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Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Dear Mr. McCabe:

Thank you for providing me with a copy of your preliminary draft of proposed amendments of several of the federal rules, for which you seek comments.

I am a trial lawyer and author of The Hearsay Handbook, the fourth edition of which is now published by the West Group. My comment pertains to the proposed amendment of Fed. R. Evid. 804(b)(3).

I have no problem with amending the rule to provide that if the prosecution in a criminal case offers evidence (hearsay) that an unavailable witness made a statement that incriminates both the defendant and the declarant, the evidence will be excepted from the hearsay rule only if corroborating circumstances clearly indicate the trustworthiness of the statement. Several circuit courts of appeal have amended judicially the current Rule 804(b)(3) to so provide in their particular circuits, though I am not sure where they got the authority to do this.

However, I don't understand why the rule, in the last sentence, makes all statements that happen to be against the declarant's penal interest "not admissible" in a criminal case unless corroborating circumstances clearly indicate their trustworthiness. The Committee Notes offer little enlightenment. Assuming that the sentence refers only to statements made by unavailable witnesses, which is not too clear, I don't understand the rationale for it.

The last sentence of both the present rule, and the proposed amendment, conflicts with Rule 806 (Attacking and Supporting Credibility of Declarant), which places no requirement of corroboration on the admission of a self-incriminating inconsistent statement, or self-incriminating statement indicative of bias, made by an unavailable author of admissible hearsay.

For example, in the recent case of *Davis v Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), the state introduced assertions made by a lady, during a 911 telephone call to the police, that her boy friend (the defendant) was beating her up. The assertions were excepted from the hearsay rule as excited utterances. The state was unable to locate the caller at the time of trial and she did not testify. Assume, for purpose of illustration, that the defendant offered evidence that the caller later made an inconsistent statement (oral or written), not corroborated, that her wounds were self-inflicted and that she accused the defendant of causing them to gain advantage over him in a forthcoming divorce or custody hearing. The last sentence of Rule 803(b)(3), particularly as worded in the proposed amendment, makes such evidence inadmissible. Why?

In criminal cases the prosecution often introduce out-of-court statements that incriminate the defendant that were made by one or more co-conspirators who do not testify, statements that are excepted from the definition of hearsay by Rule 801(d)(2)(E). If such statements also incriminate the declarants, as they often do, the proposed amendment of Rule 803(b)(3) would make them inadmissible unless corroborating circumstances clearly indicate their trustworthiness. This would substantially change existing law, and disadvantage the prosecution in criminal cases. Does the Committee really intend to do this?

Moreover, if such a co-conspirator made a self-incriminatory inconsistent statement (for example, acknowledging that he was the trigger man, not the defendant), why should Rule 803(b)(3) prohibit the defendant from impeaching the co-conspirator's credibility by introducing it, regardless of whether corroborating circumstances clearly indicate its trustworthiness?

None of the other 28 exceptions from the hearsay rule that are delineated in Rules 803, 804(b), and 807, or the four exceptions from the definition of hearsay contained in Rule 801(d), purport to determine the admissibility of evidence. They only describe specific types of evidence that cannot be excluded by a hearsay objection.

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It seems to me that a more appropriate way to accomplish the Committee's goal, as set forth in the Committee Note, is to amend the last sentence of Rule 803(b)(3) so that it reads as follows:

A statement tending to expose the declarant to criminal liability, when offered in a criminal case, is included within this exception from the hearsay rule only if corroborating circumstances clearly indicate the trustworthiness of the statement.

I hope that you will find this comment of some value.

Yours truly,



David F. Binder

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