Facially Exculpatory Yet Inherently Incriminating: Why Affirmative Defense Statements Should Qualify as Statements Against Penal Interest Under Rule 804(b)(3)

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INTRODUCTION

Jerry Peteet could hardly contain himself as he read the affidavit his attorney had received only minutes before. "[I, Barry Rogers,] believed that [Robert

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Taylor] was going to fire at me due to the look on his face and I fired a second shot at his legs to cause him to drop the gun."[1] These were the words that Peteet had been waiting to hear for the more than two years since he was charged with the attempted murder of Taylor. The affidavit, signed under penalty of perjury, had been notarized only hours before. In it, Rogers took responsibility for the very attack that prosecutors were alleging Peteet had committed. Peteet's lawyers were keenly aware that a jury might not believe Rogers's account. Rogers and Peteet had been close friends for some time, and Rogers had taken several years to come forward with his version of events. Still, both Peteet and his lawyers knew that Rogers's affidavit was Peteet's best chance of convincing a jury he was not guilty of attempted murder. The affidavit would undoubtedly buttress the testimony of both Peteet and Peteet's brother that Rogers had been the shooter. For the first time since he had been charged, Peteet breathed a sigh of relief. Unbeknownst to him, however, his jury would never see Rogers's powerful admission.

Shortly after the United States Attorney's Office received the Rogers affidavit, the Government filed a motion in limine to prevent Peteet from introducing the affidavit on the grounds that it was inadmissible hearsay. The Government's motion was premised on the fact that Rogers would almost surely invoke his Fifth Amendment privilege if called to testify for the defense. Peteet's lawyers would therefore seek to admit the statement under Federal Rule of Evidence 804(b)(3). That rule provides for an exception to the traditional bar against hearsay evidence if three conditions are satisfied. First, the declarant must be unavailable.[2] Second, the statement must be against the declarant's penal interest. That is, the statement itself must have "so great a tendency to . . . expose the declarant to . . . criminal liability" that "a reasonable person in the declarant's position would have made [the statement] only if the person believed it to be true."[3] Third, the statement must be "supported by corroborating circumstances that clearly indicate its trustworthiness."[4]

The Government's motion focused on the latter two requirements. First, the Government alleged that the Rogers affidavit was not sufficiently against Rogers's penal interest to qualify as a statement against interest. "Where the third-party admission claims self-defense," the Government asserted, "the story is actually exculpatory as to the third party, and thus fails to constitute a statement against penal interest."[5] Next, the Government alleged that the statement failed to

1. Gov't's Motion in Limine to Exclude Affidavit of Barry D. Rogers at Exhibit A, United States v. Peteet, No. 4:11-cr-246-CDP (E.D. Mo. Sept. 11, 2012), ECF No. 979 [hereinafter Gov't's Motion]. The dramatization that follows is adapted from the pleadings and court filings associated with *United States v. Henley*, 766 F.3d 893 (8th Cir. 2014). All references to this storyline are for illustrative purposes only and are not intended to be taken as fact.

2. FED. R. EVID. 804(b).

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

4. FED. R. EVID. 804(b)(3)(B).

5. Gov't's Motion, *supra* note 1, at 5.

meet Rule 804(b)(3)'s corroboration requirement in part because of the relationship between Rogers and Peteet, the statement's timing, and the circumstances under which it was made.[6] Over the defense's objection, the trial court ultimately agreed with the Government that Rogers's affidavit did not qualify as a statement against penal interest.[7] Peteet was ultimately found guilty of attempted murder and sentenced to 276 months in prison.[8]

On appeal to the United States Court of Appeals for the Eighth Circuit, Peteet again asserted that the Rogers affidavit was admissible under Rule 804(b)(3). The Eighth Circuit dismissed Peteet's arguments, its reasoning mirroring the Government's arguments at trial. The court first concluded that "[t]he Rogers affidavit was not clearly against [Rogers's] own interest because in it he claims he shot Taylor in self defense."[9] It then noted that the affidavit "lacked indicia of trustworthiness" before eventually affirming Peteet's conviction.[10]

In affirming Peteet's conviction, the Eighth Circuit became the second court of appeals to hold that affirmative defense statements—statements alleging that otherwise criminal conduct was justified or should be excused—are not statements against interest under Rule 804(b)(3).[11] To be clear, it is certainly appropriate for courts to hold that a *particular* affirmative defense statement is inadmissible under Rule 804(b)(3) because it is not "supported by corroborating circumstances that clearly indicate its trustworthiness."[12] But to conclude categorically, as several courts have done, that such statements do not qualify as statements against penal interest because they are intended to exculpate the declarant is contrary to the textual demands of Rule 804(b)(3) and its theoretical underpinnings. To that end, this Note will argue that affirmative defense statements should, as a general matter, qualify as statements against the declarant's penal interest under Rule

6. *Id.* at 12, 14.

7. Courtroom Minute Sheet Criminal Proceedings, United States v. Smith, No. 4:11-cr-246-CDP (E.D. Mo. Oct. 9, 2012), ECF No. 1087.

8. United States v. Henley, 766 F.3d 893, 905 (8th Cir. 2014).

9. *Id.* at 915 (citing United States v. Shryock, 342 F.3d 948, 981 (9th Cir. 2003)).

10. *Id.* at 915–16 (citing FED. R. EVID. 804(b)(3)).

11. The Ninth Circuit's decision in *Shryock*, in which the court held that a self-defense statement by a third party did not merit admission under Rule 804(b)(3), predated *Henley*. Since *Henley*, the United States Court of Appeals for the District of Columbia Circuit in 2017 noted that, "as a general matter, a self-defense claim is not 'clearly' against a declarant's interest" so as to qualify for admission under Rule 804(b)(3). United States v. Slatten, 865 F.3d 767, 805 (D.C. Cir. 2017) (citing *Henley*, 766 F.3d at 915).

State courts asked to interpret their respective versions of the statement against penal interest exception have similarly held that affirmative defense statements do not qualify for admission under the exception. *See, e.g.*, Hartfield v. State, 161 So. 3d 125, 136–37 (Miss. 2015) (concluding that a statement asserting alleged criminal conduct occurred under duress was not admissible as a statement against penal interest); Bailey v. State, 78 So. 3d 308, 318 (Miss. 2012) (concluding that a statement asserting alleged criminal conduct occurred in self-defense was not admissible as a statement against penal interest); People v. Pierson, No. 279653, 2008 WL 5382651, at *4 (Mich. Ct. App. Dec. 23, 2008) (concluding that a statement asserting alleged criminal conduct occurred in defense of others was not admissible as a statement against penal interest).

12. FED. R. EVID. 804(b)(3)(B).

804(b)(3). Such statements are "sufficiently against the declarant's penal interest 'that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.'"[13] Though facially exculpatory, affirmative defense statements impliedly acknowledge the declarant's involvement in alleged criminal conduct. The incriminatory nature of such statements is not eliminated merely because the declarant asserts such conduct was justified or should be excused. Their admission under Rule 804(b)(3) ultimately aligns with the overall purpose of the Federal Rules of Evidence and the design of the criminal justice system.

Part I of this Note addresses background information necessary to understanding this evidentiary issue, including both a general review of hearsay law and the specific standards governing statements against penal interest under Rule 804(b)(3). With this foundation, Part II demonstrates why affirmative defense statements should qualify as statements against the declarant's penal interest under Rule 804(b)(3). Finally, Part III explains why recognizing affirmative defense statements as statements against interest ultimately aligns with the liberal thrust of the Federal Rules of Evidence and the overall aims of the criminal justice system, a system that is designed, first and foremost, to protect the innocent.

I. BACKGROUND

This Part begins by discussing hearsay statements and their treatment under the Federal Rules of Evidence. Then, this Part addresses statements against the declarant's penal interest, focusing on both the theoretical and historical foundation of the hearsay exception and the Supreme Court's construal of the exception in *Williamson v. United States*. Lastly, this Part provides an overview of affirmative defenses and reviews how federal courts currently treat affirmative defense statements.

A. HEARSAY AND ITS EXCEPTIONS

The treatment of hearsay evidence in federal courts derives from the realization that the admission of reliable evidence is central to "the truth-determining process in criminal trials."[14] American courts today help to ensure the reliability and trustworthiness of testimony through three procedural protections. First, witnesses are placed under oath. Second, witnesses are generally required to present their testimony in open court so that the trier of fact can personally evaluate the witness's behavior and body language. Third, witnesses are subject to cross-examination by the opposing party.[15] Although

13. Williamson v. United States, 512 U.S. 594, 603–04 (1994).

14. Dutton v. Evans, 400 U.S. 74, 89 (1970).

15. FED. R. EVID. art. VIII advisory committee's note to 1972 proposed rules; *cf.* Crawford v. Washington, 541 U.S. 36, 61 (2004) ("[T]he [Confrontation] Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that

these three mechanisms help ensure the reliability of testimony offered in open court, such mechanisms are absent when out-of-court statements are admitted into evidence. Thus, to combat the dangers inherent in hearsay testimony, Article VIII of the Federal Rules of Evidence places special limits on when such evidence can be admitted.

Importantly, not all out-of-court statements are considered hearsay and thus subject to Article VIII's requirements. Rule 801(c) defines hearsay as a statement "the declarant does not make while testifying at the current trial or hearing" that is offered into "evidence to prove the truth of the matter asserted in the statement."[16] Any hearsay problem thus traditionally begins with determining whether the particular out-of-court statement is being offered for its truth. If, for example, the out-of-court statement is being offered for impeachment purposes,[17] to prove its effect on the listener,[18] or for its legal significance as a verbal act,[19] the statement is not hearsay. As a result, the admissibility of such statements is determined without reference to those rules outlined in Article VIII of the Federal Rules of Evidence. In contrast, out-of-court statements offered for their truth are subject to Article VIII's requirements.[20] Thus, if an out-of-court declarant is overheard stating that "the person who assaulted me had a knife," the statement is considered hearsay if it is offered in court to prove that the assailant in fact had a knife. Its admissibility would then turn on the remaining rules found in Article VIII.

Chief among Article VIII's remaining rules is Rule 802's general prohibition against the admission of hearsay evidence. Under that rule, hearsay statements are inadmissible in court proceedings unless an exception exists within a federal statute, the Federal Rules of Evidence themselves, or "other rules prescribed by the Supreme Court."[21] Though some hearsay exceptions can be found outside the

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evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.").

16. FED. R. EVID. 801(c).

17. *See* MCCORMICK ON EVIDENCE § 249, at 426 (Kenneth S. Broun et al. eds., 6th ed. 2006) ("The theory of impeachment does not depend upon the prior statement being true and the present one false. Instead, the mere fact that the witness stated the facts differently on separate occasions is sufficient to impair credibility.").

18. *See id.* ("A statement that [the declarant] made a statement to X is not subject to attack as hearsay when its purpose is to establish the state of mind thereby induced in X, such as receiving notice or having knowledge . . . .").

19. *See id.* at 425 (outlining examples of verbal acts, including "the offer and acceptance which brought [a] contract into being," and "evidence of [an] utterance by [a] defendant of words relied on as constituting a slander or deceit").

20. Although this statement is true as a general matter, it is worth noting that Rule 801 further provides that some out-of-court statements, even if offered for their truth, are not considered hearsay. Under Rule 801(d), for example, an out-of-court statement, even if it would otherwise qualify as hearsay under Rule 801(c), is not considered hearsay if it is offered against an opposing party. *See* FED. R. EVID. 801(d)(2). Because they are not hearsay under Rule 801, statements by a party opponent, like verbal acts and statements offered for their effect on the listener, are not subject to Article VIII's follow-on requirements.

21. FED. R. EVID. 802.

Federal Rules of Evidence,[22] the vast majority of hearsay exceptions are found within the Rules themselves. Hearsay exceptions under the Rules fall into three categories. First, Rule 803 enumerates certain hearsay exceptions that apply regardless of whether the declarant is available to testify.[23] Rule 803 "proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available."[24] Second, Rule 804 outlines those hearsay exceptions that require the declarant to be unavailable to testify at the current proceeding.[25] Rule 804 is premised on the belief that "hearsay which admittedly is not equal in quality to testimony of the declarant on the stand may nevertheless be admitted if the declarant is unavailable and if his statement meets a specified standard."[26] Finally, Rule 807 provides for a residual, catch-all exception should otherwise necessary and trustworthy hearsay fail to meet one of the enumerated exceptions found in Rules 803 or 804.[27] Statements against the declarant's penal interest, the focus of the following section, fall into the second of these categories.

B. STATEMENTS AGAINST PENAL INTEREST

To qualify as a statement against penal interest, the statement must satisfy three requirements. First, the declarant must be unavailable to testify at the current proceeding.[28] If, for example, the witness will invoke his or her Fifth Amendment privilege against self-incrimination or testifies that he or she is unable to remember the events for which he or she was called to testify, then the declarant is considered unavailable under Rule 804.[29] Second, the declarant's statement must be such that "a reasonable person in the declarant's position would have made [the statement] only if the person believed it to be true because, when made, it . . . had

22. *See, e.g.*, FED. R. CIV. P. 32 (outlining when depositions can be used in civil court proceedings); FED. R. CRIM. P. 4(a) (permitting affidavits to be used to establish probable cause for the issuance of warrants).

23. *See* FED. R. EVID. 803.

24. FED. R. EVID. 803 advisory committee's note to 1972 proposed rules; *see, e.g.*, United States v. Dean, 823 F.3d 422, 427 (8th Cir. 2016) (noting that the present sense impression exception found in Rule 803(1) is rooted in the understanding that the "substantial contemporaneity of event and statement [required under the exception] minimizes unreliability due to defective recollection or conscious fabrication" (quoting United States v. Hawkins, 59 F.3d 723, 730 (8th Cir. 1995))).

25. *See* FED. R. EVID. 804.

26. FED. R. EVID. 804(b) advisory committee's note to 1972 proposed rules; *see* Idaho v. Wright, 497 U.S. 805, 820 (1990) (noting that the dying declaration exception found in Rule 804(b)(2) is "based on the belief that persons making such statements are highly unlikely to lie").

27. *See* FED. R. EVID. 807; *see, e.g.*, United States v. Dalton, 918 F.3d 1117, 1133 (10th Cir. 2019) (noting that Rule 807 "should be used only in extraordinary circumstances where the court is satisfied that the evidence offers guarantees of trustworthiness and is material, probative and necessary in the interest of justice" (internal quotation marks omitted) (quoting United States v. Tome, 61 F.3d 1446, 1452 (10th Cir. 1995))).

28. FED. R. EVID. 804(b).

29. FED. R. EVID. 804(a); *see, e.g.*, United States v. Dupree, 870 F.3d 62, 80 (2d Cir. 2017) (holding that a deceased declarant was unavailable under Rule 804(a)).

so great a tendency . . . to expose the declarant to . . . criminal liability."[30] Finally, when the statement "is offered in a criminal case as one that tends to expose the declarant to criminal liability," the statement must be "supported by corroborating circumstances that clearly indicate its trustworthiness."[31] Ultimately, however, Rule 804's textual requirements are only a starting point. To apply the Rule, one must consider its historical and theoretical foundation, as well as the Supreme Court's pronouncements relating to the Rule in *Williamson v. United States*.[32]

1. Historical and Theoretical Foundation

As with many modern hearsay exceptions, statements against interest are rooted in the belief that some out-of-court statements are sufficiently trustworthy that their admission is appropriate despite the fact that the witness will not testify in person.[33] Statements against interest, the Advisory Committee notes, are sufficiently trustworthy because people "do not make statements which are damaging to themselves unless satisfied for good reason that they are true."[34] The strongest statements against penal interest are those that are essentially confessions. Overcoming such powerful evidence requires one to answer the difficult question, "How could [an] innocent [person] convincingly confess to crimes [he or she] knew nothing about?"[35] But even those statements against penal interest that fall short of a full confession still admit some degree of complicity in a criminal act. For many, "experience, logic and common sense"[36] suggest that no individual would voluntarily admit that which "ha[s] the potential to single him [or her] out

30. FED. R. EVID. 804(b)(3)(A); *see, e.g.*, United States v. Dargan, 738 F.3d 643, 646, 649–50 (4th Cir. 2013) (holding that a declarant's statement to a prison cellmate admitting involvement in an armed robbery was sufficiently against the declarant's penal interest to qualify for admission under Rule 804(b)(3)).

31. FED. R. EVID. 804(b)(3)(B); *see, e.g.*, *Dupree*, 870 F.3d at 80 (holding that a declarant's statements were sufficiently trustworthy to be admitted under Rule 804(b)(3) because the statements were made to "a person whom the declarant believe[d was] an ally" and were not an "attempt[] to shift criminal culpability from" the declarant (alteration in original) (quoting United States v. Saget, 377 F.3d 223, 230 (2d Cir. 2004)).

32. 512 U.S. 594 (1994).

33. *See* MCCORMICK ON EVIDENCE, *supra* note 17, § 316, at 519 (noting that "special trustworthiness justif[ies] most of the exceptions to the hearsay rule").

34. FED. R. EVID. 804(b)(3) advisory committee's note to 1972 proposed rules.

35. Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1052 (2010). Notably, false confessions are not as uncommon as some would believe. *See* Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 430 & n.4 (1998) (collecting sources documenting false confessions). An awareness that individuals do falsely confess to crimes they did not commit may one day encourage Congress to "reconsider the wisdom behind Rule 804(b)(3)." John P. Cronan, *Do Statements Against Interests Exist? A Critique of the Reliability of Federal Rule of Evidence 804(b)(3) and a Proposed Reformulation*, 33 SETON HALL L. REV. 1, 24 (2002). But until that time, federal courts will continue to interpret and apply the Rule in line with the historical and theoretical foundation discussed here.

36. Donnelly v. United States, 228 U.S. 243, 277 (1913) (Holmes, J., dissenting).

for greater scrutiny and punishment"[37] unless it were true. Thus, with the declarant's statement likely to be true, courts today are willing to admit such hearsay testimony even though the witness will not testify in person.

Although modern courts allow for the admission of statements against penal interest, courts were historically reluctant to recognize this hearsay exception. In 1844, English courts rejected the exception in the *Sussex Peerage Case*.[38] Courts in the United States similarly dismissed attempts to admit hearsay testimony as statements against penal interest.[39] Although courts were willing to admit statements against pecuniary interest, the circumstances giving rise to statements against penal interest were different: both the declarant and the testifying witness were likely to be associated with criminal conduct.[40] Coupled with the fact that the declarant would not be available to testify, courts were concerned that formalizing this exception would lead to the admission of false testimony.[41] During the drafting of the Federal Rules of Evidence, such fears impacted the scope of Rule 804. On the one hand, the drafters recognized that statements against penal interest bore similar indicia of reliability as statements against pecuniary interest.[42] On the other hand, the drafters were keenly aware of the risks associated with such testimony.[43] Their sensible compromise, which remains in effect today, allows for the admission of statements against penal interest subject to a corroboration requirement when used in criminal cases.[44]

2. *Williamson v. United States*

The Supreme Court refined the scope of Rule 804(b)(3) in *Williamson v. United States*.[45] The *Williamson* Court addressed whether a confession by an unavailable declarant could be admitted into evidence under Rule 804(b)(3) when only part of the confession incriminated the declarant.[46] Reginald Harris, the out-of-court declarant, had been arrested for carrying significant amounts of cocaine in the trunk of his rental vehicle.[47] He ultimately admitted his

37. United States v. Slatten, 865 F.3d 767, 826 (D.C. Cir. 2017) (Rogers, J., concurring in the judgment).

38. The Sussex Peerage (1844) 8 Eng. Rep. 1034 (HL) 1034–35 ("The declarations of a deceased clergyman to his son, to the effect that he had celebrated a marriage between the deceased Peer and his alleged wife [in violation of the Royal Marriage Act], are not receivable in evidence as the declarations of a deceased party made against his own interest; such interest not being an interest of a pecuniary nature.").

39. *See, e.g.*, *Donnelly*, 228 U.S. at 273–76 ("In this country there is a great and practically unanimous weight of authority in the state courts against admitting evidence of confessions of third parties made out of court and tending to exonerate the accused.").

40. *See* MCCORMICK ON EVIDENCE, *supra* note 17, § 318, at 521.

41. *Id.* (noting that early courts refused to admit statements against penal interest because of a belief that doing so would "open[] the door to a flood of witnesses testifying falsely to confessions that were never made or testifying truthfully to confessions that were false").

42. *See* FED. R. EVID. 804(b)(3) advisory committee's note to 1972 proposed rules.

43. *See id.*

44. *See id.*

45. 512 U.S. 594 (1994).

46. *Id.* at 599.

47. *Id.* at 596.

involvement in a scheme to transport narcotics for Fredel Williamson.[48] At Williamson's trial, Harris refused to testify despite being granted immunity.[49] His confession was admitted against Williamson under Rule 804(b)(3) as a statement against Harris's penal interest.[50] Williamson was ultimately found guilty of various drug offenses.[51] His conviction was affirmed on appeal to the United States Court of Appeals for the Eleventh Circuit.[52] The Supreme Court granted certiorari to address the scope of Rule 804(b)(3) of the Federal Rules of Evidence. Its opinion reversing the Eleventh Circuit clarified Rule 804(b)(3)'s textual requirements in two ways.[53]

First, the Court held that an entire admission by an unavailable declarant is not admissible under Rule 804(b)(3) merely because a portion of it is sufficiently against the declarant's interest to qualify as a statement against penal interest.[54] To arrive at this conclusion, the Court went about determining what qualified as a "statement" under Rule 804(b)(3). It considered two possible definitions. The broader of the two definitions defined a statement as "a report or narrative."[55] "Under this reading," the Court noted, "[a declarant's] entire confession—even if it contains both self-inculpatory and non-self-inculpatory parts—would be admissible so long as in the aggregate the confession sufficiently inculpates him [or her]."[56] In contrast, the narrower definition defined a statement as "a single declaration or remark."[57] This definition would only allow admission of "those declarations or remarks within [a] confession that are individually self-inculpatory."[58] Ultimately, the Court found the latter definition more appropriate.[59] The Court noted that the Rule is rooted in the precept that "reasonable people . . . tend not to make self-inculpatory statements unless they believe them to be true."[60] But "[t]he fact that a person is making a broadly self-inculpatory confession," the Court explained, "does not make more credible the confession's non-self-inculpatory parts."[61] Thus, courts today can no longer admit an entire narrative merely because one portion of it meets Rule 804(b)(3)'s requirements.[62] Under *Williamson*, courts must individually test each declaration present within a larger narrative against the Rule's textual

48. *Id.* at 597.
49. *Id.*
50. *Id.* at 597–98.
51. *Id.* at 597.
52. *Id.* at 598.
53. *See id.* at 596.
54. *See id.* at 601–02.
55. *Id.* at 599 (quoting *Statement*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961)).
56. *Id.*
57. *Id.* (quoting *Statement*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961)).
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *See, e.g.*, United States v. Smalls, 605 F.3d 765, 786 (10th Cir. 2010) (noting that certain non-self-inculpatory statements "*may* need to be extracted from the self-inculpatory parts of" an "extended confession" before the self-inculpatory parts can be admitted into evidence under Rule 804(b)(3)).

requirements and can only admit those declarations that individually qualify under the exception.

Second, the *Williamson* Court provided further guidance to the lower federal courts as to which statements qualify as statements against penal interest.[63] "The question under Rule 804(b)(3)," the Court noted, "is always whether the statement was sufficiently against the declarant's penal interest 'that a reasonable person in the declarant's position would not have made the statement unless believing it to be true,' and this question can only be answered in light of all the surrounding circumstances."[64] Notably, facially inculpatory statements are not the only statements that qualify as statements against penal interest under this standard. "Even statements that are on their face neutral," the Court proclaimed, "may actually be against the declarant's interest."[65] A statement as innocuous as "Sam and I went to Joe's house," for example, "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."[66] The Court's articulation as to which statements qualify under Rule 804(b)(3) undoubtedly expanded the Rule's scope.[67] And together with *Williamson*'s first holding, the Court's guidance as to which declarations qualify as statements against penal interest continues to inform the modern application of the Rule and its applicability to affirmative defense statements generally.

C. AFFIRMATIVE DEFENSES AND AFFIRMATIVE DEFENSE STATEMENTS UNDER RULE 804(B)(3)

In the American legal system, courts have continually recognized that even though a particular actor may have met all the elements of a particular criminal offense, criminal liability should not attach if the actor's conduct was justified or excusable.[68] An actor, for example, may allege he or she acted in self-defense or out of necessity. Similarly, an actor may claim he or she acted while insane or under duress. These types of defenses are referred to as affirmative defenses

63. 512 U.S. at 603–04.

64. *Id.*

65. *Id.* at 603.

66. *Id.*

67. *See, e.g.*, United States v. Barone, 114 F.3d 1284, 1298–99 (1st Cir. 1997) (concluding that a declarant's statement with respect to his "'problem' and 'big mistake' in having stolen cocaine and money" from a member of a criminal enterprise was sufficiently against the declarant's interest to qualify for admission under Rule 804(b)(3)).

68. *See* Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 203 (1982). Notably, justification- and excuse-type defenses are two distinct concepts. *See* Joshua Dressler, *Foreword: Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1158 (1987). When a defendant alleges his or her conduct is justified, the defendant is arguing that the "harm [caused by his or her conduct] is outweighed by the need to avoid an even greater harm or to further a greater societal interest." Robinson, *supra*, at 213. Self-defense and necessity are common justification-type defenses. *See id.* at 214–15. In contrast, excuse-type defenses "admit that the deed may be wrong, but excuse the actor because conditions suggest that the actor [was] not responsible for his [or her] deed." *Id.* at 221. Examples of excuse-type defenses include insanity and duress. *Id.* at 222. Today, the distinction between justification- and excuse-type defenses is largely ignored. *See* Dressler, *supra*.

because in each situation the actor must come forward with some evidence to support his or her claim that the conduct was justified or should be excused.[69] If the finder of fact concludes that the defendant's actions were justified or should be excused, the defendant is often absolved of all criminal liability.[70]

Although raising an affirmative defense has the potential to absolve the defendant of criminal liability, raising such a defense is no small decision because the very act of raising the defense admits a number of elements the prosecution is required to prove. Pleading self-defense after being charged with murder, for example, concedes a number of facts that are helpful to the prosecution's case. Most significantly, the defendant admits to having been the individual who killed the victim. But even short of this admission, the defendant admits knowledge of the incident, presence at the scene of the crime, and, in some cases, the requisite *mens rea* to commit the offense. A defendant is, of course, free to plead an affirmative defense in the alternative. He or she could argue, for example, that he or she did not commit the crime but that if he or she did, it was in self-defense. As a practical matter, however, such a course of action is unlikely to succeed.[71] Asserting an affirmative defense is therefore no easy decision. Its potential to absolve a criminal defendant of liability must be weighed against its foreclosure of countless other legal strategies ordinarily available to a criminal defendant.

Despite the various ways that asserting an affirmative defense can be against a declarant's interest, several courts have held that third-party affirmative defense statements are not sufficiently against the declarant's penal interest to be admitted under Rule 804(b)(3).[72] *United States v. Shryock* serves as one

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69. *See, e.g.*, 18 U.S.C. § 17(a) (2012) ("It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts."); United States v. Zayac, 765 F.3d 112, 120 (2d Cir. 2014) ("A defendant is entitled to a jury instruction regarding duress only if he makes 'some showing on each element' of the defense." (quoting United States v. Gonzalez, 407 F.3d 118, 122 (2d Cir. 2005))); United States v. Al-Rekabi, 454 F.3d 1113, 1122 (10th Cir. 2006) ("To qualify for an instruction on an affirmative defense such as necessity a defendant must produce evidence of each element sufficient to warrant its consideration by the jury."); United States v. Thomas, 34 F.3d 44, 47 (2d Cir. 1994) ("The government generally has the burden of disproving self-defense beyond a reasonable doubt once it is raised by a defendant.").

70. *See, e.g.*, CRIM. PATTERN JURY INSTRUCTIONS COMM. OF U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT, CRIMINAL PATTERN JURY INSTRUCTIONS § 1.34 (2018), https://www.ca10.uscourts.gov/sites/default/files/clerk/Jury%20Instructions%20Update%202018.pdf [https://perma.cc/4H8M-84NQ] ("Under the law, a person is not criminally liable for his [or her] conduct while insane.").

71. *See* United States v. Demma, 523 F.2d 981, 985 (9th Cir. 1975) (en banc) ("While we hold that a defendant may both deny the acts and other elements necessary to constitute the crime charged and at the same time claim entrapment, the high risks to him make it unlikely as a strategic matter that he will choose to do so.").

72. *See* cases cited *supra* note 11.

Notably, a defendant can never offer his or her own affirmative defense statement into evidence as a statement against penal interest. In order to invoke Rule 804, the declarant must first be considered unavailable under the Rule. FED. R. EVID. 804(b). However, the proponent of a particular statement cannot invoke the Rule if he or she "procured or wrongfully caused the declarant's unavailability as a

such example.[73] That case arose after Raymond Shryock was charged under federal racketeering statutes with ordering the murder and attempted murder of Albert Orosco and Hector Galvez, respectively.[74] Larry Hernandez, the individual who prosecutors alleged had carried out Shryock's orders, stated to the police that his actions were in self-defense.[75] With Hernandez unavailable to testify at trial, Shryock's attorneys sought to admit Hernandez's statement under Rule 804(b)(3).[76] The trial court held that Hernandez's statement was not admissible as a statement against penal interest.[77] The Ninth Circuit affirmed: "Obviously, [Rule 804(b)(3)'s requirements are] not met here. Hernandez could have made the statement to serve his own penal interest—self defense would absolve him of criminal liability—and not because he believed the statement to be true."[78]

The Ninth Circuit's conclusory reasoning in *Shyrock* mirrors that of other courts of appeals that have considered the question. As recently as August of 2017, the D.C. Circuit noted in *United States v. Slatten* that "as a general matter, a self-defense claim is not 'clearly' against a declarant's interest."[79] But ultimately, the analysis in *Shryock* and in *Slatten* runs contrary to the theoretical basis of Rule 804(b)(3) and the Supreme Court's dictates in *Williamson*. To conclude otherwise, as these courts have done, runs contrary to the liberal thrust of the Federal Rules of Evidence and the overall aims of the criminal justice system.

II. AFFIRMATIVE DEFENSE STATEMENTS AS STATEMENTS AGAINST PENAL INTEREST

This Part demonstrates why affirmative defense statements, as a general matter, should qualify for admission under Rule 804(b)(3). First, this Part establishes that affirmative defense statements are sufficiently against the declarant's penal interest to qualify for admission under Rule 804(b)(3). Second, this Part shows that Rule 804(b)(3)'s corroboration requirement prevents defendants from admitting otherwise false affirmative defense statements from an unavailable declarant in order to unjustly avoid punishment.

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witness in order to prevent the declarant from attending or testifying." FED. R. EVID. 804(a). Courts have interpreted this provision to preclude a defendant from invoking the Fifth Amendment and then seeking to take advantage of the hearsay exceptions outlined in Rule 804. *See, e.g.*, United States v. Peterson, 100 F.3d 7, 13 (2d Cir. 1996) ("When the defendant invokes his Fifth Amendment privilege, he has made himself unavailable to any other party, but he is not unavailable to himself.").

73. 342 F.3d 948, 981 (9th Cir. 2003).

74. *Id.* at 966–67.

75. *Id.* at 966–67, 981.

76. *Id.* at 981.

77. *Id.*

78. *Id.*

79. 865 F.3d 767, 805 (D.C. Cir. 2017) (citing United States v. Henley, 766 F.3d 893, 915 (8th Cir. 2014)).

A. IMPLIEDLY ACKNOWLEDGED INVOLVEMENT

Affirmative defense statements should, as a general matter, qualify for admission as statements against the declarant's penal interest under Rule 804(b)(3).[80] These statements impliedly admit a number of crucial elements of allegedly criminal conduct that independently satisfy Rule 804(b)(3)'s textual requirements as refined by the Supreme Court in *Williamson*. The incriminatory nature of such admissions is not eliminated merely because the admission is facially exculpatory.

To begin, it is appropriate to again acknowledge the extent to which affirmative defense statements impliedly acknowledge a number of facts that could be harmful to the declarant. First and foremost, for all affirmative defense statements the declarant impliedly concedes that he or she committed the *actus reus* of the offense. This admission alone greatly reduces the prosecutor's burden were the declarant ever charged with a crime. But for many affirmative defense statements, admitting the *actus reus* is merely the beginning. Many affirmative defense statements impliedly admit the *mens rea* associated with the criminal offense, the element of a criminal offense that is often the most difficult for prosecutors to establish.[81] Additionally, the declarant of an affirmative defense statement also admits knowledge of the incident and having been present when it occurred. Here too, these facts are undoubtedly enough to subject the declarant to "greater scrutiny" by law-enforcement personnel.[82] Lastly, asserting an affirmative defense

80. It is, of course, impossible to determine the admissibility of an entire class of statements collectively. *See* Williamson v. United States, 512 U.S. 594, 603 (1994) ("[W]hether a statement is self-inculpatory or not can only be determined by viewing it in context."); *Slatten*, 865 F.3d at 827 (Rogers, J., concurring in the judgment) (noting that any "generalization" as to the admissibility of an entire category of statements "is inappropriate because determining whether a statement is self-inculpatory is a 'fact-intensive inquiry, which . . . require[s] careful examination of all the circumstances surrounding the criminal activity involved'" (alteration in original) (quoting *Williamson*, 512 U.S. at 604)). Herein lies part of the concern with the lower federal courts' categorical rejection of affirmative defense statements as statements against penal interest under Rule 804(b)(3). But at the risk of appearing hypocritical, it is perhaps useful to conceptualize affirmative defense statements into two general categories:

First, there are those affirmative defense statements in which the incriminating part of the admission can be easily separated from the part of the admission asserting the conduct was justified or should be excused. An example would be "I shot him three times because I feared for my life." The treatment of these admissions under Rule 804(b)(3) and *Williamson* would arguably be simple. The first part of the admission, namely, "I shot him three times," would be excised from the latter, self-serving part of the sentence. *See Williamson*, 512 U.S. at 599. The first part of the admission would then be admitted under the Rule after the proponent satisfied Rule 804(b)(3)'s remaining requirements.

Second, there are those statements for which the affirmative defense claim is so intertwined with the self-inculpatory part of the admission that it is impossible to separate the two aspects of the admission. An example of this latter category of admissions would be a declarant's statement that "it was self-defense" after being asked if he or she shot the victim. This Note takes the position that even for statements in this second category, where it is impossible to excise the exculpatory elements of the admission from the inculpatory parts, admission is appropriate under Rule 804(b)(3).

81. *See* Assaf Hamdani, Essay, Mens Rea *and the Cost of Ignorance*, 93 VA. L. REV. 415, 422 (2007) ("Mental states are inherently difficult to prove, especially since the prosecution can often rely only on circumstantial evidence to support its case.").

82. *See Slatten*, 865 F.3d at 826 (Rogers, J., concurring in the judgment).

may also foreclose a number of alternative defense theories that might more easily secure an acquittal if the declarant were eventually charged with a crime.[83] It would be nearly impossible to argue misidentification or fabrication, for example, after a declarant alleges self-defense. The declarant would have equal difficulty raising any one of the various affirmative defenses that he or she did not initially assert. Thus, although facially exculpatory, affirmative defense statements impliedly admit a number of facts that are potentially damaging to the declarant.

Importantly, a number of facts impliedly acknowledged by a declarant asserting an affirmative defense easily survive Rule 804(b)(3)'s textual requirements as refined by the Supreme Court in *Williamson*. Textually, Rule 804(b)(3) requires that the proponent of the statement demonstrate that "a reasonable person in the declarant's position would have made [the statement] only if the person believed it to be true because, when made, it . . . had so great a tendency to . . . expose the declarant to . . . criminal liability."[84] Whether a statement meets this requirement, the Court noted in *Williamson*, "can only be determined by viewing it in context."[85] Conceding both the *actus reus* and the *mens rea*, as affirmative defense statements often do, would certainly, as a general matter, meet this standard.[86] A reasonable person would only admit knowledge of the incident and presence at the scene if such facts were true, thereby satisfying Rule 804(b)(3).[87] And a reasonable person would also realize that by asserting one justification or excuse the declarant is thereafter unable to assert another contradictory theory justifying or excusing his or her conduct.[88] Thus, although facially exculpatory, affirmative defense statements impliedly acknowledge a number of factual assertions sufficient to qualify for admission under Rule 804(b)(3), as refined by *Williamson*.

Notably, the incriminatory nature of affirmative defense statements is not eliminated or even reduced because such statements are facially exculpatory. In *Williamson*, the Supreme Court noted that "[e]ven statements that are on their face neutral may actually be against the declarant's interest."[89] Under *Williamson*, lower courts are thus instructed to consider not merely what a statement facially asserts but also what the declarant impliedly concedes in making

83. *See* Mathews v. United States, 485 U.S. 58, 65–66 (1988) (noting that "the high risks" of raising inconsistent defenses "make it unlikely as a strategic matter that [a defendant would] choose to do so" (quoting United States v. Demma, 523 F.2d 981, 985 (9th Cir. 1975) (en banc))).

84. FED. R. EVID. 804(b)(3)(A).

85. *Williamson*, 512 U.S. at 603.

86. *See id.* (noting that "yes, I killed X" would "likely be admissible under Rule 804(b)(3)"); Chia v. Cambra, 360 F.3d 997, 1004 (9th Cir. 2004) (noting that an admission can inculpate a declarant when it "remov[es] all doubt as to [the declarant's *mens rea*]").

87. *See* McClung v. Wal-Mart Stores, Inc., 270 F.3d 1007, 1015 (6th Cir. 2001) (noting that a declarant's statements placing him or her "at the same location as the victim" can be evidence of his or her "opportunity and intent to commit the crime"); United States v. Barone, 114 F.3d 1284, 1297 (1st Cir. 1997) (noting that statements "demonstrat[ing] 'an insider's knowledge' of a criminal enterprise and its criminal activities [can be] sufficiently against [the declarant's] penal interest to come within the exception").

88. *See Williamson*, 512 U.S. at 604 (noting that a statement conceding possible defenses can be sufficiently against the declarant's interest to qualify for admission under Rule 804(b)(3)).

89. *Id.* at 603.

the statement. As previously demonstrated, affirmative defense statements concede a number of facts contrary to the declarant's penal interest. If Rule 804(b)(3)'s remaining requirements are met, including the corroboration requirement discussed next, it is thus entirely proper to admit affirmative defense statements under Rule 804(b)(3).

B. RULE 804(B)(3)'S CORROBORATION REQUIREMENT AS A SAFEGUARD TO ABUSE

Those opposed to the admission of affirmative defense statements under Rule 804(b)(3) suggest that to do so would permit innocent third-party declarants to falsely take responsibility for criminal conduct so that both the defendant and the declarant unjustly avoid punishment.[90] These concerns are exaggerated for two reasons:

First, it is highly doubtful that "[s]uch an implausible high-risk high-reward strategy"[91] would occur with any sort of frequency to merit exclusion of an entire category of statements. It is unlikely, for example, that a declarant would falsely take responsibility for assaulting a particular victim in the vain hope that by claiming he or she acted in self-defense he or she would ultimately receive no punishment whatsoever. This *take-one-for-the-team* hypothetical "would only make sense if [the declarant] were absolutely confident the self-defense claim would hold up."[92] Otherwise, as one circuit judge put it, "the heroic narrative would give way to something far more troubling, with devastating consequences for the [declarant]."[93] It is thus unlikely that such a situation would arise with any sort of frequency to merit categorical exclusion of affirmative defense statements as statements against penal interest.

Second, any remaining concerns regarding the remote possibility of such a situation occurring are alleviated in large part by Rule 804(b)(3)'s corroboration requirement. When a statement against penal interest is offered in a criminal case, the proponent must demonstrate that the statement "is supported by corroborating circumstances that clearly indicate its trustworthiness."[94] The corroboration requirement serves as an additional guarantee of trustworthiness beyond the "circumstantial guarant[ees] of reliability"[95] attendant to statements against penal interest generally.[96] As the Advisory Committee's comments make clear, "[t]he requirement of corroboration should be construed [by courts] in such a manner as to effectuate its purpose of circumventing fabrication."[97] Federal courts take the

90. *See* United States v. Slatten, 865 F.3d 767, 828 (D.C. Cir. 2017) (Rogers, J., concurring in the judgment) (discussing the Government's opposition to admitting affirmative defense statements under Rule 804(b)(3) on this basis); Gov't's Motion, *supra* note 1, at 6 (opposing admission of the Rogers affidavit for similar reasons).

91. *Slatten*, 865 F.3d at 828 (Rogers, J., concurring in the judgment).

92. *Id*.

93. *Id*.

94. FED. R. EVID. 804(b)(3)(B).

95. FED. R. EVID. 804(b)(3) advisory committee's note to 1972 proposed rules.

96. *See generally* MCCORMICK ON EVIDENCE, *supra* note 17, § 319(f), at 524 (discussing Rule 804(b)(3)'s corroboration requirement).

97. FED. R. EVID. 804(b)(3) advisory committee's note to 1972 proposed rules.

requirement seriously, regularly relying on it to ensure only those hearsay statements meeting the requisite threshold of reliability are admitted into evidence.[98] Courts also frequently refuse to admit third-party confessions that would exculpate a defendant because such statements fail to meet Rule 804(b)(3)'s corroboration requirement.[99] Ultimately, this same requirement would also adequately serve to prevent an otherwise false affirmative defense statement from being admitted into evidence to unjustly exonerate a criminal defendant. Together with the slim possibility a declarant would even attempt such a strategy, it is thus unlikely that admitting affirmative defense statements under the Rule would unjustly subvert the fact-finding process in the way opponents imagine.

III. POLICY CONSIDERATIONS

This final Part focuses on policy considerations that militate in favor of admitting affirmative defense statements as statements against penal interest under Rule 804(b)(3). First, this Part shows that admitting affirmative defense statements under Rule 804(b)(3) aligns with the aims of the Federal Rules of Evidence. Then, this Part demonstrates that admitting affirmative defense statements as statements against penal interest is consistent with the overall design of the criminal justice system.

A. THE LIBERAL THRUST OF THE FEDERAL RULES OF EVIDENCE

Admitting affirmative defense statements as statements against penal interest aligns both with the overall purpose and the liberal thrust of the Federal Rules of Evidence. As indicated in Rule 102, the Rules "should be construed so as to administer every proceeding fairly . . . to the end of ascertaining the truth and securing a just determination."[100] These overall aims serve as guideposts when a particular factual or legal situation is capable of two divergent interpretations under the Rules.[101] The Rules also generally favor admissibility. The "liberal thrust"[102] of the Rules is demonstrated, for example, in those rules relating to relevancy,[103]

98. *See, e.g.*, United States v. Taylor, 848 F.3d 476, 486–87 (1st Cir. 2017) (affirming the trial court's refusal to admit a statement under Rule 804(b)(3) because the statement's proponent could not satisfy Rule 804(b)(3)'s corroboration requirement); United States v. Lozado, 776 F.3d 1119, 1132 (10th Cir. 2015) (same).

99. *See, e.g.*, United States v. Caldwell, 760 F.3d 267, 290 (3d Cir. 2014) (holding that a third-party confession failed to satisfy Rule 804(b)(3)'s corroboration requirement); United States v. Bigesby, 685 F.3d 1060, 1065 (D.C. Cir. 2012) (same).

100. FED. R. EVID. 102.

101. *See, e.g.*, Ohler v. United States, 529 U.S. 753, 763 (2000) (Souter, J., dissenting) (relying in part on the overall purpose of the Federal Rules of Evidence as outlined in Rule 102 in opposing the Court's majority opinion); Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152–53 (1999) (holding that trial courts must have wide "latitude in deciding how to test an expert's reliability" in order to effectuate the aims of the Federal Rules of Evidence as outlined in Rule 102 (emphasis omitted)).

102. Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169 (1988).

103. *See* Bennett Capers, *Rape, Truth, and Hearsay*, 40 HARV. J.L. & GENDER 183, 208 (2017) (noting "the very liberal approach normally accorded relevancy" under the Rules).

hearsay,[104] and expert testimony.[105] Recognizing statements against penal interest was itself an attempt to liberalize the Rules. The Advisory Committee's comments to Rule 804(b)(3) note, for example, that inclusion of statements against penal interest as a hearsay exception was intended to expand the existing common law exception to its "full logical limit."[106] In close cases and in those cases when to do otherwise would undermine a court's goal of "securing a just determination,"[107] courts are thus encouraged to err on the side of admitting controversial evidence.

As applied to the admissibility of affirmative defense statements under Rule 804(b)(3), these principles favor admission. Third-party confessions, of which affirmative defense statements are a subset, are surely some of the most powerful evidence a defendant can present in his or her defense.[108] With this evidence, a criminal defendant can firmly assert that the prosecution has failed to meet its burden. This evidence, if believed, would also fulfill any juror's common-sense expectation that if a particular defendant did not commit the charged offense, "there should be at least some evidence suggesting that someone else did."[109] To exclude evidence of this magnitude would run contrary to "fundamental standards of due process."[110] It would no doubt also run contrary to the goal of ensuring that every proceeding is administered fairly "to the end of ascertaining the truth and securing a just determination."[111]

Admitting such statements under Rule 804(b)(3) also gives full effect to the liberal thrust of the Federal Rules of Evidence. By refusing to admit affirmative defense statements as statements against penal interest, federal courts adhere to a policy that appears to value form over substance. Courts often quickly dismiss claims that these statements meet Rule 804(b)(3)'s requirements merely because such statements are facially exculpatory.[112] This policy needlessly complicates Rule 804(b)(3). Doing so is especially troubling, as the Rules themselves were intended to "relax[] the traditional barriers"[113] that previously limited the

104. *See Beech Aircraft Corp.*, 488 U.S. at 169 (endorsing a "broad approach to admissibility under Rule 803(8)(C)" in part because such an approach aligns with "the liberal thrust of the Federal Rules").

105. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 588 (1993) (noting "the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to "opinion" testimony'" (quoting *Beech Aircraft Corp.*, 488 U.S. at 169)).

106. FED. R. EVID. 804(b)(3) advisory committee's note to 1972 proposed rules.

107. FED. R. EVID. 102.

108. *See* Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (describing a third-party confession as "critical evidence"); David S. Schwartz & Chelsey B. Metcalf, *Disfavored Treatment of Third-Party Guilt Evidence*, 2016 WIS. L. REV. 337, 342 (noting that there is "often a compelling need for a criminal defendant disputing his [or her] identity as the perpetrator to offer at least some evidence relevant to show that someone else committed the crime"); *see also* Bruton v. United States, 391 U.S. 123, 139 (1968) (White, J., dissenting) (describing a "defendant's own confession" as "probably the most probative and damaging evidence that can be admitted against him [or her]").

109. Schwartz & Metcalf, *supra* note 108, at 342.

110. *Chambers*, 410 U.S. at 302.

111. FED. R. EVID. 102.

112. *See supra* notes 72–79 and accompanying text.

113. Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169 (1988).

admissibility of otherwise reliable evidence under the common law. A liberal approach to admissibility, in contrast, would instead recognize the inherently incriminating nature of affirmative defense statements. And like the overall purpose of the Federal Rules of Evidence, such an approach would thus also counsel in favor of admitting affirmative defense statements under Rule 804(b)(3).

B. "IT IS FAR WORSE TO CONVICT AN INNOCENT MAN THAN TO LET A GUILTY MAN GO FREE"

Like the liberal thrust and aims of the Federal Rules of Evidence, the overall design of the criminal justice system is ultimately served by admitting affirmative defense statements as statements against penal interest under Rule 804(b)(3). In a criminal justice system designed to protect the innocent, criminal defendants facing the most severe of consequences deserve the opportunity to present this powerful form of evidence to the trier of fact.

American criminal law reflects "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[114] This determination is grounded in the belief that errors in the criminal justice system are inevitable, regardless of the extent to which the system seeks to prevent errors from occurring.[115] Simultaneously, "virtually everyone agrees that convicting an innocent person is a more costly mistake than acquitting a guilty one."[116] For this reason, the system is designed in such a way that "when an error does occur, it will be a false acquittal rather than a false conviction" that results.[117] This construct informs criminal discovery obligations,[118] legal ethics,[119] burdens of proof,[120] and the various roles of advocates in the adversarial system.[121] The Federal Rules of Evidence likewise provide criminal defendants

114. *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

115. *See* LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY 1 (2006).

116. *Id.*

117. *Id.* at 1–2.

118. *See* Brady v. Maryland, 373 U.S. 83, 87–88 (1963) ("The United States wins its point whenever justice is done its citizens in the courts. A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him . . . helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice . . . ." (internal quotation marks and footnote omitted)).

119. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 3.1 (AM. BAR ASS'N 2018) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous . . . . A lawyer for the defendant in a criminal proceeding . . . may nevertheless so defend the proceeding as to require that every element of the case be established.").

120. *See In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.").

121. *See* United States v. Wade, 388 U.S. 218, 256–57 (1967) (White, J., dissenting in part and concurring in part) ("Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime. To this extent, our so-called adversary system is not adversary at all; nor should it be. But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and

with a number of advantages that are otherwise unavailable to the prosecution.[122] Together, this amalgamation of procedural and substantive guarantees serves to reduce erroneous convictions and thereby enhance the "[p]ublic legitimacy" of the criminal justice system.[123]

The criminal justice system's philosophical underpinnings ultimately counsel in favor of admitting affirmative defense statements under Rule 804(b)(3). Here, *Donnelly v. United States*, and particularly Justice Holmes's dissent, is instructive.[124] In *Donnelly*, which predated the Federal Rules of Evidence by over fifty years, the Supreme Court addressed whether statements against penal interest could be admitted into evidence as hearsay testimony.[125] The defendant, James Donnelly, was alleged to have killed a man named Chickasaw.[126] At trial, Donnelly sought to admit into evidence a statement by Joe Dick, who had since passed away, that he, and not Donnelly, had committed the crime.[127] The majority concluded that such evidence was inadmissible hearsay.[128] In doing so, the Court aligned itself with the "great and practically unanimous weight of authority in the state courts"[129] holding that "declarations of this character are to be excluded as hearsay."[130] Justice Holmes dissented, arguing instead that "experience, logic and common sense" suggest that this form of evidence should be admitted into evidence.[131] Justice Holmes pointed first to the significance of such evidence. "The confession," Justice Holmes noted, "coupled with circumstances pointing to its truth, would have a very strong tendency to make any one outside of a court of justice believe that [the defendant] did not commit the crime."[132] He then invoked the principles underlying the criminal justice system to argue in favor of admission: "[W]hen we surround the accused with so many safeguards, some of which seem to me excessive, I think we ought to give him the benefit of a fact that, if proved, commonly would have such weight."[133] Returning to first principles, it was thus imperative that Donnelly be permitted to admit such evidence.

Under the same logic employed by Justice Holmes in *Donnelly*, it is equally important that affirmative defense statements be admitted as statements against

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is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty." (footnote omitted)).

122. *See, e.g.*, FED. R. EVID. 404(a)(2)(A) (permitting the prosecution to offer evidence attacking the defendant's character only if the defendant first "offer[s] evidence of the defendant's pertinent trait"); FED. R. EVID. 609(a) (allowing a defendant's prior felony conviction for crimes that do not involve "a dishonest act or false statement" to be admitted to impeach the defendant's credibility as a witness only if "the probative value of the evidence outweighs its prejudicial effect to that defendant").

123. *See* LAUDAN, *supra* note 115, at 2.

124. 228 U.S. 243, 277–78 (1913) (Holmes, J., dissenting).

125. *See id.* at 272 (majority opinion).

126. *Id.* at 252–53.

127. *Id.* at 253.

128. *Id.* at 276.

129. *Id.* at 273.

130. *Id.* at 276.

131. *Id.* at 277 (Holmes, J., dissenting).

132. *Id.*

133. *Id.* at 278.

penal interest under Rule 804(b)(3). These statements, like the confession at issue in *Donnelly*, are powerful forms of evidence. If credited, these statements would carry significant weight with the trier of fact. By not admitting such statements, courts increase the risks of convicting an innocent person. Quite simply, this result is contrary to the very design of the criminal justice system.

Of course, Rule 804(b)(3) is not the only path through which an affirmative defense statement can be admitted into evidence.[134] Such evidence may be admissible under the residual exception outlined in Rule 807.[135] A defendant could also always argue that due process demands the admission of such evidence even if the statement does not qualify under a recognized hearsay exception.[136] But notably, these alternative routes of admissibility are intended to be methods of last resort. The legislative history of Rule 807's residual exception, for example, provides that it should "be used . . . only in exceptional circumstances."[137] And defendants seeking to invoke the Due Process Clause in order to bypass an otherwise generally applicable rule of evidence undoubtedly face "an uphill struggle."[138] In a system of justice designed to protect the innocent, defendants seeking to admit such powerful exculpatory evidence should not have to face such significant obstacles. These statements qualify in their own right for admission under Rule 804(b)(3), and the goals of the criminal justice system are

134. In addition to the alternative methods of admissibility discussed here, a defendant can also seek to admit affirmative defense statements under Rule 803. But notably, these exceptions apply regardless of if the declarant is available to testify, *see* FED. R. EVID. 803, and unlike Rule 804(b)(3), do not require that the statement be "supported by corroborating circumstances that clearly indicate its trustworthiness," *see* FED. R. EVID. 804(b)(3). The exceptions in Rule 803 are therefore, in many ways, easier to satisfy than Rule 804(b)(3). As such, although these exceptions are also possible alternatives to Rule 804(b)(3), attorneys are more likely to seek out these exceptions in the first instance. Thus, for practical purposes, when a defendant seeks to admit an affirmative defense statement under Rule 804(b)(3), the possibility of admitting the statement under one of the many exceptions outlined in Rule 803 has likely been exhausted.

135. *See* FED. R. EVID. 807(a) (allowing for the admission of certain hearsay statements even if the statements are "not specifically covered by a hearsay exception in Rule 803 or 804"); United States v. Slatten, 865 F.3d 767, 805–06, 809 (D.C. Cir. 2017) (admitting a self-defense statement under Rule 807 after concluding that the statement was not admissible under Rule 804(b)(3) in part because, "as a general matter, a self-defense claim is not 'clearly' against a declarant's interest" (citing United States v. Henley, 766 F.3d 893, 915 (8th Cir. 2014))).

136. *See* Holmes v. South Carolina, 547 U.S. 319, 324 (2006) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." (internal quotation marks omitted) (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986))).

137. S. REP. NO. 93-1277, at 20 (1974); SEC v. First City Fin. Corp., 890 F.2d 1215, 1225 (D.C. Cir. 1989) ("We recognize that the legislative history of this exception indicates that it should be applied sparingly."); *see e.g.*, United States v. Dalton, 918 F.3d 1117, 1133–34 (10th Cir. 2019) (noting that Rule 807 can only be invoked in "extraordinary circumstances" before concluding that it was not an abuse of discretion for a trial court to conclude that statements made to a federal agent were not admissible under Rule 807).

138. Fortini v. Murphy, 257 F.3d 39, 46 (1st Cir. 2001); *see, e.g.*, United States v. Mitrovic, 890 F.3d 1217, 1221–25 (11th Cir. 2018) (concluding that due process did not require evidence otherwise inadmissible under the Federal Rules of Evidence to be admitted at the defendant's trial).

ultimately furthered by admitting this form of evidence under this exception in the first instance.

CONCLUSION

The Eighth Circuit's model reasonable doubt instruction, an instruction like that which Jerry Peteet's jury would have heard, analogizes proof beyond a reasonable doubt to that which a person "would not hesitate to rely and act upon . . . in life's most important decisions."[139] For defendants like Jerry Peteet who are facing countless years in prison, the instruction is meant as one of the last levels of protection against a wrongful conviction. But the instruction can become a hollow promise to a defendant if exculpatory evidence that is vital to his or her case is never shown to the trier of fact.

When a third party takes responsibility for the crimes another is alleged to have committed but alleges that conduct was justified or should be excused, there can be no doubt that this evidence can raise a reasonable doubt in the mind of a rational juror. A juror is likely to credit this type of admission because "a reasonable person in the declarant's position would have made [the statements] only if the person believed [them] to be true."[140] This litmus test for evaluating the testimony is the same inquiry the trial judge must use to determine the admissibility of such statements under Rule 804(b)(3). And yet, those federal circuit courts that have considered whether affirmative defense statements qualify under this standard have held that these statements are insufficiently against the declarant's penal interest to qualify for admission.

Those federal courts of appeals to have addressed the issue are, of course, not entirely on a frolic: affirmative defense statements are facially exculpatory and would, at first glance, appear ineligible for admission under Rule 804(b)(3). But a system of justice designed to protect the innocent deserves more than this specious analysis. This Note has thus argued that affirmative defense statements qualify as statements against penal interest under Rule 804(b)(3). Although these statements are facially exculpatory, these admissions impliedly acknowledge a number of facts that are sufficiently against the declarant's interest to be admitted under this hearsay exception. Simply put, admitting the *actus reus*, presence at the scene, knowledge of the event, and in some cases the *mens rea* to commit the crime are unquestionably enough to meet Rule 804(b)(3)'s requirements. Rule 804(b)(3)'s corroboration requirement ultimately ensures the reliability of this evidence, thereby alleviating concerns that admitting these statements into evidence could result in false hearsay testimony corrupting the truth-seeking process.

It is certainly a rare case when a defendant can point to a third-party affirmative defense statement as affirmative evidence of his or her innocence. But this fact

139. JUDICIAL COMM. ON MODEL JURY INSTRUCTIONS FOR THE EIGHTH CIRCUIT, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT § 3.11 (2017), http://www.juryinstructions.ca8.uscourts.gov/Criminal-Jury-Instructions-2017.pdf [https://perma.cc/EL79-6BDV].

140. FED. R. EVID. 804(b)(3)(A).

does not diminish the weight of such evidence in those cases that present this precise fact pattern. And when this fact pattern does arise, both the liberal thrust of the Federal Rules of Evidence and the overall aims of the criminal justice system militate in favor of admitting this evidence under Rule 804(b)(3).

When Jerry Peteet received Barry Rogers's affidavit, he felt a sense of relief. The powerful evidence would undoubtedly challenge the prosecution's case. He trusted that the criminal justice system was designed to protect the innocent. But in the end, his sense of relief was dashed after both the trial court and the Eighth Circuit ruled the evidence inadmissible under Rule 804(b)(3). It would be inappropriate at this juncture to question the legitimacy of his conviction based on these holdings alone. But it is certainly appropriate to ask questions about the legitimacy of these holdings under the Federal Rules of Evidence as informed by the goals of the criminal justice system. And, unfortunately, the answers to those questions are only likely to leave one more fully convinced that because the criminal justice system is "[c]reated by human beings, it is at the mercy of human error."[141]

141. Greg Johnson, *A More Perfect Criminal Justice System*, PENN TODAY (Dec. 18, 2014), https://penntoday.upenn.edu/2014-12-18/features/more-perfect-criminal-justice-system [https://perma.cc/R9GF-TYWU].