The court reasoned that because the admission of an inculpatory extrajudicial statement so impacts the confrontational rights of the accused, the United States Supreme Court decision in *Chambers v. Mississippi*[29] demanded the admission must be subjected to a "close examination" that is not required of exculpatory declarations.[30] As a consequence of this determination the *Sarmiento-Perez* court concluded an expansive interpretation of the against-interest requirement of rule 804(b)(3), as demonstrated in *United States v. Thomas*,[31] was inappropriate for use with inculpatory hearsay.[32]

26. 633 F.2d at 1098 (citing United States v. Alvarez, 584 F.2d 694, 701 (5th Cir. 1978)).
27. 633 F.2d at 1098.
28. *Id.*
29. 410 U.S. 284 (1973).
30. The *Chambers* Court emphasized the right of confrontation, noting that it helps assure the "accuracy of the truth-determining process." *Id.* at 295 (citing Dutton v. Evans, 400 U.S. 74, 89 (1970)). The *Chambers* Court also noted that the right to confront is not absolute but "its denial or significant diminution calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be *closely examined*." *Id.* (citing Berger v. California, 393 U.S. 314, 315 (1969) (emphasis added)).
31. 571 F.2d 285 (5th Cir. 1978). In *Thomas*, the United States Court of Appeals for the Fifth Circuit determined an extrajudicial statement having probative value in a trial against the declarant would satisfy the requirement of rule 804(b)(3) which demands that the statement 'tend' to subject the declarant to criminal liability. *Id.* at 288. The *Sarmiento-Perez* court termed this an "expansive interpretation of the against-interest requirement. . . ." 633 F.2d at 1101.
32. 633 F.2d at 1101.

This conclusion ultimately led the court to hold Aguilar's custodial confession, although self-incriminating, was not sufficiently contrary to his penal interest to be an admission under rule 804(b)(3).[33] The court also held the confession had carried "critical weight"[34] in the trial court and thus its admission was reversible error.[35]

ANALYSIS

The original Advisory Committee[36] draft of rule 804(b)(3) explicitly barred the admission of inculpatory extrajudicial statements. The final sentence of the proposed rule stated: "This example does not include a statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused."[37] Although this sentence was retained in the 1971 Advisory Committee draft,[38] it was ultimately omitted in both the final unpublished draft forwarded to the United States Supreme Court[39] and in the official Advisory Committee draft promulgated by the Court in late 1972.[40] The House of Representatives reinserted the

33. *Id.* at 1102. For an examination of the rationale behind the court's determination *see* note 69 *infra*.

34. The term "critical weight" was used in Douglas v. Alabama, 380 U.S. 415 (1964), to denote the amount of persuasion a particular event or piece of evidence carried with the finder of the fact. In *Douglas*, the Court determined that because the error in question added critical weight to the prosecution's case the defendant's conviction had to be reversed. *Id.* at 420.

35. 633 F.2d at 1104.

36. In March 1965, Chief Justice Warren commissioned the Advisory Committee and a Reporter for the committee to draft rules of evidence for use in the federal courts. The first draft completed by the committee was published in 1969. *Proposed Amendments to the Federal Rules of Evidence: Hearings on H.R. 5463 Before the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 37, 40-41 (1974) [hereinafter cited as *Senate Hearings*] (statement of Judge Albert B. Maris). For a most thorough examination of the drafting processes of rule 804(b)(3) see Tague, *Perils of the Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804 (b)(3)'s Penal Interest Exception*, 69 GEO. L. J. 851 (1981) [hereinafter cited as *Perils of the Rulemaking Process*].

37. Proposed FED. R. EVID. 804(b)(4) (1969 Draft), 46 F.R.D. 161, 378 (1969). Before the rule became law it was renumbered as 804(b)(3).

The sentence quoted above is often referred to as the "*Bruton* sentence" because the restrictive qualification was added by Professor Edward L. Cleary, the Reporter to the Advisory Committee, to ensure rule 804(b)(3) would not clash with his interpretation of Bruton v. United States, 391 U.S. 123 (1968), and Douglas v. Alabama, 380 U.S. 415 (1965). *Perils of the Rulemaking Process, supra* note 36, at 866 n.52 (citation omitted).

38. Proposed FED. R. EVID. 804(b)(4) (1971 Draft), 51 F.R.D. 315, 438-39 (1971).

39. Comment, *Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest*, 66 CALIF. L. REV. 1189, 1191 (1978).

40. FED. R. EVID. 804(b)(3) (1972 Draft), 56 F.R.D. 183, 321 (1972). The sentence's deletion was explained by the Advisory Committee in the official draft:

Ordinarily the third-party confession is though [sic] of in terms of exculpating the

sentence when the Federal Rules of Evidence were submitted for Congressional amendment and approval.[41] The Senate Judiciary Committee decided, however, to delete the sentence from its own version of the rules[42] and the joint conference committee subsequently agreed to eliminate the sentence.[43] Consequently, the final version of rule 804(b)(3), as passed by Congress, contained no specific references to inculpatory hearsay.[44]

Although at least one distinguished commentator had determined the rule's legislative history conclusively demonstrated a legislative intent to exclude inculpatory statements,[45] the *Sarmiento-Perez* court, without stating adequate justification, paralleled its previous decision

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accused, but this is by no means always or necessarily the case: it may include statements implicating him, and under the general theory of declarations against interest they would be admissible as related statements. Douglas v. Alabama, 380 U.S. 415 . . . and Bruton v. United States, 389 U.S. 818 [sic] . . . both involved confessions by codefendants which implicated the accused. While the confession was not actually offered in evidence in *Douglas*, the procedure followed effectively put it before the jury, which the Court ruled to be error. Whether the confession might have been admissible as a declaration against penal interest was not considered or discussed. *Bruton* assumed inadmissibility, as against the accused, of the implicating confession of his codefendant. . . . These decisions, however, by no means require all statements implicating another person be excluded from the category of declarations against interest.

Advisory Committee's Note to Proposed FED. R. EVID. 804(b)(4) (1972 Draft), 56 F.R.D. 183, 327-28 (1972).

41. HOUSE COMM. ON THE JUDICIARY, REPORT ON FEDERAL RULES OF EVIDENCE, H.R. REP. NO. 650, 93d Cong., 1st Sess. 16 (1973). *See also Senate Hearings, supra* note 36, at 6 (statement of William L. Hungate); *Perils of the Rulemaking Process, supra* note 37, at 854 n.10.

42. SENATE COMM. ON THE JUDICIARY, REPORT ON FEDERAL RULES of EVIDENCE, S. REP. NO. 1277, 93d Cong., 2d Sess. 21-22, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7051, 7068.

43. COMM. OF CONFERENCE, REPORT ON FEDERAL RULES OF EVIDENCE, H.R. REP. NO. 1597, 93d Cong., 2d Sess. 12, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7098, 7106. The stated reason for the deletion was: "to avoid attempting to codify constitutional evidentiary principles." *Id.*

44. *See* note 12 *supra*.

45. WEINSTEIN, *supra* note 3, ¶ 804(b)(3)[03]. Weinstein, after noting that the first two drafts of rule 804(b)(3) explicitly barred the admission of inculpatory declarations, concluded:

Except in the most unusual situation, [exclusion of the statement] . . . would have been the result obtained under the present rule. When the House Judiciary Committee reinstated the final sentence of the first two drafts . . . it made this point clear. But the addition was dropped by the Senate and acceeded [sic] to by the House on the ground that it was not needed. . . . In context, this means that the Rule should be interepreted to include this language.

Id. at 804-110. Weinstein's conclusion has been critized on the ground that his analysis was based upon the confrontation clause and rule 403 and not upon the ambiguity of rule 804(b)(3). Comment, *Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest*, 66 CALIF. L. REV. 1189, 1191 n.18 (1978).

in *United States v. Alvarez*[46] by concluding "the rule clearly contemplates the admission, under appropriate circumstances, of . . . inculpatory (to a criminally accused) statements against the declarant's penal interest."[47] The court also stated, again without supportive reasoning, "[t]he draftsman of the rule 'left to the courts the task of delineating prerequisites to the admissibility of inculpatory against-penal-interest hearsay.'"[48]

Reiterating its decision in *Alvarez*, the *Sarmiento-Perez* court set forth a three-part test[49] for admission of inculpatory declarations. The test's prerequisites for admission are *identical* to those outlined by rule 804(b)(3) for the admission of exculpatory hearsay declarations against interest.[50] The *Sarmiento-Perez* court tried to distinguish the two standards by stating, somewhat unconvincingly, that in the *Alvarez* decision it had never intended that the two tests be applied identically nor had the *Alvarez* court purported to establish the maximum limits the confrontation clause might place upon the admissibility of inculpatory extrajudicial statements.[51]

The *Sarmiento-Perez* court's attempted clarification of its position in *Alvarez* is less than convincing because the unambiguous language used by the court in *Alvarez* left it unsusceptible to multiple interpretations. Referring to its determination that an inculpatory declaration is admissible if corroborating circumstances exist which clearly indicate its trustworthiness, the *Alvarez* court stated "[w]e believe that this construction fully corresponds to the Court's directive in *Dutton v. Evans* and will thus avoid the constitutional [confrontation clause] difficulties that Congress acknowledged but deferred to judicial resolution."[52] The *Alvarez* court further stated, "by transplanting the language governing exculpatory statements onto the analysis for ad-

46. 584 F.2d 694 (5th Cir. 1978).
47. 633 F.2d at 1098.
48. *Id.* (citing United States v. Alvarez, 584 F.2d at 700).
49. *See* note 27 and accompanying text *supra*.
50. Rule 804(b)(3) requires that the declarant be unavailable, the statement be sufficiently against the declarant's interest that a reasonable man would not make it unless he believed it to be true and, as a special requirement for exculpatory statements, that there be corroborating circumstances clearly indicating the statement's trustworthiness. *See* note 11 *supra* for a formal recitation of rule 804(b)(3).

Comparing the requirements for the admissibility of exculpatory declarations under 804(b)(3) with the three-part test delineated by the court in *Alvarez* it becomes apparent that the *Alvarez* test is nothing more than a mirror image of the requirement of rule 804(b)(3) for the admission of exculpatory declarations.
51. 633 F.2d at 1098.
52. 584 F.2d at 701.

mitting inculpatory hearsay, a *unitary standard* is derived which offers the most workable basis for applying Rule 804(b)(3)."[53] The *Sarmiento-Perez* court's position that the *Alvarez* decision was not intended to establish a unitary standard for determining the admissibility of against-interest hearsay is further undermined by the *Alvarez* court's reliance on case law concerning exculpatory statements to determine the admissibility of the inculpatory declaration then before it.[54]

This "clarification" of *Alvarez* was essential, however, to the *Sarmiento-Perez* court's overall analysis of rule 804(b)(3) because it freed the court to conduct an in-depth examination of the interaction between the confrontation clause and inculpatory hearsay statements.[55] The court began by expressly recognizing that although the confrontation clause of the sixth amendment forms the defendant's foremost protection against the use or misuse of incriminating hearsay declarations,[56] the defendant's confrontation rights,[57] as formulated by the United States Supreme Court in *Bruton v. United States*[58] and *Douglas v. Alabama*,[59] are not absolute if certain "indicia of reliability" are present.[60]

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53. *Id.* (emphasis added).

54. The *Alvarez* court, noting that it created a unitary standard for determining the admissibility of both inculpatory and exculpatory statements under rule 804(b)(3), stated: "Therefore, in our analysis [of] the trustworthiness of Lopez' inculpatory hearsay, we look to decisions considering exculpatory statements." *Id.* n.9. For a review of the case law the *Alvarez* court relied on see 584 F.2d at 699-702.

55. The admission of inculpatory hearsay necessarily invokes questions concerning the confrontation rights of the accused because the admission of incriminating extrajudicial statements circumvents the defendant's constitutional right "to be confronted with the witnesses against him. . . ." U.S. CONST. amend. VI. For discussion of the relationship between the admission of inculpatory hearsay and the confrontation clause *see* WEINSTEIN, *supra* note 3, ¶ 804(b)(3)[03] at 804-109; United States v. Sarmiento-Perez, 633 F.2d 1092, 1100 (5th Cir. 1981).

56. 633 F.2d at 1099 (citing United States v. Alvarez, 584 F.2d at 700).

57. *See* note 15 *supra*.

58. 391 U.S. 123 (1968). The *Bruton* Court held the admission of incriminating hearsay (custodial confession) violated the petitioner's right of cross-examination as secured by the confrontation clause. Although the *Bruton* holding seems to eliminate any argument for admitting inculpatory hearsay, in fact it does not because the *Bruton* Court explicitly noted: "There is not before us . . . any recognized exception to the hearsay rule . . . and [therefore] we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause." *Id.* at 128 n.3.

59. 380 U.S. 415 (1965). The *Douglas* Court reversed the defendant's conviction because a custodial confession of a separately-tried codefendant, directly incriminating the defendant, was admitted into evidence under the pretense of cross-examination. The Court reasoned that the confrontation clause of the sixth amendment prevented the admission of evidence whose reliability could only be insured by an unobtainable cross-examination of the declarant. *Id.* at 419-20.

60. Dutton v. Evans, 400 U.S. 74 (1970). The *Dutton* Court held the admission of inculpatory hearsay, under a recognized exception to the hearsay rule (it was a state

Realizing, probably correctly, that the reliability requirement of the confrontation clause presents a more demanding standard than the reliability requirement associated with the *Alvarez* test,[61] the *Sarmiento-Perez* court focused its attention on delineating the threshold of admissibility of inculpatory statements as defined by the confrontation clause.[62] The court consequently determined, "[w]hen inculpatory hearsay is sought to be admitted into evidence under the aegis of a recognized exception to the hearsay rule, the right to confront . . . is being asked to yield to another legitimate interest in the criminal trial process . . . ."[63] Thus the competing interest to which the right to confront yields must be, under *Chambers v. Mississippi*[64] and *Ohio v. Roberts*,[65] "closely examined."

As a result of its comprehensive analysis, the *Sarmiento-Perez* court established a new and distinct test for determining the admissibility of inculpatory hearsay under rule 804(b)(3). This test involves an application of the three-part *Alvarez* test in light of the "close examination" called for in *Chambers* and *Roberts*. In the *Sarmiento-Perez* court's application of the new test it assumed, without discussion, that the hearsay evidence sought to be admitted met the criteria of parts (1) and (3) of the *Alvarez* test.[66] The Court therefore focused on the second element of the test: "The statement must so far tend to subject the declarant to criminal liability that a reasonable person in his position would not have made the statement unless he believed it to be true."[67]

This against-interest requirement had previously been interpreted by the fifth circuit as encompassing disserving statements that would

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hearsay exception), did not necessarily violate the confrontation rights of the accused if certain indicia of reliability were present. The *Dutton* Court carefully distinguished the facts before it from those in Douglas v. Alabama, 380 U.S. 415 (1965). It stated that the evidence involved was not crucial or devastating nor was a custodial confession involved as in *Douglas*. 400 U.S. at 87. As the *Sarmiento-Perez* court pointed out, the distinguishing language in *Dutton* implies that custodial confessions are not within the purview of statements that *Dutton* would admit. 633 F.2d at 1104.

61. See note 27 and accompanying text *supra*.

62. 633 F.2d at 1099. The court stated: [w]here the confrontation clause is implicated, it will tend inevitably to place the threshold of admissibility under the applicable hearsay exception at a level that will pass constitutional muster." *Id.* at 1100. *See also* Dutton v. Evans, 400 U.S. 74, 81-82 (1970).

63. 633 F.2d at 1100. The other interest the court is referring to is the interest in affording the trier of fact "the opportunity to consider all relevant testimony that is sufficiently trustworthy." *Id.*

64. 410 U.S. 284 (1973). For a brief discussion of the *Chambers* opinion see notes 29 and 30 and accompanying text *supra*.

65. 448 U.S. 56 (1980).

66. *See* note 27 and accompanying text *supra*.

67. *Id.*

have probative value in a trial against the declarant.[68] Mindful of the close examination requirement, however, the *Sarmiento-Perez* court ruled that because of the readily perceived advantages of implicating another in the same crime as the defendant himself is implicated[69] the definition was not suitable for determining the admissibility of inculpatory hearsay.[70]

Except for a reference to two sources which discuss the issue,[71] the *Sarmiento-Perez* court declined to elaborate on what it considered sufficient to pass a close examination of the against-interest requirement. Although this treatment of the issue tends to leave lower courts without satisfactory guidance, the *Sarmiento-Perez* court was perhaps merely being careful not to decide issues that were not properly before it.

In the *Sarmiento-Perez* court's actual application of its newly formulated test it determined, without difficulty, that Aguilar's custodial confession, implicating Sarmiento-Perez, was not sufficiently contrary to Aguilar's penal interest to satisfy rule 804(b)(3).[72] The court arrived at this conclusion after closely examining the facts and circumstances surrounding Aguilar's confession. It determined a reasonable person in Aguilar's position might well have been motivated to misrepresent the role of others in the crime in which he himself was implicated in order to "curry favor with the authorities."[73] The court supported its conclusion with a brief review of several Supreme Court opinions which note the inherent unreliability of custodial confessions which implicate others.[74] It is important to note, however, that the aggregate of these opinions by the Court indicates that custodial confessions which implicate another in the same crime as that in which the accused himself is implicated are too fraught with elements of unreliability to be ad-

68. United States v. Thomas, 571 F.2d 285, 288 (5th Cir. 1978).

69. The Sarmiento-Perez court noted: "[T]he very natural desire to curry favor from the arresting officers, the desire to alleviate culpability by implicating others, the enmity often generated in a conspiracy gone awry, the desire for revenge, all might lead an arrestee-declarant to misrepresent or to exaggerate the role of others in the criminal enterprise. 633 F.2d at 1102.

70. *Id.* at 1101-02.

71. The court referred to WEINSTEIN, *supra* note 3, ¶ 804(b)(3)[02], at 804-97 through -101 and to Comment, *Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest*, 66 CALIF. L. REV. 1189, 1214-15 (1978).

72. 633 F.2d at 1102.

73. *Id.* The court felt that a reasonable man may have viewed the statement to be *in* his interest rather than against it. *Id.* For a discussion of the court's rational *see* note 69 *supra*.

74. *Id.* at 1102-04. The court discussed three cases at length. Bruton v. United States, 391 U.S. 123 (1968); Dutton v. Evans, 400 U.S. 74 (1970); Douglas v. Alabama, 380 U.S. 415 (1965).

missible under any but the most exceptional circumstances. From this viewpoint it appears that the *Sarmiento-Perez* court's final decision to exclude Aguilar's custodial confession was dictated long before it undertook its probing examination of rule 804(b)(3). Although the *Sarmiento-Perez* court's thorough opinion and newly formulated test will be invaluable to future courts when passing on the inculpatory hearsay issue, it appears that the court improperly decided issues and formulated tests that were not required to decide issues actually before it. The court was careful, however, not to pass upon the related issue of whether the admission of Aguilar's custodial confession would have offended the confrontation rights of Sarmiento-Perez.

CONCLUSION

The fifth circuit's decision in *Sarmiento-Perez* was a great step forward from its decision in *Alvarez*. In *Sarmiento-Perez*, unlike *Alvarez*, the Fifth Circuit Court of Appeals meticulously outlined the reasoning involved in permitting, under appropriate circumstances, the admission of inculpatory hearsay under rule 804(b)(3).

The *Sarmiento-Perez* decision is also noteworthy for its careful analysis of the conflict between the confrontation clause and the admission of inculpatory hearsay. Although the *Sarmiento-Perez* court declined to pass upon the issue whether the *Alvarez* test, coupled with the close examination requirement of *Chambers* and *Roberts*, would sufficiently guarantee trustworthiness, and thus circumvent confrontational problems, the mere undertaking of the analysis should greatly benefit future courts faced with similar fact patterns.

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