

2002

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Mary Cecilia Sweeney-Kwok

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### Recommended Citation

Mary Cecilia Sweeney-Kwok, *An Argument Against the Arbitrary Acceptance of Guilty Pleas as Statements Against Interest*, 71 Fordham L. Rev. 215 (2002).

Available at: <https://ir.lawnet.fordham.edu/flr/vol71/iss1/5>

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# AN ARGUMENT AGAINST THE ARBITRARY ACCEPTANCE OF GUILTY PLEAS AS STATEMENTS AGAINST INTEREST

*Mary Cecilia Sweeney-Kwok\**

## INTRODUCTION

Consider the following situation: Vicki is arrested for securities fraud involving an Internet initial public offering. Vicki confesses to facts already known by the investigators, and claims that that she is only a pawn in her friend Liz's game. Vicki pleads guilty in exchange for a lesser charge than if she had gone to court.<sup>1</sup> As part of the deal, the prosecutor prepares Vicki's plea allocution,<sup>2</sup> which incriminates "another" in the conspiracy to which Vicki has confessed.<sup>3</sup> In the trial against Liz, the prosecution calls Vicki as a witness. Vicki exercises her right not to testify, which renders her unavailable.<sup>4</sup> The prosecution then offers Vicki's plea allocution, under the Federal Rules of Evidence 804(b)(3) hearsay exception for statements against interest,<sup>5</sup> as evidence of the conspiracy to which Vicki confessed.<sup>6</sup>

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\* J.D. Candidate, 2003, Fordham University School of Law. I would like to thank Professor Daniel Richman for his thoughtful guidance. Thanks to Professor James Cohen and Professor Ian Weinstein for their comments. I am especially grateful to my parents, Edward and Ann Sweeney, and husband, Alistair Kwok, for providing everlasting support and encouragement in all my endeavors.

1. See *infra* Part III.A.1.a.

2. See *infra* Part III.A.1.c.

3. Allocutions later accepted into evidence in a criminal trial generally do not refer to others by name, but when they are offered as evidence against another defendant, the logical conclusion is that the defendant is the person directly incriminated. See *infra* notes 141-42, 163, 328-32 and accompanying text.

4. See *infra* note 283.

5. The Federal Rules define a statement against interest as [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 believing 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.

Fed. R. Evid. 804(b)(3).

6. See *infra* note 109 and accompanying text.

The Second, Seventh and Ninth Circuits would admit the allocution<sup>7</sup> because the declarant would have been under oath, in the presence of a judge, and facing a potentially lengthy prison sentence.<sup>8</sup> These circuits ignore the effect of the plea bargaining process on the reliability of an accomplice's plea allocution.<sup>9</sup> Although the highest courts of Minnesota and Mississippi have found such plea allocutions to be so unreliable that their admission violates the Confrontation Clause,<sup>10</sup> no other circuit has addressed the admissibility of an unavailable accomplice's plea allocution. Most, however, have found statements of an accomplice-declarant made to the government to be self-serving and therefore unreliable.<sup>11</sup> This Note argues that the admission of an accomplice's guilty plea, tainted by government involvement,<sup>12</sup> violates the Confrontation Clause as interpreted by a majority of the Supreme Court in *Lilly v. Virginia*,<sup>13</sup> and by a majority of the circuit courts. Additionally, this Note demonstrates that admission of plea allocutions to prove an element of an offense improperly circumvents the intent of Rule 803(22).<sup>14</sup>

Part I of this Note discusses the history and purpose of the statement against interest exception in the common law, statutory, and Confrontation Clause contexts. Part II examines the conflict between the approach of the circuits that admit guilty pleas of unavailable declarants on a seemingly *per se* basis, and the contrary view of other courts and commentators. Part III argues that the arbitrary admission of guilty pleas, particularly of alleged accomplices, violates the Confrontation Clause because of the incentives inherent in the plea bargaining process. Part III also offers a statutory argument as an alternative to the constitutional argument, finding that the admission of plea allocutions improperly circumvents legislative intent under, *inter alia*, the Second Circuit decision in *United States v. Oates*.<sup>15</sup>

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7. *See infra* Part II.A.

8. The actual sentence bargained for and received by the declarant often will be much less than that potentially "risked" by allocuting, and certainly less than what the declarant could have received after conviction at trial. *See infra* Part III.A.1.a; *infra* note 155.

9. *See infra* Part II.A.

10. *See infra* Part II.B.

11. *See infra* Part I.C.

12. *See infra* Part III.A.1.c.

13. *Lilly v. Virginia*, 527 U.S. 116 (1999). There was no majority opinion in *Lilly*. *See infra* notes 112-25 and accompanying text.

14. *See infra* Part III.B.

15. 560 F.2d 45 (2d Cir. 1977).

## I. ADMISSIBILITY OF ACCOMPLICE CONFESSIONS AS STATEMENTS AGAINST INTEREST: THE COMMON LAW, THE FEDERAL RULES, AND THE CONFRONTATION CLAUSE

The common law, Supreme Court, and other federal courts did not recognize the statement against penal interest exception to the hearsay rule until the advent of the Federal Rules of Evidence in 1975.<sup>16</sup> Although there had been wide support for the admissibility of exculpatory statements against penal interest, statements made to authorities that incriminated other persons had been generally considered unreliable.<sup>17</sup> Section A discusses the common law hearsay exception for statements against interest, which does not include accomplice confessions offered by the prosecution.

Federal Rule of Evidence 804(b)(3), governing the admission of statements against penal interest, was enacted with the understanding that statements made to authorities, inculcating another or others, would not be admissible under the Confrontation Clause.<sup>18</sup> Section B covers Rule 804(b)(3), its legislative history, and the Advisory Committee Notes.

Finally, Section C discusses accomplice statements against penal interest in the context of the Supreme Court's Confrontation Clause jurisprudence. As the lower courts continue to grapple with prosecutorial use of the rule, the Supreme Court has consistently emphasized its aversion to the admission of accomplice statements made to authorities.

Although the Court has not addressed the admission of plea allocutions under the exception for statements against interest, the Court has never upheld the admission against a non-declarant of a co-conspirator's statement to the government.<sup>19</sup> All nine Justices in *Lilly v. Virginia*<sup>20</sup> reiterated the Court's unwillingness to permit the admission of such statements against an accused.<sup>21</sup>

### A. *The Common Law Excludes Accomplice Statements Made to the Government*

When offered at another defendant's trial, a guilty plea allocution is an out-of-court statement. When introduced to prove the truth of the matter asserted, a plea allocution is hearsay. The hearsay rule bars such a statement unless it qualifies under an exception to the rule.

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16. See *infra* Part I.B.

17. See *infra* notes 31-34 and accompanying text.

18. See *infra* notes 51-59 and accompanying text.

19. See *infra* note 64 and accompanying text.

20. 527 U.S. 116 (1999).

21. See *infra* Part I.C.3.

Plea allocutions of unavailable declarants are generally offered under the hearsay exception for statements against interest.<sup>22</sup>

Hearsay is an "assertion[], offered testimonially, which ha[s] not been in some way subjected to the test of cross-examination."<sup>23</sup> The theory behind the exclusion is that, without cross-examination, those "deficiencies, suppressions, sources of error [or] untrustworthiness, which [may] lie underneath the bare untested assertion of a witness," cannot be exposed.<sup>24</sup> While most cases require that testimony also should be under oath, "it is clear beyond doubt that the oath . . . is merely an incidental feature customarily accompanying cross-examination, and that cross-examination is the essential and real test required by the rule."<sup>25</sup> The "statement made under oath is, merely as such, equally obnoxious to the hearsay rule."<sup>26</sup> Not even an oath can substitute for cross-examination.

An exception to the hearsay rule may exist, however, where "it may be sufficiently clear . . . that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation."<sup>27</sup> Similarly, when cross-examination is impossible due to the unavailability of the declarant, "so far as . . . some substitute for cross-examination is found to have been present, there is ground for making an exception."<sup>28</sup>

According to Dean Wigmore, the trustworthiness of a statement against interest is assumed because of the "experience that a statement asserting a fact distinctly against one's interest is unlikely to be deliberately false or heedlessly incorrect."<sup>29</sup> Such a statement is

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22. See *infra* Part II.

23. 5 Wigmore, *Evidence in Trials at Common Law* § 1362, at 3 (Chadbourn rev. 1974) (emphasis omitted).

24. *Id.* Wigmore considers the purpose of confrontation to be cross-examination. For Wigmore, "the right of confrontation is identical with the right to cross-examine." Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 Minn. L. Rev. 557, 592 (1992). Wigmore defines confrontation as "the opportunity of cross-examination." Wigmore, *supra* note 23, § 1362, at 28. He continues:

Confrontation also involves a subordinate and incidental advantage, namely, the observation by the tribunal of the witness' demeanor on the stand, as a minor means of judging the value of his testimony. But this minor advantage is not regarded as essential, i.e., it may be dispensed with when it is not feasible. Cross-examination, however, the essential object of confrontation, remains indispensable.

*Id.*

25. Wigmore, *supra* note 23, § 1365, at 10.

26. *Id.* See *infra* Part II.B for discussion on the oath as an indication of reliability.

27. Wigmore, *supra* note 23, § 1420, at 251.

28. *Id.*

29. *Id.* § 1457, at 329; see *Mercer's Adm'r v. Mackin*, 77 Ky. (14 Bush) 434, 441 (1879); *Gibblehouse v. Stong*, 3 Rawle 437, 438 (Pa. 1832). This rationale, however, is troubling: "people do not normally intentionally say things that are against their interest, it seems much more likely that a statement that appears to be against interest is in fact not against interest." Ronald J. Allen, et. al., *Evidence: Text, Cases, and*

“sufficiently sanctioned, though oath and cross-examination are wanting.”<sup>30</sup> In other words, the need for the truth-finding tool of cross-examination may be lessened when a declarant’s statement is truly against his or her interest.

Whether a statement of a fact is “against interest,” however, depends upon the circumstances.<sup>31</sup> For this premise, Wigmore’s treatise cites to a case in which a statement was made to a police officer directly after an arrest.<sup>32</sup> The court found that the hearsay was not admissible as a statement against interest, because “[i]t is common knowledge that an arrestee can ‘curry[] favor with law enforcement authorities by implicating others in the offence.’”<sup>33</sup> According to Wigmore, a declarant who can make a deal by incriminating others cannot be in circumstances that create a statement against interest.<sup>34</sup>

As the Supreme Court has noted, Wigmore “expressly distinguishes” these kinds of statements, offered by the prosecution, from exculpatory statements offered by an accused.<sup>35</sup> Although the treatise urges the admission of the latter, confessions by an alleged accomplice “are not to be used by the prosecution against the accused,”<sup>36</sup> because “the interest of A. in obtaining a pardon by confessing and betraying his cocriminals is in such cases usually so important that, according to the doctrine of preponderance of interest, the statement would not even under the present exception be admissible.”<sup>37</sup>

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Problems 575 (2d ed. 1997). Similarly, as the Supreme Court has noted, “[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.” *United States v. Williamson*, 512 U.S. 594, 599-600 (1994).

30. Wigmore, *supra* note 23, § 1457, at 329.

31. *Id.* § 1463, at 337; *see Duncan v. Smith*, 393 S.W.2d 798, 803 (Tex. 1965).

32. *United States v. Johnson*, 802 F.2d 1459 (D.C. Cir. 1986); *see Wigmore, supra* note 23, § 1463, at 337.

33. *Johnson*, 802 F.2d at 1465 (quoting *United States v. Coachman*, 727 F.2d 1293, 1296 (D.C. Cir. 1984)) (second alteration in original); *see Wigmore, supra* note 23, § 1463, at 337.

34. *See Wigmore, supra* note 23, § 1463, at 337; *id.* § 1477, at 358 n.1 (finding that “the interest of A. in obtaining a pardon by confessing and betraying his cocriminals is in such cases usually so important that . . . the statement would not even under the present exception be admissible”).

35. *Lilly v. Virginia*, 527 U.S. 116, 131 (1999) (citing Wigmore, *supra* note 23, § 1477, at 358 n.1).

36. Wigmore, *supra* note 23, § 1477, at 358 n.1. The treatise excepts such confessions “so far as they are the admissions of a coconspirator.” *Id.* This exception appears in the Federal Rules of Evidence. Fed. R. Evid. 801(d)(2)(e).

37. Wigmore, *supra* note 23, § 1477, at 358 n.1 (citation omitted). The doctrine of preponderance of interest “admit[s] the statement only if on the whole the disserving interest preponderates in probable influence.” *Id.* § 1464, at 338. Dean Wigmore notes a minority view in which “the counter-interest should affect only the weight of the evidence.” *Id.*

B. *The Drafters of the Federal Rules of Evidence Intended to Exclude an Accomplice's Custodial Statement to Authorities*

Until very recently, the Supreme Court and the other federal courts did not acknowledge an exception for statements against penal interest.<sup>38</sup> The adoption of the Federal Rules of Evidence in 1975 created this new exception. The Rules generally exclude hearsay,<sup>39</sup> but Rule 804 allows the admission of certain kinds of hearsay where the declarant is unavailable to testify in court.<sup>40</sup> Rule 804(b)(3) is the specific exception for statements against interest, including those against penal interest.<sup>41</sup>

The Rule was not intended to include all statements against penal interest. In fact, the preliminary draft of the Rule was the inverse of

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38. Although exculpatory statements against penal interest are included under the Rule, such statements are offered by the accused and pose no Confrontation Clause concerns. *Lilly*, 527 U.S. at 130 (plurality opinion). Despite the lack of a constitutional conflict, the Supreme Court at first did not allow even the admission of exculpatory hearsay under an exception for statements against interest because the exception was not recognized under the common law. *Donnelly v. United States*, 228 U.S. 243 (1913) (exculpatory confession). The Court held, in accordance with traditional English law, that only statements against pecuniary interest could be admitted in the trial of someone other than the declarant. *Id.* at 272-77. This decision was widely criticized, *Lilly*, 527 U.S. at 129-30 (plurality opinion) (discussing the criticism of *Donnelly* by Wigmore and other commentators), and eventually the Court "endorsed the more enlightened view" in *Chambers v. Mississippi*, 410 U.S. 284 (1973), holding that a court may admit exculpatory statements against interest. *Lilly*, 527 U.S. at 130 (plurality opinion).

The Supreme Court directly addressed the admissibility of inculpatory statements against penal interest in *Bruton v. United States*, 391 U.S. 123 (1968), which overruled *Delli Paoli v. United States*, 352 U.S. 232 (1957). The *Bruton* court premised the opinion on the express understanding that statements against penal interest could not be admitted against the accused, noting that "the hearsay statement inculpatory petitioner was clearly inadmissible against him under traditional rules of evidence . . . . There is not before us, therefore, any recognized exception to the hearsay rule insofar as petitioner is concerned . . . ." *Bruton*, 391 U.S. at 128 n.3.

39. "Hearsay" is 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." Fed. R. Evid. 801(c). According to the Rules, "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." Fed. R. Evid. 802.

40. Fed. R. Evid. 804(a). A declarant may be considered unavailable if the declarant has exercised a privilege not to testify; refuses to testify despite a court order; has no memory of the subject matter of the hearsay; is physically or mentally unable to testify; or is absent despite the proponent's reasonable efforts to procure declarant's attendance. *Id.*

The Advisory Committee to the Rules noted that unavailability is a prerequisite because Rule 804(b) hearsay "is not equal in quality to testimony of the declarant on the stand." Fed. R. Evid. 804(b) advisory committee's note. This view contrasts with the Advisory Committee's note to Rule 803, which "suggests that unavailability is not required for [Rule] 803 exceptions because they are reliable hearsay." Allen, *supra* note 29, at 556.

41. See *supra* note 5.

the Rule today.<sup>42</sup> The first draft excluded statements implicating the defendant, offered by the prosecution:

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 civil or criminal liability or to render invalid a claim by him against another or to make him an object of hatred, ridicule, or social disapproval, that a reasonable man in his position would not have made the statement unless he believed it to be true. *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.*<sup>43</sup>

The drafters of the Rule believed the last line to be "constitutionally required"<sup>44</sup> by the Supreme Court's decisions in *Douglas v. Alabama*<sup>45</sup> and *Bruton v. United States*.<sup>46</sup> Both of these decisions held that the admission of nontestifying accomplices' custodial confessions violated the defendant's confrontation right.<sup>47</sup>

Legislative history shows that the preliminary rule remained unchanged until Congress became involved.<sup>48</sup> The last line was changed, largely due to pressure from one senator,<sup>49</sup> to the current version because "[c]odification of a constitutional principal is unnecessary."<sup>50</sup>

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42. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161 (1969) [hereinafter Preliminary Draft].

43. Rule 8-04(b)(4) from the Preliminary Draft, *supra* note 42 (emphasis added).

44. Peter W. 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, 866 n.52 (1981). The preliminary draft of the exception also allowed exculpatory statements offered by the accused, an influence of Wigmore. *Id.* at 867 n.55.

45. 380 U.S. 415 (1965) (finding the use of accomplice's custodial confession on direct examination of nontestifying prosecution witness a violation of defendant's confrontation right); *see infra* notes 69-72 and accompanying text.

46. 391 U.S. 123 (1968) (finding the admission of codefendant's custodial confession against its declarant, despite the use of limiting instructions, to be an "intolerabl[e]" violation of defendant's confrontation right in joint trial); *see infra* notes 79-83 and accompanying text.

47. In *Douglas*, the admission, through the prosecution's direct examination of the nontestifying declarant as a hostile witness, had been against the defendant. *Douglas*, 380 U.S. at 416-17. In *Bruton*, the confession had been admitted against the declarant in defendant's joint trial, and the jury had been instructed to consider the confession only against the declarant. *Bruton*, 391 U.S. at 123-25.

48. Andrew R. Keller, *Inculpatory Statements Against Penal Interest and the Confrontation Clause*, 83 Colum. L. Rev. 159, 175 (1983).

49. Tague, *supra* note 44, at 873-97 (describing the substantial involvement of Senator John L. McClellan, Chairman of the Senate Subcommittee on Criminal Laws and Procedure of the Senate Committee on the Judiciary, resulting in the current version of 804(b)(3)).

50. Senate Comm. on the Judiciary Report on the Federal Rules of Evidence, S. Rep. No. 93-1277, at 22 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7068. The major

The final version of the Rule, therefore, was not meant to reflect constitutional principles. Its drafters assumed that courts would exclude statements that the Supreme Court had found violative of the Confrontation Clause under *Bruton*—for example, custodial confessions of accomplices offered by the prosecution.<sup>51</sup> The Advisory Committee agreed that the last line was unnecessary<sup>52</sup> because an accomplice confession made in custody could never qualify as a statement against interest.<sup>53</sup>

The final Rule formally recognizes a statement against penal interest as an exception to the hearsay rule, evidencing the Advisory Committee's finding that "exposure to criminal liability satisfies the against-interest requirement."<sup>54</sup> The Advisory Committee noted, however, "[w]hether a statement is in fact against interest must be determined from the circumstances of each case."<sup>55</sup> Echoing the preliminary draft's *Bruton* line, the Committee commented that "a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest."<sup>56</sup> The very same statement made "to an acquaintance[]" would have no difficulty in qualifying.<sup>57</sup>

The intention of the final Rule was that an accomplice's custodial statement, offered against the accused by the prosecution, could not be admitted as a statement against interest. First, admission of the statement would violate the defendant's confrontation right.<sup>58</sup>

impetus behind the change seems to have been Senator McClellan's concern that the preliminary draft of the rule would, if enacted, "further debilitate an already weak Federal system of criminal justice," by allowing a defendant to offer exculpatory statements without collaboration. Tague, *supra* note 44, at 873 (quoting Letter from Senator John L. McClellan to Judge Albert B. Maris, Committee on the Rules of Practice and Procedure (Aug. 12, 1971) (internal quotation marks omitted)). The requirement of collaboration for exculpatory statements was added after Senator McClellan cosponsored a bill that could have "jeopardize[d]" the work accomplished on the Rules to that point. *Id.* at 873-74.

51. Tague, *supra* note 44 at 895 n.207.

52. The preliminary draft of the rule "relied upon [*Bruton*] only to repel any supposition that a statement of this kind is truly against interest." *Id.* at 892 n.191 (citing Preliminary Draft of Proposed Federal Rules of Evidence, (Public's) Suggestions with Reporter's Comments, at 191 (on file at Judicial Conference)); see also Proposed Rule 8-04(4) advisory committee's note, Preliminary Draft, *supra* note 42, at 386 ("The unacceptability of a confession [incriminating the defendant] as a declaration against interest is emphasized in the dissenting opinion of Mr. Justice White . . .").

53. Tague, *supra* note 44, at 892-93.

54. Fed. R. Evid. 804 advisory committee's note.

55. *Id.*

56. *Id.* (citing Justice White's dissent in *Bruton*).

57. *Id.*; cf. *Denny v. Gudmanson*, 252 F.3d 896, 903 (7th Cir. 2001) (holding that confessions to friends and relatives are admissible under the Confrontation Clause where self-inculpatory, non-custodial, and not blame-shifting).

58. See *supra* text accompanying note 51.

Second, the statement, by definition, fails to qualify as “against interest” because the accomplice’s self-interest most likely provided the impetus for the statement in the first place.<sup>59</sup> These subtleties escaped parties in the courts. Before long, the Supreme Court had to interpret the new Rule in light of the old confrontation right.

*C. The Confrontation Clause and the Supreme Court’s Longstanding Aversion to Accomplice Statements Made by Unavailable Declarants*

The plea allocution of an unavailable declarant, offered for its truth against the accused,<sup>60</sup> not only must qualify under some hearsay exception<sup>61</sup> but must also satisfy the Confrontation Clause of the Sixth Amendment.<sup>62</sup> While the Supreme Court never has addressed the admission of an accomplice’s *plea allocution* as a statement against interest,<sup>63</sup> the Court has yet to uphold the admission of an accomplice’s *custodial confession* against a non-declarant defendant.<sup>64</sup>

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59. See *supra* text accompanying note 53.

60. The prior guilty plea of a party to a case is an admission and so may be admitted for its truth, without regard for the reliability of the statement, against the declarant when offered by the opposing party. Fed. R. Evid. 801(d)(2). The basis for common law and statutory exceptions for party-opponent admissions is not any theory of reliability, but rather “the adversarial nature of the process.” Paul R. Rice & Neals-Erik William Delker, *A Short History of Too Little Consequence*, 191 F.R.D. 678, 690 (2000).

61. Note that judgments against third persons, offered to prove an element of an offense against an accused, are excluded from the exception in Rule 803(22). See *infra* Part III.B.

62. The Constitution guarantees

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defen[se].

U.S. Const. amend. VI.

63. In *Kirby v. United States*, 174 U.S. 47 (1899), the Court found unconstitutional a statute that allowed a guilty plea entered by a thief of property to be admitted against the recipient of the property as conclusive evidence of the property’s stolen nature. This decision was the basis for the exclusion in Rule 803(22). See *infra* Part III.B.

64. A plurality of the Court affirmed the admission of a spontaneous comment to a cellmate informant. *Dutton v. Evans*, 400 U.S. 74 (1970) (upholding the admission of a coconspirator’s statement made while in the “concealment” phase of a conspiracy, as excepted under Georgia’s rules of evidence). The *Lilly* plurality noted, however, that

[w]hile Justice Stewart’s plurality opinion observed that the declarant’s statement was “against his penal interest,” the Court’s judgment did not rest on that point, and in no way purported to hold that statements with such an attribute were presumptively admissible. Rather, the five Justices in the majority emphasized the unique aspects of the case and emphasized that the co-conspirator spontaneously made the statement and “had no apparent reason to lie.”

This section first discusses the underpinnings of the Court's pre-Federal Rules Confrontation Clause jurisprudence, forged by the Court's protection of the accused from the admission of accomplice custodial statements.<sup>65</sup> This section then examines the Court's post-Federal Rules decisions and its continuing aversion, despite a compromise in the confrontation right, to the admission of unavailable accomplice incriminations against the defendant.<sup>66</sup> The Court's statutory interpretation of Federal Rule 804(b)(3) is examined for the meaning of the term "statement against interest" and the resulting criteria for the admission of accomplice statements under that exception.<sup>67</sup> Finally, this section discusses the Supreme Court's unabated distrust of accomplice statements made to the government, exemplified by *Lilly v. Virginia*.<sup>68</sup>

### 1. Pre-Federal Rules Forging of a Pure Confrontation Right and the Inadmissibility of Unavailable Accomplice Custodial Confessions Against the Accused

The Court first addressed prosecutorial use of a custodial confession in *Douglas v. Alabama*.<sup>69</sup> The codefendant implicated the petitioner in a confession, was tried separately and convicted, and exercised his privilege not to testify at the petitioner's trial. The prosecution was permitted to treat the declarant as a hostile witness and, as part of the examination, to read statements from the purported confession.<sup>70</sup> The Supreme Court found that the prosecution's reading from the confession effectively introduced the confession into evidence,<sup>71</sup> and held that the defendant was denied his right to confrontation because he was unable to question the declarant about the truth of the alleged confession.<sup>72</sup>

The Court also emphasized the importance of confrontation in *Pointer v. Texas*,<sup>73</sup> which it decided on the same day as *Douglas*, and in *Barber v. Page*.<sup>74</sup> In these cases, the Court found that the right to confrontation extended to testimony from the defendant's preliminary

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*Lilly v. Virginia*, 527 U.S. 116, 132 n.2 (1999) (citations omitted).

65. See *infra* Part I.C.1.

66. See *infra* Part I.C.2.

67. See *infra* notes 99-111 and accompanying text.

68. See *infra* Part I.C.3.

69. 380 U.S. 415 (1965) (holding that the Confrontation Clause is applicable to the states).

70. *Id.* at 416-17.

71. *Id.* at 419.

72. *Id.* at 419-20. Because the confession was "a fundamental part" of the case against the defendant, the error was not harmless and required reversal. *Id.* at 420.

73. 380 U.S. 400 (1965) (holding that the right to confrontation extends to testimony from the defendant's preliminary hearing).

74. 390 U.S. 719 (1968) (finding that cross-examined prior testimony may not be admitted despite a showing of unavailability).

hearing<sup>75</sup> and that because confrontation is a “trial right,” even the admission of cross-examined prior testimony may be found unjustified despite declarant’s unavailability.<sup>76</sup> For the confrontation right to be satisfied, the Court required, at the very least, that prior testimony be subject to cross-examination by counsel for the accused.<sup>77</sup> The Court therefore required that statements against penal interest, even as prior testimony, were admissible only if the accused had been given the opportunity to confront the declarant.<sup>78</sup>

In *Bruton v. United States*, the Court held that the confession of a nontestifying codefendant in a joint jury trial is inadmissible *as an admission against the declarant* when it implicates the accused, despite the use of limiting instructions to that effect.<sup>79</sup> The lower court had instructed the jury not to consider the confession against the petitioner, but only against the declarant.<sup>80</sup> The Supreme Court reversed the petitioner’s conviction, holding that limiting instructions cannot protect a defendant’s confrontation right sufficiently in a joint trial when hearsay as damaging as the confession of a nontestifying codefendant is admitted.<sup>81</sup>

The *Bruton* Court found accomplice incriminations to be “inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others.”<sup>82</sup> It referred to the decision in *Pointer*, finding the inherent unreliability of this kind of evidence “intolerabl[e]” when the accused is denied the right to confront the declarant.<sup>83</sup>

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75. *Pointer*, 380 U.S. at 407.

76. *Barber*, 390 U.S. at 725.

77. *Pointer*, 380 U.S. at 407 (finding that the admission of testimony from a preliminary hearing at which defendant had no counsel denied him the right to cross-examine the declarant); see *Barber*, 390 U.S. at 725 (finding that defendant has not waived the right to cross-examine declarant of prior testimony where government has made no showing of declarant’s unavailability).

78. Mark E. Sharp, *Military Rule of Evidence 804(b)(3)’s Statement Against Penal Interest Exception: Can the Rule Stand on Its Own?*, 130 Mil. L. Rev. 77, 86 (1990).

79. *Bruton v. United States*, 391 U.S. 123 (1968) (overruling *Delli Paoli v. United States*, 352 U.S. 232 (1957)).

80. *Id.* at 125.

81. *Id.* at 126. The Court found that the confession “added substantial . . . weight to the Government’s case in a form not subject to cross-examination.” *Id.* at 128.

82. *Id.* at 136.

83. *Id.* The Court qualified the *Bruton* holding in *Richardson v. Marsh*, 481 U.S. 200 (1987). In an opinion authored by Justice Scalia, the Court held that a nontestifying codefendant’s inculpatory statement which is “not incriminating on its face,” but becomes “so only when linked with evidence introduced later at trial,” is *admissible against the declarant* in a joint trial when accompanied by a proper limiting instruction and redacted of all reference to the accused. *Id.* at 208. For a discussion on the viability of redaction, see Benjamin E. Rosenberg, *The Future of Codefendant Confessions*, 30 Seton Hall L. Rev. 516, 530-36 (2000). Professor Douglass “would exclude the accomplice confession [from joint trials] not because it is unreliable . . . [but] simply because the government, by its affirmative choice to indict and try the

## 2. Post-Federal Rules Confrontation Clause Analysis

*Ohio v. Roberts* was the first post-Federal Rules case that significantly impacted Confrontation Clause jurisprudence.<sup>84</sup> In *Roberts*, the Court made an express link between the Confrontation Clause and the reliability of hearsay.<sup>85</sup> The Court held that the statement of an unavailable declarant may be admissible under the Confrontation Clause if it “bears adequate ‘indicia of reliability’”: “Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.”<sup>86</sup>

The Court subsequently refined the latter part of the *Roberts* test in *Idaho v. Wright*,<sup>87</sup> requiring that hearsay evidence “possess indicia of

defendants together, has made it impossible to confront the reluctant accomplice.” John G. Douglass, *Confronting the Reluctant Accomplice*, 101 Colum. L. Rev. 1797, 1814 n.57 (2001) (arguing that the Confrontation Clause, while mandating confrontation, does not simultaneously mandate exclusion of hearsay).

In *Richardson*, the petitioner’s own testimony permitted the inference that she was present during the planning of the crime. See *Richardson*, 481 U.S. at 208. *But see Sanders v. Moore*, 156 F. Supp. 2d 1301, 1319 n.28 (M.D. Fla. 2001). The court in *Sanders* noted that

even in joint trials, the admission into evidence of a redacted statement made by an accomplice has been held violative of the objecting defendant’s right of confrontation where the redacted statement, despite the lack of any explicit reference to the objecting defendant, could reasonably be understood only as referring to that defendant.

*Id.* (citing, *inter alia*, *United States v. Foree*, 43 F.3d 1572 (11th Cir. 1995)).

84. *Ohio v. Roberts*, 448 U.S. 56 (1980) (finding the Confrontation Clause satisfied where the prosecution had made a good-faith attempt to locate an unavailable declarant and where defendant had an opportunity to cross-examine declarant at the preliminary hearing from which the prosecution wanted to offer testimony).

85. See John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 Geo. Wash. L. Rev. 191, 203-06 (1999) (finding that *Roberts* simply continued what had been started in *Mattox v. United States*, 156 U.S. 237 (1895), which was decided on procedural grounds but also interpreted the Confrontation Clause as an evidentiary rule that would give way to exceptions).

86. *Roberts*, 448 U.S. at 66. This test suggests that the Confrontation Clause requires a showing of unavailability for all hearsay offered by the prosecution. *White v. Illinois*, 502 U.S. 346, 359 (1992) (Thomas, J., concurring); Rosenberg, *supra* note 83, at 537. The Court’s concern in cases involving accomplice incriminations is emphasized by its dismissal of the unavailability requirement in other cases. See *White*, 502 U.S. at 353-57 (holding that unavailability was not a requirement under the Confrontation Clause for excited utterances and statements made for medical treatment); *United States v. Inadi*, 475 U.S. 387, 394 (1986) (holding that a coconspirator’s statement made in the furtherance of a conspiracy was admissible without a showing of the declarant’s unavailability). No court has found Rule 804(b)(3) to be a firmly rooted exception to the hearsay rule. See, e.g., *United States v. Moskowitz*, 215 F.3d 265, 269 (2d Cir. 2000) (noting that the court has declined to decide whether 804(b)(3) is a firmly-rooted exception).

87. 497 U.S. 805 (1990) (involving the incriminating hearsay of unavailable victim

reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.”<sup>88</sup> The *Wright* Court rejected the argument that “evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears ‘particularized guarantees of trustworthiness.’”<sup>89</sup> The Court concluded that the hearsay rule would not bar the admission of a statement “if the declarant’s truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility.”<sup>90</sup>

Despite a definite compromise in what many had considered to be an absolute confrontation right,<sup>91</sup> the Court has not upheld the admission of an accomplice statement, made to authorities, that would satisfy even the *Roberts* test.<sup>92</sup> It identified the difficulty inherent in admitting such statements by flagging them as “presumptively unreliable” in *Lee v. Illinois*.<sup>93</sup>

The *Lee* Court found an accomplice’s custodial confession incriminating a defendant “presumptively unreliable,”<sup>94</sup> and, therefore, unable to qualify under a firmly rooted hearsay exception.<sup>95</sup> The Court concluded that the State failed to rebut the presumption of inherent unreliability for accomplice confessions because the statement was unsworn, given in response to interrogation by the police, and untested by “contemporaneous cross-examination by counsel.”<sup>96</sup>

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as related by pediatrician).

88. *Id.* at 822.

89. *Id.*

90. *Id.* at 820.

91. Criticism of the *Roberts* test, finding the Supreme Court’s interpretation of the Confrontation Clause inappropriate and duplicative of the hearsay inquiry, abounds. *See, e.g.*, Akhil Reed Amar, *The Constitution and Criminal Procedure* 94 (1997) (arguing that only those statements of an unavailable declarant made expressly for prosecutorial purposes are subject to complete exclusion); Berger, *supra* note 24 (arguing that the Confrontation Clause was intended as a prosecutorial restraint and requires exclusion of an unavailable declarant’s statement or documented procedures for its admission); Douglass, *supra* note 83, at 1803 n.22, 1810 (“The Court’s approach invites both prosecutors and defendants to ignore confrontation in their pretrial decisions because they both know that the ultimate admissibility of hearsay will depend upon something else: its supposed reliability.”); Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 *Geo. L.J.* 1011 (1998) (arguing that the confrontation right requires exclusion of statements, made by an unavailable declarant, that may reasonably be considered to have been made for prosecutorial purposes).

92. *See supra* note 64.

93. 476 U.S. 530, 539 (1986).

94. *Id.* (holding that an accomplice’s confession is presumptively unreliable, and that the particular confession at issue “did not bear sufficient independent ‘indicia of reliability’” to rebut the presumption).

95. *Id.* at 536. Petitioner and her codefendant had opted for a joint trial by a judge without a jury. *Id.* Confessions of both defendants were admitted against each declarant, and neither testified. *Id.* The trial judge expressly relied on the codefendant’s confession in deciding the guilt of the petitioner. *Id.* at 538.

96. *Id.* at 544.

Additionally, the State failed to show that the confession was “free from any desire, motive, or impulse [the codefendant] may have had either to mitigate the appearance of his own culpability by spreading the blame or to overstate Lee’s involvement in retaliation for her having implicated him in the murders.”<sup>97</sup> The codefendant “not only had a theoretical motive to distort the facts to Lee’s detriment, but . . . he also was actively considering the possibility of becoming her adversary: prior to trial, [he] contemplated becoming a witness for the State against Lee.”<sup>98</sup>

In *Williamson v. United States*,<sup>99</sup> the Supreme Court interpreted Federal Rule 804(b)(3) without reaching Confrontation Clause analysis,<sup>100</sup> but narrowly construed the Rule because of the same concerns about reliability.<sup>101</sup> Finding that “[o]ne of the most effective ways to lie is to mix falsehood with truth,” the Court ruled that the exception does not allow for the admission of non-self-inculpatory statements, even though they may be part of a “broader narrative that is generally self-inculpatory.”<sup>102</sup> For admission, the Court required separate determinations that each statement offered under the exception was self-inculpatory.<sup>103</sup>

The Court also precluded admission of statements that directly implicate the defendant. To implicate a defendant in a crime, the inference to the crime must be made with other evidence. The Court noted: “[W]hen seen with other evidence, an accomplice’s self-inculpatory statement can inculcate the defendant directly: ‘I was robbing the bank on Friday morning,’ coupled with someone’s testimony that the declarant and the defendant drove off together Friday morning, is evidence that the defendant also participated in the robbery.”<sup>104</sup>

The *Williamson* Court emphasized that the self-inculpatory nature of a statement depends on the circumstances. The Court offered the following statement as an example: “Sam and I went to Joe’s

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97. *Id.*

98. *Id.* The Court noted that such incentives are a “reality of the criminal process, namely, that once partners in a crime recognize that the ‘jig is up,’ they tend to lose any identity of interest and immediately become antagonists, rather than accomplices.” *Id.* at 544-45.

99. 512 U.S. 594 (1994).

100. *Id.* at 605.

101. *Id.* at 599-600.

102. *Id.* at 599-601.

103. As Justice Kennedy concluded, this approach narrows what would have been acceptable under the common law exception. *Id.* at 618-19 (Kennedy, J., concurring in the judgment). The common law, of course, would have excluded inculpatory statements against penal interest, made by an accomplice to authorities, altogether. See *infra* notes 31-37 and accompanying text. Justice Kennedy seems to have ignored this fact in arguing that the common law allowed the inclusion of collateral statements neutral to the declarant’s interest. See *Williamson*, 512 U.S. at 618-19 (Kennedy, J., concurring in the judgment).

104. *Williamson*, 512 U.S. at 603 (emphasis added).

house.”<sup>105</sup> This statement “might be against the declarant’s interest if a reasonable person in the declarant’s shoes would realize that being linked to Joe and Sam would implicate the declarant in Joe and Sam’s conspiracy.”<sup>106</sup> The Court vacated the defendant’s conviction, finding that the declarant’s statements, in light of the circumstances, may not have been truly self-inculpatory.<sup>107</sup> A reasonable person in the declarant’s position might have thought that implicating another would decrease his or her sentence.<sup>108</sup>

The *Williamson* Court indicated in dicta that the “squarely” self-inculpatory statement of an unavailable declarant might be admissible against an accused under Rule 804(b)(3) as evidence of a conspiracy.<sup>109</sup> The Court did not hold that such a statement would conclusively satisfy the Confrontation Clause.<sup>110</sup> The Court noted, however, 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.”<sup>111</sup>

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105. *Id.*

106. *Id.* The Court rejected the approach advocated by Justice Kennedy, one that would not bar the use of “collateral-neutral” statements. These are statements within a broader self-inculpatory narrative that, while not necessarily self-serving, do not solely implicate the declarant: “[W]hen two or more people are capable of committing a crime and the declarant simply names the involved parties, that statement often is considered neutral, not self-serving.” *Id.* at 618 (Kennedy, J., concurring in the judgment). In Justice Kennedy’s example—“John and I robbed the bank”—the phrase “John and” would be considered collateral-neutral. *Id.* at 612 (Kennedy, J., concurring in the judgment). Justice Kennedy notes that the entire statement is neutral, “save for the possibility of conspiracy charges.” *Id.* “The Court . . . adopt[s] the extreme position that no collateral statements are admissible under Rule 804(b)(3).” *Id.* at 613 (Kennedy, J., concurring in the judgment). Under *Williamson*, “a statement which shifts a greater share of the blame to another person (self-serving) or which simply adds the name of a partner in crime (neutral) should be excluded.” Jack B. Weinstein & Margaret A. Berger, 5 Weinstein’s Federal Evidence 804-58 (Joseph M. McLaughlin ed., 2d ed. 2002).

107. *Williamson*, 512 U.S. at 604.

108. Justice O’Connor noted: “Small fish in a big conspiracy often get shorter sentences than people who are running the whole show, especially if the small fish are willing to help the authorities catch the big ones.” *Id.* (citation omitted).

109. *Id.* at 603. “[A] declarant’s squarely self-inculpatory confession—‘yes, I killed X’—will likely be admissible under Rule 804(b)(3) against accomplices of his who are being tried under a co-conspirator liability theory.” *Id.* (citing *Pinkerton v. United States*, 328 U.S. 640, 647 (1946) (holding that evidence of acts committed by coconspirators in the furtherance of a conspiracy, without direct evidence that an accused participated in such acts, is sufficient to sustain a conviction against the accused for the commission of such acts)).

110. *Id.* at 605.

111. *Id.* “[T]he Court suggested that if the accomplice statement legitimately falls within the hearsay exception, it will satisfy the Sixth Amendment as well.” Douglass, *supra* note 83, at 1820.

### 3. *Lilly v. Virginia* and the Supreme Court's Unabated Distrust of Accomplice Incriminations Made to the Government

*Lilly v. Virginia* reversed the admission of another custodial accomplice confession.<sup>112</sup> Justice Stevens, joined by Justices Souter, Ginsberg and Breyer, applied the *Roberts* reliability analysis.<sup>113</sup> The plurality noted the Court's continued distrust of "an accomplice's statements that shift or spread the blame to a criminal defendant."<sup>114</sup> Accordingly, the plurality reiterated that the blame-shifting statement of an unavailable accomplice is presumptively unreliable.<sup>115</sup> The *Lilly* plurality found it "highly unlikely" that this presumptive unreliability could be rebutted "when the government is involved in the statements' production, and when the statements describe past events and have not been subjected to adversarial testing."<sup>116</sup>

The plurality further narrowed the list of safeguards that would allow for the admissibility of a statement under *Roberts*.<sup>117</sup> The plurality found that "the absence of an express promise of leniency" does not ensure reliability because "police need not tell a person who is in custody that his statements may gain him leniency in order for the suspect to surmise that speaking up, and particularly placing blame on his cohorts," could be in his best interest.<sup>118</sup> The *Lilly* plurality emphasized the necessity for adversarial testing, particularly where the statement was made in response to leading questions.<sup>119</sup> The Court reversed and remanded for harmless error analysis.<sup>120</sup>

Justice Scalia, concurring in part and concurring in the judgment, characterized the admission of the custodial confession as "a paradigmatic Confrontation Clause violation."<sup>121</sup> He cited to Justice Thomas' concurring opinion in *White v. Illinois*,<sup>122</sup> in which Justice Thomas found that the admission, without confrontation, of any "formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions" violated the Confrontation Clause.<sup>123</sup> Justice Thomas agreed, in a separate concurrence, that a Confrontation Clause violation had occurred, per his *White*

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112. *Lilly v. Virginia*, 527 U.S. 116, 134 (1999) (plurality opinion).

113. Justices Scalia and Thomas rejected the reliability analysis, but concurred in part and in the judgment. See *infra* notes 121-24 and accompanying text.

114. *Lilly*, 527 U.S. at 133 (quoting *White v. Illinois*, 502 U.S. 346, 357 (1992)).

115. *Id.*

116. *Id.* at 137.

117. Prosecutors aim to characterize hearsay as statements against interest "[t]hrough the target may be a little smaller after *Lilly*." Douglass, *supra* note 83, at 1851.

118. *Lilly*, 527 U.S. at 139.

119. *Id.*

120. *Id.* at 140.

121. *Id.* at 143 (Scalia, J., concurring in part and concurring in the judgment).

122. 502 U.S. 346 (1992).

123. *Id.* at 364-65 (Thomas, J., concurring in part and concurring in the judgment).

concurrence, but he also agreed with Chief Justice Rehnquist in emphasizing that not all statements incriminating a defendant should be barred.<sup>124</sup>

While *Lilly* produced no majority opinion, "it is clear that a custodial statement to law enforcement personnel does not fall within a firmly rooted exception."<sup>125</sup> Therefore, any custodial statement made to authorities can only be admitted upon a showing of particularized guarantees of trustworthiness. The Supreme Court considers these statements to be presumptively unreliable because the declarant's version of events likely will be influenced by his or her interest in obtaining a lenient sentence.<sup>126</sup> Because the Court has not yet addressed the admissibility of an accomplice's plea allocution, lower courts have applied the Supreme Court's Confrontation Clause precedent to such statements with varying results. The next part discusses these courts' analyses.

## II. WHETHER ACCOMPLICE PLEA ALLOCUTIONS OFFER "PARTICULARIZED GUARANTEES OF TRUSTWORTHINESS"

A person typically would not admit to a crime under penalty of imprisonment without the admission being true.<sup>127</sup> In this respect, a guilty plea is similar to custodial confessions. Plea allocutions, however, are made under oath and in the presence of a judge, who must ensure that the plea is voluntary and has a factual basis.<sup>128</sup> The defendant may bargain with the prosecutor for a more lenient sentence in exchange for the plea,<sup>129</sup> and the prosecution may prepare the allocution, with the actual testimony of the declarant consisting entirely of short answers in response to questioning.<sup>130</sup> Generally, there is no adversarial testing by means of other evidence or witness testimony.<sup>131</sup>

Although guilty pleas were not admitted by any circuit until several years after the adoption of the Federal Rules,<sup>132</sup> the admitting courts have accepted the guilty plea of an unavailable accomplice as a

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124. *Lilly*, 527 U.S. at 143-44 (Thomas, J., concurring in part and concurring in the judgment). Justice Thomas, for example, would admit statements made to a family member or bystander, or any other non-formal, nontestimonial statements, without requiring confrontation. This position is similar to that of Akhil Reed Amar. See Amar, *supra* note 91 (arguing that only those statements prepared for prosecutorial purposes should be barred under the Confrontation Clause).

125. Michael H. Graham, *Federal Practice & Procedure* § 7075 (3rd ed. 2000).

126. See *supra* notes 82-83, 94-98, 114-16 and accompanying text.

127. See *supra* Part I.A.

128. Fed. R. Crim. P. 11. *But see* Abraham S. Goldstein, *The Passive Judiciary: Prosecutorial Discretion and the Guilty Plea* 41 (1981) (finding that the majority of accepted pleas have little resemblance to the truth); *infra* Part III.A.2.a.

129. See *infra* Part III.A.1.

130. See *infra* note 161 and accompanying text.

131. See *infra* text accompanying note 318.

132. See *United States v. Winley*, 638 F.2d 560, 562 (2d Cir. 1981).

statement against interest and have found plea allocutions sufficiently trustworthy under the Confrontation Clause.<sup>133</sup> Courts allowing the admission of allocutions generally consider guilty pleas to be statements against interest *per se* because the declarant subjects himself or herself to a potentially long sentence, though the actual sentence received may be significantly reduced.<sup>134</sup> These courts also find that the plea proceeding generally ensures the “particularized guarantees of trustworthiness” required by *Roberts* for statements not falling into a firmly-established exclusion to the hearsay rule.<sup>135</sup> Plea allocutions have been found particularly trustworthy because the declarant was under oath and in front of a judge. Section A of this part discusses the analysis of the circuits that have not extended the custodial confession analogy to the accomplice’s plea allocution.

Section B discusses the analyses of state courts, including the Supreme Courts of Minnesota and Mississippi, finding an accomplice’s allocution—though the declarant was under oath, in front of a judge, and risking a potentially long imprisonment—to lack guarantees of reliability sufficient to satisfy the Confrontation Clause.

The analyses of the circuits that have not yet addressed the issue, as applied to other statements against penal interest made to the government, illuminate how these circuits would likely consider the admissibility of an accomplice’s allocution. Section C of this part examines the decisions of these circuits on other statements against penal interest, made to the government either in the custodial setting, or under oath and in a formal, testimonial environment.

### A. *The Admitting Circuits*

For admission in a criminal trial, the statement of an unavailable declarant must qualify under a hearsay exception and satisfy analysis under the Confrontation Clause.<sup>136</sup> The Second Circuit was the first circuit to admit such statements, followed by the Seventh and Ninth Circuits. These courts have held that plea allocutions qualify as genuine statements against interest, and therefore are admissible under Federal Rule 804(b)(3), and have inherent and particularized

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133. The Second Circuit has the most decisions on the issue, all finding the admission of guilty pleas to be constitutional. The Seventh Circuit agrees with the reasoning of the Second Circuit. *United States v. Centracchio*, 265 F.3d 518, 529 (7th Cir. 2001) (“Like the Second Circuit . . . , we find that [the declarant’s] plea allocution contains the particularized guarantees of trustworthiness that justify its admissibility under the Confrontation Clause.”). The Ninth Circuit followed the analyses of the Second and Seventh Circuits. *United States v. Aguilar*, 295 F.3d 1018, 1022 (9th Cir. 2002) (“We adopt the reasoning of the Second and Seventh Circuits and hold that the . . . guilty pleas at issue before us bear particularized guarantees of trustworthiness sufficient [for] admission under the Confrontation Clause.”).

134. See *infra* notes 137-40, 155 and accompanying text.

135. See *supra* text accompanying notes 84-86.

136. See *supra* notes 60-62 and accompanying text.

guarantees of trustworthiness sufficient for admission under the Sixth Amendment.

### 1. The Second Circuit Approach

In the Second Circuit, a guilty plea generally is a statement against interest, except when the declarant faces no criminal liability for the crime to which he or she allocutes.<sup>137</sup> In other words, as a general rule, a plea allocation qualifies under Rule 804(b)(3) as long as its declarant faces some potential penalty.<sup>138</sup> The Second Circuit considers in its analysis only the potential penalty faced by the declarant, even where the declarant, by pleading, has avoided imprisonment entirely.<sup>139</sup> The court recently held: “[T]he guarantee of trustworthiness . . . is based on [the possibility of a lengthy sentence] at the time the statement is made, even if the defendant expects to, and in fact actually does, receive a lesser sentence.”<sup>140</sup>

The Second Circuit also finds it significant that a statement has been redacted. Redaction usually means replacing the defendant’s name with a neutral word.<sup>141</sup> The statement is considered self-inculpatory if portions exculpating the declarant have been removed, though the remaining portions may incriminate the defendant in addition to the declarant.<sup>142</sup>

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137. *United States v. Scopo*, 861 F.2d 339, 348 (2d Cir. 1988).

138. *See id.*

139. *Id.* at 348-49 (finding that, although the declarant did not serve any prison time, his statements were against interest because he was exposed to a “potential” prison term of forty years and fines of \$275,000, and that “even if [declarant] privately believed that because of his illness the court would not require him to suffer incarceration, there would be little reason for him to suppose that the court would also therefore excuse him from paying a fine”).

140. *United States v. Walsh*, 7 Fed. Appx. 20, 2001 WL 290347, at \*1 (2d Cir. Mar. 23, 2001) (considering only the declarant’s potential sentence of twenty years though he bargained for and received a sentence of only one and a half to two years).

141. The following is a typical plea allocation:

I entered into a conspiracy with others between March of 1997 and April of 1998 to commit securities and wire fraud in connection with four accounts at Briarwood Investments by causing unauthorized transactions to be executed in these four accounts of Briarwood Investments and knowing that such transactions would be executed by telephone, fax, into an internal securities clearing house system.

*United States v. Tropeano*, 252 F.3d 653, 655 (2d Cir. 2001) (quoting the transcript of a plea allocation, a portion of which was found to be erroneously admitted).

142. *Walsh*, 2001 WL 290347, at \*2. This practice is at odds with *Williamson*, which held that not even collateral-neutral statements may be admitted under Rule 804(b)(3). *See* Richard T. Sahuc, *The Exception That Swallowed the Rule: The Disparate Treatment of Federal Rule of Evidence 804(b)(3) as Interpreted in United States v. Williamson*, 55 U. Miami L. Rev. 867, 889 (2001) (finding the Second Circuit to be one of the “main culprits in the misinterpretation of *Williamson*”); *supra* notes 99-108 and accompanying text.

A recent decision sums up the Second Circuit's Confrontation Clause jurisprudence on the admission of a guilty plea when the declarant is unavailable:

Particularized guarantees of trustworthiness exist where (1) the plea allocation subjected the defendant to the risk of a lengthy term of imprisonment, (2) the allocation was given under oath, and (3) the district court instructs the jurors that the allocation may only be considered as evidence that a conspiracy existed, and not as evidence that the defendant in the instant case was a member of the alleged conspiracy or otherwise guilty of the crimes charged against [the declarant].<sup>143</sup>

In a summary order, the Second Circuit observed that, as a general rule, the existence of these three circumstances satisfy the Confrontation Clause.<sup>144</sup> The court in *United States v. Petrillo*<sup>145</sup> noted that the third of these circumstances, the limiting jury instruction, is "unrelated to the trustworthiness of the statement" at the time it was made.<sup>146</sup>

The Second Circuit also has recognized the explicit influence of the prosecution as improper. In *United States v. Tropeano*, the government asked the district court judge to inquire whether the

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143. *United States v. Chan*, 184 F. Supp. 2d 337, 342-43 (S.D.N.Y. 2002) (citing *United States v. Moskowitz*, 215 F.3d 265, 269 (2d Cir. 2000)). The Second Circuit often finds inherent reliability in these circumstances. *United States v. Gallego*, 191 F.3d 156, 168 (2d Cir. 1999) (noting that "self-inculpatory portions of the allocation . . . are particularly trustworthy"); *United States v. Williams*, 927 F.2d 95, 98-99 (2d Cir. 1991) (trusting the district court's judgment on trustworthiness of declarants because district court conducted the allocations); see also *Chan*, 184 F. Supp. 2d at 343 n.2 (finding that because declarants were not cooperators, they had no incentive to curry favor with the government at the plea hearings).

144. See, e.g., *Moskowitz*, 215 F.3d at 269 ("The instant case having the same 'particularized guarantees of trustworthiness' found sufficient in [*Gallego*, 191 F.3d at 167] there was no Confrontation Clause violation in the admission of the plea allocation.").

145. 237 F.3d 119 (2d Cir. 2000).

146. *Id.* at 123 n.1. A typical limiting instruction is as follows:

[Y]ou may consider [the declarant's allocation] only on the following two issues: (1) whether there was a conspiracy or scheme to commit securities fraud, to make false statements and submit false documents to the [SEC], to lie to the auditors, and to create false entries in . . . books and records; and (2) what if anything [declarant] did in order to further the objects of that conspiracy if you find that it existed.

However, the question of whether the defendant on trial . . . was also a member of that conspiracy or the scheme alleged in the indictment is an issue for which you will have to rely on other evidence. There is no evidence in these statements naming any other defendant or co-conspirator.

If you find, based in part on these statements, that a conspiracy or a scheme as charged in the indictment existed, you must decide as a separate question whether the defendant on trial . . . was a part of the alleged conspiracy or scheme, based entirely on the other evidence in the case. There is nothing in these statements that answers that question one way or another.

*Moskowitz*, 215 F.3d at 269 (third alteration in original).

declarant had conspired with one person or more than one.<sup>147</sup> The declarant answered that he had conspired with more than one person.<sup>148</sup> This follow-up statement to the plea allocution, in answer to an explicit government request, even though it did not attempt to shift blame, “may well have been an attempt to ‘curry favor,’” and as such was found to lack necessary guarantees of trustworthiness.<sup>149</sup>

Implicit influence on the accomplice’s guilty plea allocution, however, is not recognized by the Second Circuit as a legitimate factor in the making of a plea allocution. The court in *Petrillo* found that the “potential for coercion or misrepresentation during the negotiation over guilty plea allocutions may be present in theory.”<sup>150</sup> The court concluded, however, that the district court did not abuse its discretion where the statements ““were made in open court, under oath, before the sentencing judge, following extensive pre-trial proceedings, with the assistance of counsel, and against the declarants’ penal interests.””<sup>151</sup>

## 2. The Seventh Circuit Approach

The Seventh Circuit first considered the admission of a plea allocution in *United States v. Seavoy*.<sup>152</sup> The court in *Seavoy* acknowledged that there was no cross-examination of the declarant’s testimony. Testimony was “fed . . . to him without objection from defense counsel.”<sup>153</sup> The court found sufficient guarantees of trustworthiness existed because the declarant was under oath and was questioned by both the prosecutor and defense counsel about his involvement in the crime.<sup>154</sup>

Although there was evidence that the declarant had motivation to lie in his statement in order to gain a substantial reduction in his sentence,<sup>155</sup> the court found it significant that the statement presented

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147. *United States v. Tropeano*, 252 F.3d 653, 655-56 (2d Cir. 2001).

148. *Id.*

149. *Id.* at 658-59. *But see* *United States v. Centracchio*, 265 F.3d 518 (2001) (finding district court’s exclusion of plea allocution an abuse of discretion despite government preparation of allocution text); *infra* notes 161, 171 and accompanying text.

150. *United States v. Petrillo*, 237 F.3d 119, 122 (2d Cir. 2000).

151. *Id.* at 122-23 (quoting *United States v. Petrillo*, 60 F. Supp. 2d 217, 220 (S.D.N.Y. 1999)).

152. 995 F.2d 1414 (7th Cir. 1993). The testimony had been offered pursuant to Rule 804(b)(5)—subsequently renumbered as Rule 807—which provides a residual exception for statements not specifically covered by another exception but possessing “equivalent circumstantial guarantees of trustworthiness.” Fed. R. Evid. 807.

153. *Seavoy*, 995 F.2d at 1418.

154. *Id.*

155. *Id.* The declarant understood that his maximum statutory penalty would be twenty-five years imprisonment and a \$250,000 fine, but he had negotiated to receive “between 51 and 78 months,” that is, roughly, between four and eight years. *Id.* at 1421.

a “neutral kind of story,” corroborated by other evidence, and implicating the defendant no more than the other evidence.<sup>156</sup> The declarant’s attempt to recant his guilty plea was not an indication of the statement’s untrustworthiness because of the “guarantees of trustworthiness surrounding [the] plea.”<sup>157</sup> The court found the plea hearing testimony to satisfy the Confrontation Clause.<sup>158</sup>

In *United States v. Centracchio*,<sup>159</sup> the Seventh Circuit found an abuse of discretion in the district court’s exclusion of a plea allocution based on the credibility of the declarant, a known liar.<sup>160</sup> The government had prepared the statement in question<sup>161</sup> and the declarant was expecting a “good deal” when he adopted the statement for his plea allocution.<sup>162</sup>

In considering whether the statement qualified for admission under Rule 804(b)(3), the Seventh Circuit found that the allocution was “truly inculpatory to [declarant] only because [it] did not seek to lessen blame *as to his crime* by spreading blame to others.”<sup>163</sup> In other words, the Seventh Circuit has held that a statement may be against interest even though it incriminates others.<sup>164</sup>

Additionally, the court in *Centracchio* found that the circumstances of the particular plea allocution supported the conclusion that “a plea of guilty is likely to be a classic statement against penal interest.”<sup>165</sup> The circumstances cited were that the statement was against interest

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156. *Id.* at 1418-19 (internal quotation marks omitted). This bootstrapping is directly at odds with *Wright*, decided three years previously. See *supra* notes 87-89 and accompanying text.

157. *Seavoy*, 995 F.2d at 1419.

158. *Id.* The Court based its conclusion on its analysis for reliability under the residual hearsay exception. *Id.*

159. 265 F.3d 518 (7th Cir. 2001).

160. *Id.* at 523. At the declarant’s sentencing hearing, subsequent to the plea hearing, the government argued that he had lied to a probation officer. *Id.*

161. The plea agreement was “entirely prepared by the government” and a portion read by the prosecutor at declarant’s plea colloquy. The declarant’s actual testimony consisted of two short, positive responses to required questioning by the presiding judge. *Id.*

162. *Id.* at 526 (internal quotation marks omitted). Ironically, the court countered defendant’s argument that the declarant expected a “good deal” at the time of the statement with the finding that, generally, a pleading declarant gets “a better deal” than that which would have been expected from going to trial. *Id.* This finding supports the argument that the guilty plea, under the circumstances, is not necessarily a statement against interest. See *infra* Part III.A.1.a.

163. *Centracchio*, 265 F.3d at 525-26. The allocution inculpated other persons, though not by name. The allocution stated that “at the beginning of each month . . . Individual A made \$500 bribe payments to defendant on behalf of the Outfit and at the direction of Individual A’s boss in the Outfit.” *Id.* at 523 (quoting a portion of the plea agreement adopted by declarant as his plea allocution).

164. This holding is at odds with *Williamson*, which held that not even collateral-neutral statements may be admitted under Rule 804(b)(3). See *supra* notes 99-108 and accompanying text. The Seventh Circuit’s holding reflects the practice in the Second Circuit. See *supra* note 142 and accompanying text.

165. *Centracchio*, 265 F.3d at 526.

and was made “with benefit of counsel, under oath, in front of a federal judge, with no promise of leniency in the actual plea agreement, and risking a substantial prison term.”<sup>166</sup> While finding “that when an accused person pleads guilty he is getting . . . a better deal than risking the consequences of going to trial,” the court found the allocution to be genuinely against the declarant’s interest.<sup>167</sup>

The court then considered whether the statement had inherent and particularized guarantees of trustworthiness sufficient for admission under the Sixth Amendment.<sup>168</sup> The court found the Second Circuit’s analysis persuasive.<sup>169</sup> Also, while the declarant may have pleaded to get a “good deal,” there was no evidence to show that he lied about his guilt in the crime.<sup>170</sup> Similarly, “while the government was admittedly involved in the production of the text of the plea allocution,” there was no evidence of manipulation of the text for the purposes of prosecuting others.<sup>171</sup> The court held that the circumstances of the plea proceeding provided the inherent guarantees of trustworthiness necessary for admission under the Confrontation Clause.<sup>172</sup>

### 3. The Ninth Circuit Approach

In *United States v. Aguilar*, the Ninth Circuit adopted the reasoning of the Second and Seventh Circuits.<sup>173</sup> The court held that the admission of a plea allocution does not violate the Confrontation Clause where the allocution

(1) is made under oath and with the representation of counsel, (2) is entered personally before a district judge who accepts the plea under Rule 11 of the Federal Rules of Criminal Procedure, (3) includes

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166. *Id.*

167. *Id.* *But see* *United States v. Garcia*, 986 F.2d 1135, 1140 n.3 (7th Cir. 1993) (suggesting that, in cases of exculpatory statements against penal interest, the motivation to curry favor with authorities could be inferred from a plea bargain in which declarant agreed to cooperate with the government in return for a government recommendation of a reduction in sentence).

168. *Centracchio*, 265 F.3d at 527-30.

169. *Id.* at 529 (citing *United States v. Gallego*, 191 F.3d 156 (2d Cir. 1999); *United States v. Moskowitz*, 215 F.3d 265 (2d Cir. 2000); *United States v. Petrillo*, 237 F.3d 119 (2d Cir. 2000)).

170. *Id.* This view is at odds with the presumed unreliability of accomplice statements made to authorities. *See supra* Part I.C.

171. *Centracchio*, 265 F.3d at 529.

172. *Id.* at 529-30. The “statements were genuinely self-inculpatory and did not seek to downplay his own role, [were made with] the benefit of counsel, . . . under oath in front of a federal judge, with no promise of leniency, and risking a prison term, and [were accompanied by] the limiting instruction proposed by the government.” *Id.* at 529.

173. *United States v. Aguilar*, 295 F.3d 1018, 1022 (9th Cir. 2002). The defendant did not dispute that the allocutions were statements against interest for the purposes of Rule 804(b)(3). *Id.* at 1020. The court addressed only the Confrontation Clause issue. *Id.*

wholly self-inculpatory remarks, and (4) subjects the declarant to a risk of substantial imprisonment. *A guilty plea that meets these criteria possesses particularized guarantees of trustworthiness sufficient to justify depriving the defendant of the opportunity to confront and cross-examine the declarant.*<sup>174</sup>

The court found that the allocutions at issue “derive[d] considerable reliability as statements against penal interest” because the “declarants embraced potentially long prison terms by pleading guilty, and . . . the evidence suggests no consideration was promised in return for those pleas.”<sup>175</sup> Additionally, the allocutions “were made under oath, with the advice of counsel, and in the presence of the same district judge who presided over [defendant’s] trial,” thus adding to the reliability of the statements.<sup>176</sup> The Ninth Circuit found that the district judge was “well-positioned to assess [each declarant’s] credibility” because he adhered to the requirements of Rule 11 of the Federal Rules of Criminal Procedure.<sup>177</sup> Such requirements ensured that each declarant was aware of the lengthy imprisonment he or she potentially faced under the terms of the plea.<sup>178</sup>

The Ninth Circuit disagreed with the other circuits’ use of the limiting instruction as a factor in determining the reliability of an allocution.<sup>179</sup> The court found that a “jury instruction that may come months or years after a codefendant’s guilty plea is not a ‘circumstance surrounding the making of a statement.’”<sup>180</sup> The Ninth Circuit therefore “depart[ed] from the Second and Seventh Circuits in this minor regard.”<sup>181</sup>

Though the court concluded that the “decision does not create a per se rule permitting the admission of a . . . guilty plea,”<sup>182</sup> any plea allocution meeting the outlined criteria ordinarily will be admitted.<sup>183</sup>

### *B. Plea Allocutions Found Not Sufficiently Reliable Despite an Oath, a Judge, and a Potentially Long Sentence*

The circuits admitting plea allocutions assume that a guilty plea is a statement against interest where the declarant, by making the

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174. *Id.* at 1019 (emphasis added).

175. *Id.* at 1022.

176. *Id.* at 1023.

177. *Id.*

178. *Id.* The Ninth Circuit noted that Rule 11 is “meant to ensure that a guilty plea is knowing and voluntary,” and “not the result of . . . promises apart from a plea agreement.” *Id.* at 1020, 1023. A plea may be entirely voluntary and still bear little resemblance to the truth. See Goldstein, *supra* note 128; *infra* Part III.A.2.a.

179. *Aguilar*, 295 F.3d at 1023.

180. *Id.* (citing *Idaho v. Wright*, 497 U.S. 805, 819 (1990)).

181. *Id.*; see also *supra* note 146 and accompanying text.

182. *Aguilar*, 295 F.3d at 1024.

183. See *supra* note 174 and accompanying text.

statement, potentially faces a lengthy imprisonment.<sup>184</sup> In addition, these circuits find the circumstances of the plea hearing—that the allocution is made under oath and in the presence of a judge—to be significant assurances of the statement’s reliability.<sup>185</sup> While no other circuit court has made a decision on the admissibility of a guilty plea as a statement against interest,<sup>186</sup> state courts, including the highest courts of two states, have found plea allocutions to be unreliable under *Lilly*.

In *State v. King*, the Supreme Court of Minnesota considered the admissibility of a plea allocution for which the declarant did not receive a reduced sentence.<sup>187</sup> The court found the Confrontation Clause issue dispositive and did not rule on admissibility under an exception to the hearsay rule.<sup>188</sup> The court noted the incentive for the prosecution to “use testimony from a guilty plea setting, which is under the direct control of the prosecutor and requires disclosing only the basic elements of the offense necessary for the court to accept the plea.”<sup>189</sup> The plea allocution’s consistency with a prior custodial statement, made “when [the declarant] arguably was seeking to curry favor with the investigators,” suggested its unreliability.<sup>190</sup> The court found that only the oath weighed in favor of admissibility, whereas the benefits granted to the declarant and the inherent unreliability of accomplice statements weighed against admissibility.<sup>191</sup> The court held that the unredacted plea allocution was inadmissible in light of these circumstances.<sup>192</sup>

The Supreme Court of Mississippi, in *Garrison v. State*, found an allocution to be unreliable based upon the circumstances.<sup>193</sup> The court

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184. See *supra* notes 143, 166, 175 and accompanying text.

185. See *supra* notes 143, 166, 176 and accompanying text.

186. So far, one district court has found that the “claim that declarant’s statements under oath before the Court during his change of plea hearing are a guarantee of trustworthiness fails to take into account the complexity and multiplicity of factors that coincide at a stage in a criminal process when a defendant self convicts.” *United States v. Lopez-Caceres*, 89 F. Supp. 2d 168, 172 (D.P.R. 1999).

187. *State v. King*, 622 N.W.2d 800 (Minn. 2001). The plea allocution mentioned the defendant by name. See *id.* at 807 n.2. The court interpreted Justice Scalia’s concurring opinion in *Lilly* as finding all statements against interest to be violations of the Confrontation Clause. *Id.* at 809 n.3. This does not seem to comport with Justice Scalia’s requirement that evidence be formalized and testimonial (e.g., not made to a friend) in order for the Clause to apply. *Lilly v. Virginia*, 527 U.S. 116, 143 (1999) (Scalia, J., concurring in part and in the judgment). Guilty plea testimony, however, would seem to violate the Clause under Justice Scalia’s view.

188. *King*, 622 N.W.2d at 806.

189. *Id.* at 808 (reserving judgment on whether declarant was unavailable and deciding only whether the plea testimony had adequate indicia of reliability).

190. *Id.* at 809.

191. *Id.* at 808-09. The State agreed only to recommend a sentence at the bottom of the range for declarant’s offense. The declarant did not receive a reduced sentence but was released from custody pending sentencing. *Id.* at 809.

192. *Id.* at 809.

193. *Garrison v. State*, 726 So. 2d 1144, 1149 (Miss. 1998).

considered the circumstances in which the statement had been made without deciding first whether the statement was in any way against the declarant's interest.<sup>194</sup> The court noted that the declarant had been under oath and had made a statement against penal interest, but found it significant that the declarant "attempted to shift as much blame as possible away from herself to get a more lenient sentence."<sup>195</sup> Although she potentially faced, and in fact received, a sentence of life imprisonment, the court concluded that the declarant thought she would receive a significantly shorter sentence by pleading guilty.<sup>196</sup> Additionally, the allocution differed in several respects from the testimony of her two accomplices, and was later recanted.<sup>197</sup> The Mississippi Supreme Court found that the circumstances of the testimony itself, combined with the subsequent recantation, weighed against a finding of particularized guarantees of trustworthiness necessary for admission under the Confrontation Clause.<sup>198</sup> The court held that admission of the testimony, which "explicitly detailed" the defendant's alleged role in the crime, was reversible error.<sup>199</sup>

In *People v. Baker*, a Michigan Court of Appeals held the inculpatory portions of a plea allocution to be inadmissible though the statement was made under oath and subjected its declarant to life imprisonment.<sup>200</sup> The court first acknowledged that the statement was clearly against the declarant's penal interest and determined that a reasonable person in the declarant's position would not have implicated himself in the crime of murder without that statement being true.<sup>201</sup> The court ruled, however, that the portions of the statement that inculpated the defendant were not against penal interest because "those statements could have been made by a reasonable person in the co-defendant's position regardless of their truth or falsity."<sup>202</sup>

The court began its hearsay analysis with the presumption that the statement was unreliable.<sup>203</sup> The statement, though made in court, was "made to authorities in a custodial setting."<sup>204</sup> The court deemed the statement voluntary. Nevertheless, because it was not made at the declarant's own initiative, the court found it less trustworthy than if had it been made to friends or family.<sup>205</sup> Furthermore, the statement

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194. *Id.* at 1148.

195. *Id.*

196. *Id.* at 1148-49.

197. *Id.* at 1149.

198. *Id.*

199. *Id.* at 1149-50.

200. *People v. Baker*, No. 226569, 2002 WL 362837, at \*4 (Mich. Ct. App. Mar. 1, 2002).

201. *Id.* at \*3.

202. *Id.*

203. *Id.* at \*4.

204. *Id.*

205. *Id.*

consisted of the declarant's responses to leading questions by the prosecution.<sup>206</sup> Finally, the statement minimized the declarant's culpability by shifting blame to the defendant.<sup>207</sup>

In *Baker*, the court determined that "once the co-defendant decided to acknowledge his guilt and became aware that he faced no further penalty, there was little incentive for him to speak truthfully."<sup>208</sup> Moreover, the declarant still had the incentive to minimize his own role in the crime, and his statement shifted most of the blame of the crime to the defendant.<sup>209</sup> The court concluded that portions of the statement that incriminated the defendant could not qualify as statements against interest.<sup>210</sup>

The court then held that, regardless of the admissibility under the rules of evidence, admission of these portions violated the defendant's confrontation right.<sup>211</sup> The court evaluated the plea allocution under the factors outlined by the Michigan Supreme Court for admission of statements against penal interest that inculcate persons in addition to the speaker.<sup>212</sup> Admission would be favored if the statement was made voluntarily, made contemporaneously with the facts asserted, made to "someone to whom the declarant would likely speak the truth," and made "spontaneously at the initiation of the declarant and without prompting or inquiry by the listener."<sup>213</sup> Weighing against admission would be a finding that the statement was "made to law enforcement officers or at the prompting or inquiry of the listener," minimized the declarant's culpability or shifted blame to another, was made for revenge or to curry favor, and was accompanied by a finding that the speaker was motivated to lie or distort the facts.<sup>214</sup> Based on these factors, the court found that the statement "inescapabl[y]" violated the Confrontation Clause.<sup>215</sup>

### C. *The Analyses of Other Circuit Courts*

Other circuits have not addressed whether an accomplice's plea allocution may be admitted against a defendant. Most circuits have examined other statements made by an accomplice to the government—for example, those made while under direct examination, made to a grand jury, made in an administrative

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206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at \*4-5 (citing *People v. Poole*, 506 N.W.2d 505 (Mich. 1993)). The declarant must, of course, be found unavailable. *Id.* at \*4.

213. *Id.* at \*5.

214. *Id.*

215. *Id.* The Court found the error to be harmless beyond a reasonable doubt and affirmed the conviction. *Id.*

proceeding, and, of course, those made while in police custody. Generally, these courts closely examine the motivations of the declarant under the totality of the circumstances in determining whether a statement is against the speaker's interest. Whether these courts will apply the same analysis to an accomplice's plea allocution remains to be seen.

### 1. Direct Examination

The Eleventh Circuit in *United States v. Deeb* found a facially self-inculcating statement made while under direct examination inadmissible under the Confrontation Clause.<sup>216</sup> Although the statement was made in open court, under oath, and in the presence of a judge, the court noted that the trustworthiness of a statement was not guaranteed by "the mere fact that [it was] made under oath."<sup>217</sup> Though the statement was facially against interest, the declarant "had a strong motive to testify in a manner that would win him favor with the Government, and he could achieve that goal by inculcating [the defendant] as the principal conspirator."<sup>218</sup> The court found the statement not against the declarant's interest in light of the circumstances,<sup>219</sup> but affirmed admission of the testimony upon a showing that the defendant had the opportunity to offer cross-examination of the testimony as conducted by codefendants.<sup>220</sup>

### 2. Grand Jury Testimony

The Fifth Circuit in *United States v. Flores* held that the grand jury testimony of an accomplice or codefendant, though a statement facially against interest, made under oath, and in a "noncustodial, formal setting," lacked indicia of reliability sufficient to satisfy the Confrontation Clause.<sup>221</sup> The court noted that if the oath and formal setting were sufficient, "Congress could have dispensed with the cross-examination requirement codified in Rule 804(b)(1)."<sup>222</sup> The court found it significant that most of the declarant's testimony was given in response to leading questions and concluded that "accomplice or codefendant grand jury testimony, in and of itself, does not exhibit sufficient indicia of reliability."<sup>223</sup> Thus, the Fifth Circuit has held that

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216. *United States v. Deeb*, 13 F.3d 1532, 1541 (11th Cir. 1994). The court found a cooperator's direct examination testimony admissible where the defendant had the opportunity to introduce testimony of the cross-examination from the same proceeding and conducted by his codefendants. *Id.* at 1539-41.

217. *Id.* at 1538 (citing *United States v. Lang*, 904 F.2d 618, 623 (11th Cir. 1990)).

218. *Id.*

219. *Id.*

220. *Id.* at 1541.

221. *United States v. Flores*, 985 F.2d 770, 776 n.14 (5th Cir. 1993).

222. *Id.* (quoting *United States v. Fernandez*, 892 F.2d 976, 981 (11th Cir. 1989)).

223. *Id.* at 777 (citing *Garner v. United States*, 439 U.S. 936, 938 (1978) (Stewart, J.,

a non-custodial statement against interest, given under oath, is not sufficiently reliable to satisfy the Confrontation Clause.

The Sixth Circuit, in *United States v. Gomez-Lemos*, held that the “mere fact that [declarants] gave testimony under oath, in the ‘relatively solemn setting’ of a grand jury proceeding, does not guarantee the trustworthiness of their statements implicating defendant.”<sup>224</sup> The court noted that the Supreme Court consistently has held “the uncross-examined testimony of an alleged co-conspirator” insufficiently reliable for admission under the Confrontation Clause.<sup>225</sup> The Sixth Circuit found no extraordinary circumstances in the offered grand jury testimony that would rebut this “strong” presumption of unreliability.<sup>226</sup>

The court in *Gomez-Lemos* also concluded that the desire to curry favor with the government does not end after a declarant has entered into a plea agreement, and not even after sentencing, because “the government still possesses influence regarding the security level and location of the prison where the [declarant] is to be incarcerated.”<sup>227</sup>

The court then found that allowing the use of extrajudicial statements “creates a powerful incentive” for the prosecution to plan for the unavailability of declarants so as to prevent confrontation.<sup>228</sup> The panel of judges noted, “[i]t is much easier to plan a trial and convince a jury of a contested set of facts if the jury hears only the direct testimony from one side.”<sup>229</sup> The Sixth Circuit, holding that the oath alone was insufficient to guarantee reliability of a non-custodial statement under the Confrontation Clause, reversed and remanded for a new trial.<sup>230</sup>

### 3. Custodial Statements

The Third Circuit in *United States v. Boyce* held that the proponent of a custodial statement against interest must show that the declarant “was not motivated by a desire to curry favor” with the government.<sup>231</sup>

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dissenting from denial of certiorari) for the premise that testimony given in front of a grand jury is not particularly reliable, because such testimony permits leading questions and multiple hearsay without cross-examination of witnesses).

224. *United States v. Gomez-Lemos*, 939 F.2d 326, 330 (6th Cir. 1991) (quoting *Tolbert v. Jago*, 607 F.2d 753, 756 (6th Cir. 1979) (Engel, J., concurring)). *But see*, e.g., *Curro v. United States*, 4 F.3d 436, 437 (6th Cir. 1993) (admitting grand jury testimony as a statement against interest).

225. *Gomez-Lemos*, 939 F.2d at 332.

226. *Id.*

227. *Id.* at 333.

228. *Id.*

229. *Id.*; *see also* Douglass, *supra* note 83, at 1814 (arguing that courts should use “the constitutional power to exclude hearsay . . . to compel the prosecution to act where necessary to allow for fair testing of hearsay”).

230. *Gomez-Lemos*, 939 F.2d at 334.

231. *United States v. Boyce*, 849 F.2d 833, 836 (3d Cir. 1988); *see also* *United States v. Palumbo*, 639 F.2d 123, 128 (3d Cir. 1981) (finding error in admission of statement

Evidence that the government would *recommend* significant sentencing concessions as the result of declarant's later plea bargain increased the likelihood of unreliability.<sup>232</sup> The court held that admission of the statement constituted an abuse of discretion under the totality of the circumstances and a prejudicial error that required reversal of defendant's convictions.<sup>233</sup>

The Sixth Circuit addressed the admissibility of custodial confessions in *United States v. McCleskey*.<sup>234</sup> The court found that a custodial confession, inculcating the defendant, is "classic, inadmissible hearsay, when offered by the government, *regardless* of the constitutional concern."<sup>235</sup> The declarant had been advised of his rights, had made a voluntary confession, and had received no express promise of leniency for cooperation.<sup>236</sup> The court found that these safeguards were applicable to the reliability of the statement *only respecting its use against the declarant*, and not respecting its use against the defendant.<sup>237</sup> Because the declarant had "a strong interest in shifting at least some of the responsibility from himself" to the defendant, the Sixth Circuit held that such a statement cannot be considered to be against its declarant's interest.<sup>238</sup> The court additionally found that the admission violated the defendant's confrontation rights for the same reasons.<sup>239</sup>

The Eighth Circuit in *United States v. Hazelett* found that statements inculcating the defendant, made after a declarant's "conviction was assured," probably were "motivated by 'the very natural desire to curry favor . . . [and] the desire to alleviate culpability by implicating others.'"<sup>240</sup> The defendant had "nothing to lose" and much to gain from pointing to defendant's culpability.<sup>241</sup> The court held that, under the circumstances, the statements were not sufficiently against the declarant's interest, and the lower court's holding to the contrary was reversible error.<sup>242</sup>

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when there was a "very real danger that the motivation" for the statement, made after police had already found cocaine on declarant, may have been to "curry favor with the authorities").

232. *Boyce*, 849 F.2d at 836-37.

233. *Id.* at 837.

234. 228 F.3d 640 (6th Cir. 2000).

235. *Id.* at 645.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *United States v. Hazelett*, 32 F.3d 1313, 1318 (8th Cir. 1994) (alterations in original) (quoting *United States v. Riley*, 657 F.2d 1377, 1384 (8th Cir. 1981)).

241. *Id.* at 1318.

242. *Id.* at 1319. The statement was the only direct evidence against the defendant to show possession of cocaine. *Id.*

In *United States v. Costa*,<sup>243</sup> the Eleventh Circuit concluded that a declarant, knowing that the government had a strong case against him, had nothing to lose and much to gain by naming the defendants as his coconspirators.<sup>244</sup> The court found that a reasonable person in the declarant's position "might well have been motivated to misrepresent the role of others in the criminal enterprise, and might well have viewed the statement inculcating the defendants to be *in* his interest rather than against it."<sup>245</sup> The statement was not genuinely against the declarant's interest because it directly implicated the defendants.<sup>246</sup> Because the statement was the only direct evidence against the defendants, the court reversed the convictions of the defendants and remanded for a new trial.<sup>247</sup>

### III. AN ACCOMPLICE'S PLEA ALLOCUTION IS GENERALLY IN THE INTEREST OF ITS DECLARANT AND ADMISSION OF SUCH STATEMENTS SHOULD BE BARRED UNDER THE CONSTITUTION AND UNDER A PROPER INTERPRETATION OF THE FEDERAL RULES

The courts that have admitted plea allocutions as statements against interest have virtually ignored the plea bargaining process. An examination of the plea bargaining process shows that an alleged coconspirator's allocution—the only kind of allocution used against another defendant—is generally *in* the interest of its declarant. The arbitrary admission of such statements violates the Confrontation Clause and improperly circumvents the Federal Rules. Section A of this part argues that the unavailable accomplice's plea allocution is not a statement against interest and is inherently unreliable because of the blame-shifting incentives present in the plea bargaining process. The oath and the presence of a judge cannot counter this inherent unreliability, and such statements should be barred under the Confrontation Clause. Section B offers the alternative argument that admission of a third person's guilty plea to prove an element of a crime against the accused circumvents the legislative intent of the Federal Rules. Therefore, plea allocutions ordinarily should be barred under the Rules.

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243. 31 F.3d 1073 (11th Cir. 1994).

244. *Id.* at 1079.

245. *Id.*

246. *Id.*

247. *Id.* at 1080. Although the confession was inadmissible under 804(b)(3) because of its direct inculcation of defendants, the court suggested that the confession would be admissible if it only implicated the defendants indirectly—if the jury were to infer indirectly from declarant's "knowledge of the cocaine and the defendants' presence in Alabama with [declarant], that the defendants also knew of the cocaine." *Id.* at 1079.

*A. An Accomplice's Plea Allocution Is Generally a Statement in the Interest of the Declarant and Presumptively Unreliable*

The fact that a statement is truly against interest makes it more reliable,<sup>248</sup> and is one of the guarantees of trustworthiness that supports its admissibility under the Confrontation Clause.<sup>249</sup>

Plea allocutions only facially qualify as statements against interest.<sup>250</sup> Whether a statement is truly against interest depends on the circumstances.<sup>251</sup> Commentators and the Supreme Court have found statements to be in the declarant's interest where he or she had the opportunity to curry favor with the government for a lenient sentence.<sup>252</sup>

Furthermore, an accomplice's allocution is the product of a process that encourages the fabrication of testimony.<sup>253</sup> As such, accomplice plea allocutions are inherently unreliable and their admission violates the Confrontation Clause, regardless of the safeguards of the plea hearing and later redaction.

**1. An Accomplice's Allocution Is Generally in the Interest of Its Declarant**

The plea bargaining process has been criticized at length.<sup>254</sup> Defendants, defense counsel, and prosecutors have many incentives to negotiate a guilty plea. The guilty plea, in effect, is a bargain in the best possible interests of all involved.<sup>255</sup> The rewards for a defendant of responding to government influence are too great to pass up.<sup>256</sup> The accomplice is in the perfect position to reap the great rewards of cooperation, and he or she likely will use fabricated testimony if it will result in a better deal.<sup>257</sup>

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248. *See supra* Part I.A.

249. *See supra* note 111 and accompanying text.

250. *See United States v. Winley*, 638 F.2d 560, 562 (2d cir. 1981).

251. *See supra* Part I.

252. *See supra* Part I.

253. *See infra* Part III.A.1.

254. *E.g.*, Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 Cal. L. Rev. 652 (1981); Stephen J. Schulhofer, *Plea Bargaining As Disaster*, 101 Yale L.J. 1979 (1992).

255. Goldstein, *supra* note 128, at 33; Ian Weinstein, *Regulating the Market for Snitches*, 47 Buff. L. Rev. 563, 625 (1999) (concluding that "cooperation is simply too attractive to all the players in the system, and they generally gain these advantages at little or no personal cost").

256. *See infra* Part III.A.1.a.

257. *See infra* notes 292-94 and accompanying text.

a. *The Rewards of Pleading Guilty*

A defendant arguably will be rewarded for responding to the influence of the government,<sup>258</sup> even in a simple guilty plea.<sup>259</sup> The guilty plea is “conditioned on receipt of a sentencing discount.”<sup>260</sup> The inducement to plead can be a sentence reduction by as much as almost forty percent.<sup>261</sup> To quote the Mississippi Supreme Court: “It may be readily seen then that, in [declarant’s] mind a guilty plea might engender favorable treatment even to the extent of reducing a sentence of life imprisonment to one of one year in the county jail.”<sup>262</sup>

258. For federal offenses, sentences are determined by the Sentencing Guidelines: [A] sentencing “range” (expressed in months in prison, including no prison time for some ranges) is established based on a so-called “Offense Level” (expressed as a certain number of points on the vertical axis of a “Sentencing Table”) and a so-called “Criminal History Category” (represented on the horizontal axis of the same “Sentencing Table”). The intersection of the particular “Offense Level” and “Criminal History Category” on the Sentencing Table produces the sentencing range. The presiding judge must give the defendant a determinate sentence within the Sentencing Guidelines range unless the judge finds a legally sufficient reason for “departure” from the range.

G. Nicholas Herman, *Plea Bargaining* § 7:02 (1997 & Supp. 2001). Entering a plea of guilty entitles the defendant to a reduction, or downward departure, for “acceptance of responsibility,” resulting in a two-level reduction from his or her offense level. *Id.* § 7:07 (noting that the two-level reduction is available “so long as the defendant admits ‘or does not falsely deny[]’ the ‘Relevant Conduct’ in connection with the offense of conviction” (citing U.S. Sentencing Guidelines Manual § 3E1.1, cmt. n.1 (1987)) (alteration in original)).

In 1999, those who were convicted after going to trial received, on average, 155.4 months of prison time. U.S. Dep’t of Justice, Bureau of Justice Statistics, 1999 Compendium of Federal Justice Statistics 64. Those opting to plea received an average of 52.3 months. *Id.* “Drug offenders convicted at trial received an average of 209.7 months as compared to the 67.9 months for drug offenders convicted by guilty plea. Violent offenders who went to trial received an average sentence of 163.4 months as compared to the 80.6 months for those convicted by plea.” *Id.*

259. “[M]ost defendants take this course, usually in exchange for a sentencing discount.” Daniel C. Richman, *Cooperating Clients*, 56 Ohio St. L.J. 69, 71-72 (1995). Professor Richman frames the ordinary plea decision as a contract in which the “benefit of [the] bargain” is a binding “sentencing concession,” in contrast with the uncertainty of a cooperation agreement. *Id.* at 91-96. Other commentators have noted that “the defendants who pay the heaviest penalties under the current regime [are those] who refuse to bargain, go to trial, and are convicted.” Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1933 (1992).

260. Richman, *supra* note 259, at 71 n.11 (finding the plea “hardly an indication of true atonement”).

261. Weinstein, *supra* note 255, at 566 n.12 (discussing incentives to plead guilty under federal sentencing guidelines).

262. *Garrison v. State*, 726 So. 2d 1144, 1148-49 (Miss. 1998) (finding the declarant’s guilty plea inadmissible though it had been made under oath and in the presence of her attorney because it lacked sufficient guarantees of trustworthiness under the Confrontation Clause); *see also Williams v. State*, 667 So. 2d 15, 21 (Miss. 1996) (“Considering the totality of the circumstances, including the declarant’s motive to fabricate . . . , this statement fails under Confrontation Clause analysis and should not be admitted.”).

The expected benefit of a sentencing discount may induce a defendant into making a possibly false<sup>263</sup> and “self-serving” statement.<sup>264</sup>

This reduction, though significant, still may result in a long prison sentence.<sup>265</sup> Therefore, “virtually all defendants are keenly interested” in the possibility of a greater sentence reduction.<sup>266</sup> In federal cases, the most significant reduction, or “downward departure,” is based on negotiating for a cooperation agreement, or a departure based on “substantial assistance.”<sup>267</sup> This option is available only to those who are in the position to implicate others.<sup>268</sup> In a case involving more than one defendant, the prosecution is often willing to give one or more codefendants the option of cooperation,<sup>269</sup> for which the reward is a lesser sentence than that of the defendant who pleads guilty without the option of cooperating.<sup>270</sup> Professor Richman finds that defendants have “extraordinary incentives to cooperate.”<sup>271</sup> Professor Weinstein agrees: “[C]ooperation is the most likely, and often the only realistic chance, a defendant has to get a sentence below the [statutory] range.”<sup>272</sup> Depending on the jurisdiction, even greater leniency may lie outside the Sentencing Guidelines, through the use of charge and fact bargaining.<sup>273</sup>

263. Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 *Hastings L.J.* 957, 985-86 (1989); see also T. Kenneth Moran & John L. Cooper, *Discretion and the Criminal Justice Process* 59 (1983) (finding that although “[p]lea bargaining ensures the fact that an accused party is punished[,] this does not mean that the person was guilty”).

264. McMunigal, *supra* note 263, at 986; see Moran & Cooper, *supra* note 263, at 75 (“The certainty of less punishment can be very persuasive to an accused . . .”).

265. Weinstein, *supra* note 255, at 575-76.

266. *Id.* at 576.

267. The “most significant . . . downward departure [is] based on providing ‘substantial assistance.’” Herman, *supra* note 258, § 7:08.

268. 18 U.S.C. § 3553(e) (1994). A cooperator provides “substantial assistance in the investigation or prosecution of another person.” *Id.*

269. See generally Ellen Yaroshesky, *Cooperation With Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 *Fordham L. Rev.* 917 (1999) (finding from numerous anecdotal accounts by prosecutors that cooperators’ incentives and opportunities to lie often result in fabricated testimony that prosecutors wrongly believe to be true).

270. “[T]he snitch can expect a far more lenient sentence than he would have received had he merely pleaded guilty.” Richman, *supra* note 259, at 72. For example, “[t]he benefits of cooperation are dramatic for narcotics defendants, at least when their sentences are compared to sentences of similarly charged defendants who do not cooperate. [An analysis of data] reveals an average sentence reduction of over five years for . . . defendants who gain cooperation departures.” Weinstein, *supra* note 255, at 581.

271. Richman, *supra* note 259, at 78 (noting that although governments have always given special leniency to snitches, those rewards “seem particularly great in these days of lengthy sentences”). Cooperation “opens the possibility of a dramatic sentence reduction, all the way down to the gold standard—a sentence of no prison time at all.” Weinstein, *supra* note 255, at 577-78.

272. Weinstein, *supra* note 255, at 577.

273. *Id.* at 608. Prosecutors consider sentencing in their charging decisions and “engage in sentence fact and factor bargaining.” Ian Weinstein, *Sinful Sentencing:*

Even in the case of defendants who would not plead guilty, their attorneys may encourage bargaining for a plea. The defense attorney has “powerful incentives to avoid trial.”<sup>274</sup> The vast majority of defense attorneys work either at a flat fee or low hourly rates, with low caps on total compensation.<sup>275</sup> “[P]revailing pathologies of the criminal justice system suggest that defense attorneys, whether retained or appointed, have strong incentives to push clients into plea bargains, with little thought to the clients’ interests.”<sup>276</sup> A defendant may be pushed into a plea bargain, even if he or she ordinarily would have wanted a trial.<sup>277</sup>

b. *Prosecutorial Incentives to Offer Attractive Plea Bargains*

There are no systemic checks on plea negotiations that would ensure that resulting plea allocutions are an accurate reflection of reality.<sup>278</sup> The chief prosecutor may seek to “enhance her reputation and her political standing” by ensuring a “high conviction rate” and “an absence of high-profile trial losses.”<sup>279</sup> Prosecutors attain both

The Wages of Overcriminalization and Harsh Mandatory Sentences Are Injustice 46 (Aug. 26, 2002) (unpublished manuscript, on file with author) (citing Lisa M. Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts*, 30 Conn. L. Rev. 569, 629 (1998); Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post-Mistretta Period*, 91 N.W. U. L. Rev. 1284 (1997); Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 Am. Crim. L. Rev. 231 (1989)). A prosecutor’s unreviewable charging decisions and fact bargaining leave “defendants [with] nowhere else to look for mercy but to the prosecutor.” *Id.* at 18-19, 39.

274. Schulhofer, *supra* note 254, at 1988.

275. *Id.* at 1988-89; Moran & Cooper, *supra* note 263, at 65, 75-76.

276. Richman, *supra* note 259, at 110-26 (but finding that, despite this, defense attorneys “do not routinely sell out their clients”); see Moran & Cooper, *supra* note 263, at 65. “Assigned defense lawyers are much more amiable to a deal with the prosecution. [T]he poor[,] who are more than likely to have assigned counsel[,] are most likely to suffer because of this . . .” *Id.*

277. See Moran & Cooper, *supra* note 263, at 64. “[S]ince the accused is made to believe that his lawyer is interested in doing the best for him, . . . if the defense lawyer tells the accused that he should agree to the bargain, he is likely, more often than not, as the record shows, to accept the deal.” *Id.*

278. See Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 Vand. L. Rev. 1, 16 (1992) (finding that “[t]he intensity of the dilemmas, the lonely position of the prosecutor, and the possibility of bad decisions are good reasons for seeking some mechanism for review” of bargaining procedures); Schulhofer, *supra* note 254, at 1990-91 (arguing that the contract theory of plea bargaining fails to account for the lack of any “market-like solutions” for massive agency costs); Weinstein, *supra* note 255, at 625-26 (concluding that “[c]ooperation’s significant costs in sentencing inequity, damage to the adversarial system and governmental encouragement of morally problematic behavior are almost entirely externalized and offer no check upon the buyers and sellers”).

279. Schulhofer, *supra* note 254, at 1987; see Moran & Cooper, *supra* note 263, at 60; see also Hughes, *supra* note 278, at 67 (finding that “[t]he prosecutor’s delicate and difficult obligation to enforce the criminal laws . . . sometimes is in danger of being clouded by public and private pressures and by personal ambition”).

goals through the use of guilty pleas.<sup>280</sup> Additionally, prosecutorial trial success, as a “key measure” of performance, pressures front-line prosecutors to seek as much evidence as possible from pleading cooperators.<sup>281</sup> Plea bargaining tends to reflect varying prosecutorial incentives that differ from the public’s interest in law enforcement, resulting in “unduly lenient sentence offers.”<sup>282</sup>

Furthermore, prosecutors have substantial incentives to offer hearsay in lieu of live testimony. As one commentator contends, “for a prosecutor who possesses a favorable hearsay statement from an accomplice who will make an unsavory or unpredictable witness at trial, the [exception] gives the prosecutor an incentive to keep the witness ‘unavailable.’”<sup>283</sup> The reality is that “[f]ew cooperating witnesses are ideal”<sup>284</sup> and their character actually may harm the government’s case.<sup>285</sup> Additionally, testifying cooperators certainly

280. See Moran & Cooper, *supra* note 263, at 60 (“Plea bargaining does produce a kind of conviction, a conviction that has not been legally proved, but a conviction in the statistical records of the prosecutor’s office.”); Schulhofer, *supra* note 254, at 1987 (finding that the chief prosecutor will “more often . . . want to ensure settlement, even if this requires overly generous plea offers”); Weinstein, *supra* note 255, at 597 (noting that the “numbers of pleading defendants . . . form a persuasive argument to others that they too should not contest their cases”).

281. Weinstein, *supra* note 255, at 596-97.

282. Schulhofer, *supra* note 254, at 1988; see also Hughes, *supra* note 278, at 14 (finding that “prosecutors often are ready to make full immunity deals with respect to serious ‘victimless’ crimes . . . in which the public does not so clearly hear the voices of an individual victim and his family crying for retribution”).

283. Douglass, *supra* note 83, at 1812. The accomplice can be put on the witness stand at the discretion of the prosecutor. *United States v. Singleton*, 165 F.3d 1297, 1301-02 (10th Cir. 1999) (holding that United States Attorney’s Office may offer leniency for truthful testimony of an accomplice without violating statute). Professor Douglass points out that “the power to immunize a witness or to bargain in exchange for testimony is the prosecutor’s alone. Courts almost never look behind the exercise of that power, even where the prosecutor’s decisions seem calculated to make confrontation impossible.” Douglass, *supra* note 83, at 1806 (footnotes omitted). Because only the prosecution has the power to compel live testimony, “nothing promotes [the] option [of] presenting hearsay along with the live, unvarnished testimony of an immunized accomplice who has not become a sycophant of the prosecutor.” *Id.* at 1811-12.

The Supreme Court has found a defendant to be denied the right of confrontation when a declarant has exercised the privilege against self-incrimination. *Douglas v. Alabama*, 380 U.S. 415, 420-21 (1965). The Court has never determined whether the prosecution can be found to have sustained its burden of showing unavailability in the same circumstances. *Lilly v. Virginia*, 527 U.S. 116, 124 n.1 (1999). *But see generally* Douglass, *supra* note 83 (arguing that neither the defense nor the prosecution wants the live testimony of most co-conspirator declarants, and the battle over unavailability is really about the admissibility of evidence). Professor Douglass finds that the live testimony of the declarant in *Lilly* similarly was not sought after. Douglass, *supra* note 83, at 1800 n.8. Douglass also discusses the impracticality of trying and sentencing a declarant as a way of extinguishing the Fifth Amendment privilege. *Id.* at 1826 n.124.

284. Weinstein, *supra* note 255, at 599; see Douglass, *supra* note 83, at 1815.

285. Douglass, *supra* note 83, at 1848 (“[P]rosecutors rightly fear that an unsavory witness may taint their whole case.”); Hughes, *supra* note 278, at 39-40 (“[A]cquittals by juries are sometimes attributable, at least in part, either to skepticism about the

will face impeachment with evidence of the cooperation agreement and their self-interest in testifying against the accused.<sup>286</sup> The use of guilty pleas avoids this showcasing of the prosecution's distasteful alliances.<sup>287</sup> Impeachment of the hearsay evidence is also avoided, though available to the defense.<sup>288</sup> Finally, the guilty plea has an aura of reliability as a statement facially against the declarant's interest, despite circumstances that may not be fully comprehended by a jury.<sup>289</sup>

*c. Substantial Government Influence on the Substance of the Allocution Further Undermines Its Reliability*

Even outside the standard cooperation context, the prosecution arguably has considerable influence on the content of a plea allocution. In return for the sentence discount, the declarant's part of the bargain is to allocute as "specified" by the prosecution and in a way that fits the prosecution's version of the facts.<sup>290</sup> In the typical cooperation scenario, the prosecutor often will dictate or prepare the allocution itself.<sup>291</sup>

Implicit forms of government influence are inherent in the accomplice scenario, and are central to the questionable reliability of accomplice incrimination.<sup>292</sup> As Professor Hughes contends, the

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credibility of cooperating witnesses who, in addition to their confessed participation in the instant crime, may also have extensive criminal records, or to revulsion at the sources of the prosecution's case.").

286. Weinstein, *supra* note 255, at 599.

287. Professor Douglas notes that "juries seldom hear from [an accomplice] unless his story is coerced through a grant of immunity, induced by a favorable plea bargain, or—as in *Lilly*—presented to the jury in the form of hearsay." Douglass, *supra* note 83, at 1816.

288. Defense counsel generally avoid the impeachment of hearsay evidence, an alternative under Rule 806 of the Federal Rules of Evidence. Douglass, *supra* note 85, at 193 n.9. Various reasons for failing to pursue impeachment may include a decision not to use limited resources on an all-or-nothing battle over admissibility, expectations that the jury will discount hearsay evidence, and maintenance of "a 'pure' denial-of-confrontation issue for de novo review on appeal, rather than a record showing that counsel sought and obtained the functional equivalent of confrontation." *Id.* at 221-24. Though the fight over admissibility seems to be strategically preferred by defense attorneys, Professor Douglass finds that most hearsay is more reliable and less prosecution-tainted than the polished testimony of an available accomplice-cooperator. Douglass, *supra* note 83, at 1828-39.

289. Cross-examination of the declarant ideally would "impeach the accomplice by demonstrating a bias toward the defendant, prior convictions, prior inconsistent statements, a self-serving motive, or an untrustworthy character." Douglass, *supra* note 83, at 1864.

290. Scott & Stuntz, *supra* note 259, at 1954.

291. See, e.g., *United States v. Centracchio*, 265 F.3d 518, 526, 529 (7th Cir. 2001) (finding a plea allocution "entirely prepared by the government" to be trustworthy regardless of declarant's possible incentive to "get a good deal").

292. Professor Douglass notes that the self-inculpatory nature of the cooperator's statement—the very basis for crediting the cooperator's statement with any

“temptation to lie in cooperation agreement cases is not just a natural feature of the landscape but *specifically is introduced or inflated by the government when it offers immunity or leniency in return for cooperation.*”<sup>293</sup> The accomplice, who possesses inside information, may find it easy to convincingly fabricate evidence.<sup>294</sup> Fabrication of a few details, if necessary, can be well worth the rewards of cooperating with the government.

An accomplice will swear in court to the words of the adversary if it results in a great deal.<sup>295</sup> It is not a stretch to conclude that the same declarants would, or do, swear to testimony fabricated at least in part.<sup>296</sup> These allocutions are later offered into evidence by the prosecution when the declarant is found to be unavailable.<sup>297</sup>

An incriminating plea allocution is the product of the accomplice’s desire for shifting blame, and is coached, if not written, by a prosecutor with an eye towards its use against another defendant. Both parties have the same goal, that of establishing a record against another person. In the cooperation context, a testifying cooperator’s lies are often used against others in court.<sup>298</sup> The plea allocution is no exception.

reliability—is highly suspect when such a statement is made to prosecutors: “When it comes to reliability, the fact that parts of the confession are self-inculpatory is almost incidental. It is difficult to ‘finger’ your criminal colleague without admitting some participation in the crime yourself.” Douglass, *supra* note 83, at 1828.

293. Hughes, *supra* note 278, at 35 (emphasis added). “Accomplices, if they give information . . . may have a natural tendency to lie in order to minimize their part in the crime. A promise of leniency in exchange for cooperation surely enhances that tendency.” *Id.* See generally Yaroshefsky, *supra* note 269 (finding from numerous anecdotal accounts by prosecutors that cooperators are eager to please prosecutors, even to the point of making false self-incriminating statements so as to appear useful).

294. See Douglass, *supra* note 83, at 1837-38 (“[T]he most significant tailoring of testimony takes place before the prosecutor ever talks to the accomplice.”); Hughes, *supra* note 278, at 32 (“Courts should instruct juries to consider how easily [testifying accomplices] with inside knowledge can fabricate testimony . . .”).

295. Cf. *United States v. Centracchio*, 265 F.3d 518, 526, 529 (7th Cir. 2001) (finding a plea allocution “entirely prepared by the government” to be trustworthy regardless of declarant’s possible incentive to “get a good deal”).

296. See generally Yaroshefsky, *supra* note 269 (finding from numerous anecdotal accounts by prosecutors that cooperators’ incentives and opportunities to lie often result in fabricated testimony that prosecutors wrongly believe to be true).

297. The prosecutor ordinarily can choose whether to make a hearsay declarant available: “Unlike most declarants, [the accomplice’s] live testimony can be purchased. His silence is a bargaining chip which the prosecutor has the power to redeem if the price is right.” Douglass, *supra* note 83, at 1804 (citing *United States v. Singleton*, 165 F.3d 1297 (10th Cir. 1999) (en banc)). Professor Douglass continues,

Typically, the accomplice’s story arrives in the form of hearsay as the result of three critical pretrial choices: the choice of the accomplice to “take the Fifth”; the choice of the prosecutor not to immunize or entice the accomplice into live testimony; and the choice of the defense to attack the hearsay itself rather than to question the accomplice’s silence or the prosecutor’s tactics.

*Id.* at 1805.

298. See generally Yaroshefsky, *supra* note 269.

d. *The Better View Is that the Accomplice's Allocution Is Generally a Statement in the Interest of Its Declarant*

Those circuits admitting plea allocutions have ignored the realities of the plea bargaining process.<sup>299</sup> As other courts have held, a statement must be genuinely against the interest of the declarant under the totality of the circumstances in order for it to be admitted under the exception.<sup>300</sup> These courts closely consider the motivations of declarants.<sup>301</sup>

Generally, most courts find that the blame-shifting nature of most accomplice incriminations preclude these statements from being against a declarant's interest.<sup>302</sup> Most circuits reason that a person who has admitted no more than the government already knows has "nothing to lose" by pointing the finger at another person's culpability,<sup>303</sup> and everything to gain by cooperating with the prosecutor.<sup>304</sup>

These circuits have found that although a statement may be facially against the interest of the declarant, the totality of the circumstances in these cases has proven otherwise.<sup>305</sup> Similarly, the guilty plea is made in circumstances that belie its characterization as a statement against interest. The declarant has nothing to lose by stating that which the prosecutor already knows. Generally, everything in the allocution is known or even prepared by the government.<sup>306</sup> Additionally, the declarant has chosen to plead guilty after knowing the realistic outcomes for all of his or her options.<sup>307</sup> In contrast to the custodial confession, the guilty plea is the product of a bargain for

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299. See *supra* notes 150-51, 167 and accompanying text.

300. See *supra* Part II.B-C.

301. See *supra* Part II.B-C.

302. See *supra* Part II.B-C.

303. See *supra* Part II.B-C.

304. See *supra* Part III.A.1.a.

305. See *supra* Part I.B-C.

306. See *supra* Part III.A.1.c.

307. See *supra* Part III.A.1.a. Cf. *United States v. Gonzalez*, 559 F.2d 1271, 1273 (5th Cir. 1977).

A complete reading of the grand jury transcript discloses that the witness was closely weighing whether it would be better for him to testify under the circumstances, or not to testify. He obviously decided it was to his best interest to testify. Given the prosecutor's offer of immunity for offenses concerning this marijuana transaction, the only civil or criminal liability that he could face at the time would occur if he did not testify. Thus whether he told the truth or not was incidental to what would happen to him if he did not say *something*. If he answered the questions at the time, he would be free of the threat of contempt. The important thing to him was that he gave *an* answer, be it truth or not. Under these circumstances, it cannot be said that "a reasonable man in his position would not have made the statement unless he believed it to be true."

*Id.*

which the declarant knows the rewards.<sup>308</sup> In the case of a cooperating codefendant, there are even greater rewards for choosing the liability of a guilty plea over that of not pleading and going to trial.<sup>309</sup> A plea allocution, under most circumstances, is made in the interest of its declarant.

## 2. An Accomplice's Allocution Is Presumptively Unreliable Despite the Safeguards of the Plea Hearing and Any Subsequent Redaction, and Its Admission Violates the Confrontation Clause

The previous section of this Note concluded that a plea allocution, particularly that of the cooperator, generally is made in the interest of its declarant. The next part of this Note finds that the plea hearing process and redaction of the allocution do not add to the reliability of the plea allocution. The plea allocution, therefore, is not any more reliable than ordinary hearsay.

Furthermore, an accomplice's guilty plea is presumptively unreliable under the *Lilly* plurality's reliability approach. This section concludes that the admission of such statements violates the Confrontation Clause under both the reliability and the testimonial approaches of the majority of the *Lilly* Court.

### a. *The Plea Hearing Does Not Add Reliability to a Plea Allocution*

For the defendant about to receive a deep sentencing discount in exchange for his guilty plea, the allocution is simply an extension of the plea negotiations.<sup>310</sup> As one commentator has concluded: "*The plea is explicitly the product of a bargain* in which each party is acting for his own benefit."<sup>311</sup> The oath and the participation of the judge are incidental to the process.<sup>312</sup> "[B]y the time the plea is tendered to the court, [a] defendant likely has at least partly executed the cooperation agreement by debriefing, or has executed it fully by testimony before a grand jury or at a trial."<sup>313</sup> The plea hearing, therefore, comes too late in the process to act as an effective safeguard of the allocution's reliability.

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308. See *supra* note 259.

309. See *supra* Part III.A.1.a.

310. Cf. Hughes, *supra* note 278, at 56 ("Until the plea is consummated . . . , it is merely an executory contract without the constitutional significance to compel judicial intervention." (citing *Mabry v. Johnson*, 467 U.S. 504 (1983))).

311. Lloyd L. Weinreb, *Denial of Justice: Criminal Process in the United States* 78 (1977) (emphasis added).

312. Hedieh Nasheri, *Betrayal of Due Process: A Comparative Assessment of Plea Bargaining in the United States and Canada* 34 (1998) (finding that the participation of the judge is necessary only to establish for the record the voluntary nature of the declarant's statement and to "effect" the plea bargain).

313. Hughes, *supra* note 278, at 18.

The declarant in a guilty plea proceeding is most likely concerned with uttering the “expected” answers that will seal the deal.<sup>314</sup> The last thing of which one can be certain is that the declarant is concerned about the accuracy of his allocution.<sup>315</sup> Making the statement is in the declarant’s best interest, and the guilty plea proceeding is “merely a ritual”—a means to an end.<sup>316</sup> Even the Massachusetts Court of Appeals has acknowledged that “a guilty plea may be affected by the exigencies of plea bargaining rather than manifest an unequivocal admission of guilt.”<sup>317</sup>

Though a declarant is likely to be more concerned with the consummation of a deal than with the significance of the proceedings, no other safeguards are in place to ensure the truth of the allocution:

In the guilty plea process . . . the defendant normally is not cross-examined. No jury evaluates the defendant’s demeanor. Admissions to the critical facts normally are not related within the context of other testimony provided by the defendant. Nor is there typically any context provided by documents, other items of physical evidence, or the testimony of other witnesses within which to evaluate the knowledge or the sincerity of the defendant’s confession.<sup>318</sup>

The presence of a judge also does not assure the accuracy of the statement.<sup>319</sup> In fact, the role of *most* judges in guilty plea proceedings is to “ratify[] agreements reached by others.”<sup>320</sup> The content of an allocution, made under the terms of a plea agreement, effectively depends on the prosecutor’s conclusions about the truth of the matter, which in turn depend, to some extent, on the declarant’s version of events.<sup>321</sup>

314. David W. Neubauer, *America’s Courts and the Criminal Justice System* 230 (5th ed. 1996).

315. Weinreb, *supra* note 311, at 78 (“So far as *his* interest is concerned, nothing turns on the accuracy of his answers; all that counts is that the answers be ‘right,’ so that the plea will be accepted.”); *see* Neubauer, *supra* note 314, at 230.

316. Weinreb, *supra* note 311, at 78; *see also* Nasheri, *supra* note 312, at 34 (finding that the judge and defendant “act out a little ritual in which statements are elicited to show that the guilty plea is made without reservations, and without the promise of leniency”).

317. *Commonwealth v. Alicia*, 378 N.E.2d 704, 706 (Mass. App. Ct. 1978) (finding erroneous admission of third party’s guilty plea to implicate the Confrontation Clause under *Kirby v. United States*, 174 U.S. 47 (1899), and reversing judgment).

318. McMunigal, *supra* note 263, at 970.

319. Neubauer, *supra* note 314, at 226 (“[T]he judge knows relatively little about each case.”).

320. *Id.*; *see* Herman, *supra* note 258, § 8:09 (“[G]iven that approximately 90% of all criminal cases in the federal system result in guilty pleas, [the] ultimate power of the judge to prohibit plea agreements altogether is not exercised.” (footnote omitted)).

321. Neubauer, *supra* note 314, at 226 (“In short, the judge is dependent on the prosecutor and, to a lesser extent, the defense attorney.”); *see* Scott & Stuntz, *supra* note 259, at 1959 (the “judge is in a poor position to supervise the bargaining process”); *see also* Yaroshefsky, *supra* note 269 (finding that prosecutors will

Admitting courts point to the plea hearing as an additional guarantee of the reliability of the allocution.<sup>322</sup> Other courts and commentators have found to the contrary.<sup>323</sup> The oath alone is no safeguard of the reliability of a cooperator's statement, even in conjunction with a statement presumably against interest.<sup>324</sup> The judge's participation cannot be expected to regulate the accuracy of the statement.<sup>325</sup> The effect on the declarant of the presence of a judge and the sanctity of the proceedings are incidental to the purpose of the testimony itself—the sealing of a bargain.<sup>326</sup> Considering the totality of the circumstances,<sup>327</sup> the plea hearing adds no reliability to the negotiated allocution, and thus the allocution is no more reliable than ordinary hearsay.

#### b. Redaction Is Not a Safeguard of Reliability

Admitting courts are more willing to admit a plea allocution if the statement has been redacted.<sup>328</sup> Redaction, however, usually means just replacing the defendant's name with a neutral word.<sup>329</sup> The result is a statement inculcating another, unnamed person or persons, which was forbidden by the Supreme Court in *Williamson*.<sup>330</sup> When this statement is admitted into evidence, the jury wonders how this is relevant to the defendant.<sup>331</sup> It is fairly easy for the jury to fill in the gaps.<sup>332</sup>

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sometimes wrongly believe and prosecute on the basis of a cooperator's version of events).

322. See *supra* Part I.A.

323. See *supra* Part II.B.

324. See *supra* Part II.B.

325. See *supra* Part III.A.1.d.

326. See *supra* Part III.A.1.d.

327. See *supra* text accompanying notes 31, 55, 105.

328. See, e.g., *United States v. Centracchio*, 265 F.3d 518, 525-26 (7th Cir. 2001) (admitting a redacted allocution); *United States v. Gallego*, 191 F.3d 156, 167 n.5 (2d Cir. 1999) (admitting a portion of the allocution that did not name coconspirators); *United States v. Williams*, 927 F.2d 95, 98 (2d Cir. 1991) (“redacting all references to the named defendants”); *United States v. Chan*, 184 F. Supp. 2d 337, 342-43 (S.D.N.Y. 2002) (admitting an allocution that did not mention the defendant by name); *supra* notes 141-42 and accompanying text.

329. See *supra* note 141 for a typical plea allocution.

330. See *supra* notes 99-108 and accompanying text.

331. Cf. *Old Chief v. United States*, 519 U.S. 172, 192 (1997) (O'Connor, J., dissenting) (arguing that allowing the defendant to stipulate as to an element of an offense leads jurors to come to their own conclusions to either the detriment of the defendant or that of the prosecution). In *Old Chief*, the defendant had the option of “redaction” and the issue was not constitutional in nature.

332. The admission of redacted hearsay in the trial of only one defendant has been found to lead a jury to conclude that a statement, even redacted of all mention of the accused, is intended as evidence against “the only person on trial.” *Sanders v. Moore*, 156 F. Supp. 2d 1301, 1319 (M.D. Fla. 2001) (finding that the admission of the statement, “I was contracted to go and do one,” violated the Confrontation Clause although it did not mention the accused and was only damaging when heard in

*c. An Unavailable Accomplice's Allocution Is Presumptively Unreliable and Its Admission Violates the Confrontation Clause*

Because the plea hearing and subsequent redaction cannot ordinarily guarantee the reliability of the negotiated allocution, the statement is no more reliable than ordinary hearsay. Accomplice statements that incriminate others are even less reliable than ordinary hearsay—they are presumptively *unreliable*.<sup>333</sup> The *Lee* Court and *Lilly* plurality cited Justice White's dissent in *Bruton*<sup>334</sup> for the premise that “[d]ue to his strong motivation to implicate the defendant and to exonerate himself, a codefendant’s statements about what the defendant said or did are less credible than ordinary hearsay evidence.”<sup>335</sup> The incentive to use fabricated evidence<sup>336</sup> to reap the rewards of cooperation is central to the Supreme Court’s view that accomplice statements made to the government are presumptively unreliable.<sup>337</sup>

The *Lilly* plurality determined that it was “highly unlikely that the presumptive unreliability that attaches to accomplices’ confessions that shift or spread blame can be effectively rebutted when . . . the government is involved in the statements’ production, and when the statements describe past events and have not been subjected to adversarial testing.”<sup>338</sup> This statement effectively describes the guilty plea of an accomplice.<sup>339</sup>

The plurality would find an accomplice statement, influenced by the government, to be presumptively unreliable.<sup>340</sup> Justices Scalia and Thomas would find that any prior testimony, admitted without confrontation, is a clear violation of the Clause.<sup>341</sup> Both views arguably would find that the admission of an unavailable accomplice’s plea hearing testimony, subject as it is to government influence,<sup>342</sup> violates the Confrontation Clause.

Plea allocutions, as a general rule, are admissible in the Second, Seventh, and Ninth Circuits if the declarant faces a potentially long sentence by making the plea allocution, regardless of the resulting sentence. An accomplice’s plea allocution, however, under most

conjunction with other evidence).

333. See *supra* text accompanying notes 93-95.

334. *Bruton v. United States*, 391 U.S. 123 (1968).

335. *Id.* at 141; see *Lilly v. Virginia*, 527 U.S. 116, 132 (1999); *Lee v. Illinois*, 476 U.S. 530, 541 (1986).

336. See *supra* notes 292-94 and accompanying text.

337. See *supra* Part I.C.

338. *Lilly*, 527 U.S. at 137.

339. See *supra* Part I.C.; see also Rosenberg, *supra* note 83, at 541-42, 544-45 (2000) (assuming that the holding in *Lilly* applies to guilty pleas as well as to confessions made to government officials).

340. See *supra* notes 112-19 and accompanying text.

341. See *supra* notes 121-24 and accompanying text.

342. See *supra* Part III.A.1.c.

circumstances, is given in the best interest of the declarant. The plea hearing and later redaction do not add reliability to the allocution. Therefore, the better view is that an unavailable accomplice's plea allocution is generally a statement in the interest of the declarant and its admission violates the Confrontation Clause.<sup>343</sup>

*B. The Admission of Guilty Pleas Under 804(b)(3) Circumvents the Intention of FRE 803(22) as a Matter of Statutory Interpretation*

An accomplice's plea allocution also should be barred as inconsistent with the intent of the Federal Rules of Evidence. The drafters sought to exclude guilty pleas of third persons to prove an element of a crime against the accused.<sup>344</sup> The admission of such hearsay under the exception for statements against interest circumvents the purpose of rule 803(22) and should be barred.<sup>345</sup>

Rule 803(22) states that "judgments against persons other than the accused," including those resulting from guilty pleas, are not excepted from the hearsay rule "when offered by the Government in a criminal prosecution for purposes other than impeachment."<sup>346</sup> This rule was premised on the Supreme Court's decision in *Kirby v. United States*.<sup>347</sup>

The intent of Rule 803(22) was to avoid conflict with the confrontation right as expressed in *Kirby*.<sup>348</sup> There, the Supreme Court held unconstitutional a statute that allowed admission of a guilty plea, entered by the thief of property, against the recipient of the property as conclusive evidence of the stolen nature of the

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343. As Judge Weinstein concluded: "Because of the danger . . . involved, exclusion should almost always result when a statement against penal interest is offered *against* an accused." Weinstein & Berger, *supra* note 106, at 804-70.

344. See *infra* notes 348-65 and accompanying text.

345. "We think it is significant that the Federal Rules of Evidence see no inconsistency between Rule 804(b)(3) and Rule 803(22), which excepts from the admissibility of judgments of conviction a 'judgment entered . . . upon a plea of guilty . . . when offered by the Government in a criminal prosecution for purposes other than impeachment . . .'" *Commonwealth v. Alicia*, 378 N.E.2d 704, 706 (1978) (alterations in original).

346. Fed. R. Evid. 803(22). The rule provides the following:

Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of *nolo contendere*), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not effect admissibility.

*Id.*

347. 174 U.S. 47 (1899); see *supra* note 63.

348. Fed. R. Evid. 803(22) advisory committee's note. The availability of the declarant is "immaterial" for this exception. Similarly, Chief Judge Seitz interpreted the *Kirby* opinion to exclude the admission of guilty pleas as evidence of a conspiracy even where the declarant was available for cross-examination. *Bisaccia v. Attorney General*, 623 F.2d 307, 313-14 (3d Cir. 1980) (Seitz, C.J., concurring).

property.<sup>349</sup> The Court noted that Kirby had not been present at the proceedings against the declarants of the guilty pleas entered against him. Even if he had been, he “would not have been permitted to examine [declarants] upon their pleas of guilty, . . . nor introduce witnesses to prove that they were not in fact guilty of the offense charged against them.”<sup>350</sup>

In *United States v. Oates*<sup>351</sup>—a Second Circuit decision involving the explicit exclusion of hearsay by one rule, circumvented by the use of a broad exception in another—the prosecution offered the report of an unavailable government chemist to show that the defendant possessed heroin,<sup>352</sup> an element of the crime charged.<sup>353</sup> The court found that Rule 803(8) specifically barred the hearsay from use by the prosecution, as the report was nothing more than “factual findings resulting from an investigation made pursuant to authority granted by law.”<sup>354</sup> The court found that the specific exclusion under Rule 803(8) indicated a “clear legislative intent” that such hearsay was also to be barred under Rule 803(6).<sup>355</sup> The court found such intent in the Advisory Committee’s noted desire to avoid impinging on the confrontation right<sup>356</sup> and on the fact that Congress added a further protection to the Rule.<sup>357</sup> The court concluded that “Congress intended . . . the absolute inadmissibility of records of this nature.”<sup>358</sup>

The Fifth Circuit followed the reasoning of *Oates* in *United States v. Cain*.<sup>359</sup> Other circuits have come to the opposite conclusion for cases in which the author of the report at issue testifies at trial.<sup>360</sup> Courts have found that, under those circumstances, there is no conflict with Rule 803(8) because the confrontation of the author “protects against the loss of an accused’s confrontation rights, the underlying rationale

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349. *Kirby*, 174 U.S. at 56.

350. *Id.* at 54. “In *Kirby*, the Court addressed a defendant’s right to confront . . . the witnesses that the government would have presented in a trial of the third person.” *Bisaccia*, 623 F.2d at 314 (Seitz, C.J., concurring).

351. 560 F.2d 45 (2d Cir. 1977).

352. *Id.* at 64.

353. *Id.* at 53-56.

354. *Id.* at 67.

355. *Id.* at 68.

356. *Id.*

357. *Id.* at 69 (noting congressional amendment that added to Rule 803(8)(B) the language “excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel”).

358. *Id.*; see also *United States v. Cain*, 615 F.2d 380, 382 (5th Cir. 1980) (following reasoning of *Oates*); *United States v. Ruffin*, 575 F.2d 346, 355-56 (2d Cir. 1978) (finding that an IRS computer printout was not admissible against defendant because it detailed matters observed by law enforcement officials).

359. 615 F.2d at 382.

360. *United States v. Sokolow*, 91 F.3d 396, 405 (3d Cir. 1996); *United States v. Hayes*, 861 F.2d 1225, 1230 (10th Cir. 1988); see *United States v. King*, 613 F.2d 670, 673 (7th Cir. 1980).

for Rule 803(8) and the basis of the court's concern in *Oates*.<sup>361</sup> As the Seventh Circuit concluded, "[w]here the author does not testify, congressional intent would be thwarted if the reports were admitted under another hearsay exception."<sup>362</sup> When defendants have raised the issue, circuit courts have construed the Rules to avoid circumvention of congressional intent.<sup>363</sup>

With Rule 803(22), Congress clearly intended to completely exclude the use of guilty pleas and allocutions as evidence of an element of a crime.<sup>364</sup> The holding of *Kirby*, upon which the rule is based, is that the elements of a crime against the defendant must be shown by live testimony. "[A] fact which can be primarily established only by witnesses cannot be proved . . . except by witnesses who confront him at the trial, upon whom he can look while being tried."<sup>365</sup>

Proper statutory interpretation precludes the use of another rule to allow the plea allocution of an unavailable declarant to be used as proof of an element of the crime with which the accused is charged. The Second, Seventh, and Ninth Circuits allow the prosecution to show the element of conspiracy by hearsay.<sup>366</sup> This view improperly circumvents the intent of Rule 803(22).

#### CONCLUSION

The elements of shifting blame to the accused, government involvement in its creation, and the incentive of a comparatively huge discount in sentencing, belie any realistic vision of the accomplice's guilty plea as a statement against interest. The presumptive

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361. *Hayes*, 861 F.2d at 1230 (citation omitted); see also *Sokolow*, 91 F.3d at 405; *King*, 613 F.2d at 673.

362. *King*, 613 F.2d at 673.

363. See, e.g., *Sokolow*, 91 F.3d at 405; *Hayes*, 861 F.2d at 1230; *King*, 613 F.2d at 673; cf. *United States v. Yakobov*, 712 F.2d 20, 26-27 (2d Cir. 1983) (declining to extend limitations of Rule 803(8)(C) to Rule 803(10) because statement at issue did not directly address the actions of defendant, but instead addressed the absence of the records of an agency, had no "evaluative" aspects, and was not among the kinds of reports intended by Congress for exclusion under Rule 803(8)); *United States v. Neff*, 615 F.2d 1235, 1242 (9th Cir. 1980) (finding that 803(10) admissions--statements as to the absence of public records--were inherently trustworthy and lacked the evaluative nature of reports at issue in *Oates*); *United States v. Stone*, 604 F.2d 922, 925 (5th Cir. 1979) (finding Rule 803(8) was "designed to allow admission of official records and reports prepared by an agency or government office for purposes independent of specific litigation"). But cf. *United States v. Picciandra*, 788 F.2d 39, 44 (1st Cir. 1986) (upholding admission of DEA report against criminal defendants under Rule 803(5) (past recollection recorded) based on pre-*Oates* First Circuit precedent); *United States v. Metzger*, 778 F.2d 1195, 1201 (6th Cir. 1985) (declining to read Rule 803(8)(C) limitations into Rule 803(10) (absence of public record or entry), because "Congress could have included the restriction found in Rule 803(8)(C) in Rule 803(10)").

364. See *supra* note 348 and accompanying text.

365. *United States v. Kirby*, 174 U.S. 47, 55 (1899).

366. *United States v. Centracchio*, 265 F.3d 518 (7th Cir. 2001); *United States v. Moskowitz*, 215 F.3d 265, 269 (2d Cir. 2000).

unreliability of an accomplice's incrimination is inherent in the incriminatory allocution of an accomplice, and such statements fail under the Confrontation Clause. Alternatively, the admission of guilty pleas circumvents the legislative intent of the Rules as expressed in Rule 803(22), and must be barred.

*Notes & Observations*