

2021-2023 REPORT
OF THE SUPREME COURT COMMITTEE
ON THE RULES OF EVIDENCE



January 12, 2023

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I. RULE AMENDMENTS CONSIDERED AND REJECTED

A. New Jersey Rule of Evidence 803(c)(25), Statement Against Interest – Adopting A Corroboration Requirement to Ensure Reliability of Hearsay Statements

In a concurring opinion in State v. Hannah, 248 N.J. 148 (2021), Chief Justice Rabner requested the Committee examine whether a corroboration requirement should be added to New Jersey Rule of Evidence 803(c)(25), Statement Against Interest. N.J.R.E. 803(c)(25) is an exception to the hearsay rule that does not depend on the declarant's availability. The rule states:

A statement which was at the time of its making so far contrary to the declarant's pecuniary, proprietary, or social interest, or so far tended to subject declarant to civil or criminal liability, or to render invalid declarant's claim against another, that a reasonable person in declarant's position would not have made the statement unless the person believed it to be true. Such a statement is admissible against a defendant in a criminal proceeding only if the defendant was the declarant.

The federal counterpart to N.J.R.E. 803(c)(25) is Federal Rule of Evidence 804(b)(3). Unlike the New Jersey rule, Fed. R. Evid. 804(b)(3) requires that the declarant be unavailable and has an additional requirement of corroboration. Specifically, Fed. R. Evid. 804(b)(3) requires that for a statement to be excepted from the hearsay rule, a statement against interest be "supported by corroborating

circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.”

In Hannah, the trial court excluded evidence from the jury that supported the defendant’s third-party guilt defense, thereby depriving him of the opportunity to prepare a complete defense. 248 N.J. at 155. The Court granted defendant’s petition for post-conviction relief after concluding that statements made by a co-defendant to his mother implicating himself in the crime were improperly excluded from evidence and should have been admitted under N.J.R.E. 803(c)(25) as statements against interest.¹ Id. at 184. The Court found that the exclusion of the evidence denied defendant a meaningful opportunity to present a complete and credible third-party guilt defense that a co-defendant was responsible for the felony murder at issue in the case. Id. at 190.

Pursuant to the Chief Justice’s direction, a Subcommittee was formed to consider whether to add a corroboration requirement to the Rule to “assure both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception.” Id. at 191 (quoting Advisory Committee’s note to 2010 amendment to Fed. R. Evid. 804(b)(3)). The

¹ Defendant advanced multiple arguments in support of his PCR application including: ineffective assistance of counsel; the Appellate Division misinterpreted N.J.R.E. 803(c)(25); the trial court improperly permitted inclusion of certain witness testimony; and the trial court improperly excluded an investigatory report with information that would have supported defendant’s third-party guilt defense.

Subcommittee considered the issue thoroughly and recommended no amendment to the Rule. The Subcommittee's Report is attached as Appendix A.

The Subcommittee first considered the history of the development of both the New Jersey and Federal Rules specifically with reference to the requirement of corroboration and declarant unavailability in the federal rule. Both rules are underpinned by the rationale that a speaker would not make a statement that is damaging with such negative consequences unless the speaker believed it was accurate. New Jersey jurisprudence considers declarations against interest "inherently trustworthy and reliable" because "no one would knowingly make a statement that would harm oneself unless it were true." Klock, John D., New Jersey Practice: Evidence Rules Annotated Volume 2D (Thomson Reuters 3d ed. 2009). Similarly, Fed. R. Evid. 804(b)(3) was developed as a hearsay exception and assumed that "persons do not make statements which are damaging to themselves unless satisfied for good reasons that they are true." Fed. R. Evid. 804 Advisory Committee's Note.

The Subcommittee also carefully considered the requirement of "declarant unavailability" which is present in the Federal Rule but not required for the New Jersey Rule. The Subcommittee noted that the drafters of the New Jersey Rule considered an out-of-court statement against interest so inherently reliable, due to the significant negative consequences of a statement against interest, that the availability of the witness to testify on the stand was irrelevant. The drafters

believed that a statement against interest testified to on the stand was no more reliable than one made out-of-court. See New Jersey Supreme Court Committee on Evidence, 1963 Report of the New Jersey Supreme Court Committee on Evidence (1963).

In exploring the history and development of declarations against interest in New Jersey, the Subcommittee relied on a research report prepared by a Subcommittee member, Professor Jon C. Lore (the “Lore Report”). The Lore Report noted:

The rationale for the New Jersey rule follows the common law and federal rules. A statement against interest is considered trustworthy because of its high probability that “a statement having such negative consequences would be made only if the speaker believed it was accurate.” People generally do not “assert, concede nor admit to facts that would affect them unfavorably” so statements that do are “inherently trustworthy and reliable.”

[Subcommittee Report at 20-21.]

The Subcommittee surveyed the 50 states and determined that New Jersey was in the minority with only five other states not requiring corroboration for statements against interest. Instead, New Jersey permits the trier of fact to weigh the probative value of a statement against interests particularly where there is no corroborating evidence offered. Indeed, “[t]he jury should undertake an unfettered and full consideration of all the circumstances surrounding the declarant’s

confession and disregard the statement or any part thereof if it finds the statement not credible.” State v. White, 158 N.J. 230, 245 (1999).

The Subcommittee, focused particularly on criminal trials, explored whether a corroboration requirement could increase the pretrial burden on trial courts in the form of Rule 104 hearings to prevent the introduction of false confessions with no ability by the State to challenge those proofs. A minority of Subcommittee members expressed concern that New Jersey was in the minority of states without a corroboration requirement and was without “some form of governor on the introduction of hearsay evidence encompassed by the rule.” Other members disagreed with this concern. They noted that disputed evidence is always subjected to evaluation under Rule 401 for relevance and Rule 403 for undue prejudice. In addition, any corroboration requirement would create an unnecessary obstacle for defendants who are attempting to mount a third-party guilt defense. The Subcommittee members were ultimately swayed by the Lore Report which explained the inherently reliable and trustworthy nature of statements against interest. The Subcommittee determined that requiring corroboration was unnecessary and potentially detrimental particularly to criminal defendants.

The full Committee reviewed the Subcommittee Report and discussed its recommendation not to adopt any change to Rule 803(c)(25). The Subcommittee members presented their perspectives on the recommendation including that New Jersey was one of only six states that does not require corroboration and one of

only two states that does not require the declarant to be unavailable. The Committee considered that the rule allows the evidence against a defendant in a criminal case only if the defendant is the declarant and that criminal cases are unique in this regard. The members considered the potential for a defendant to put forth a contrived defense, without corroboration, leaving no opportunity for cross-examination and no requirement to present competent evidence.

Other considerations included the historical recognition that declarations against interest are considered inherently reliable and jurors are in the best position to determine how to handle and whether to accept the evidence. By requiring corroboration, the amendment could divest criminal defendants of the availability of presenting a third-party defense to the jury. This is of particular concern where an uncorroborated third-party guilt defense is the only defense a criminal defendant can mount. Finally, the Committee considered that a change was not necessitated simply because New Jersey was in the minority of states without a corroboration requirement.

The Committee overwhelmingly approved the Subcommittee's Report and Recommendation.

B. Reconsideration: Admissibility of Prior Statements by Children – Adopting in the Rules of Evidence the Hearsay Exceptions Contained in N.J.S.A. 9:6-8.46 (“Evidence”) and N.J.S.A. 30:4C-15.a (“Certain Prior Statements of a Child Admissible as Evidence”)

The Committee on the Rules of Evidence, in its 2021 Report, declined to recommend that hearsay exceptions enacted by the Legislature in Titles 9 and 30 be incorporated in the Rules of Evidence. The Office of the Public Defender, Office of the Law Guardian (OLG), disagreed with the Committee’s 2021 recommendation in comments to the Court. The Supreme Court asked the Committee to consider the comments of the OLG and review its 2021 recommendation.

Specifically, in its comments, the OLG “requested that the Supreme Court amend N.J.R.E. 803(c)(27) to exclude its application when it would conflict with N.J.S.A. 9:6-8.46 (child abuse matters) (Title 9) or N.J.S.A. 30:4C-15.1a (termination of parental rights matters) (Title 30).” In support of this request, the OLG argued that “depending on which rule is applied, there would be inconsistent results on the admissibility of child statements, causing confusion to judges and attorneys.” The OLG also asserted that there would be “a disparate impact on children under age 12 in Children in Court cases alleging sexual abuse because they could be compelled to testify under N.J.R.E. 803(c)(27), but not so under the Title 9 and 30 exceptions.” The OLG suggested that Rule 803(c)(27) be amended

to exclude its application when it would conflict with “other law,” meaning statutory law.

Rule of Evidence 803(c)(27) contains a hearsay exception for statements by a child under twelve years of age related to a sexual offense committed with or against that child. Specifically, Rule 803(c)(27) provides that a statement of a child relating to sexual misconduct committed against that child is admissible if the proponent of the statement notifies the adverse party that it intends to offer the statement; the court finds, in a Rule 104(a) hearing, there is a probability that the statement is trustworthy; and the child either testifies at the proceeding or the child is unavailable as a witness and corroborating evidence is admitted. This hearsay exception is limited to statements related to a sexual offense and does not apply to broader allegations of abuse and neglect.

N.J.S.A. 9:6-8.46 permits the admission into evidence of prior, out-of-court statements by children relating to allegations of child abuse or neglect in cases under Title 9, without a showing that the child is unavailable and without a requirement of corroborating evidence. N.J.S.A. 30:4C-15.1a similarly permits the admission into evidence of prior, out-of-court statements by children relating to allegations of child abuse or neglect in Title 30 cases, including termination of

parental rights cases, without a showing that the child is unavailable and without a requirement of corroborating evidence.²

In the 2019-2021 term, the Committee formed a Subcommittee to consider the question of whether the hearsay exceptions in Titles 9 and 30 should be incorporated into the Evidence Rules. The Subcommittee consisted of three members of this Committee and four members of the Family Practice Committee, and it included lawyers from the Office of the Attorney General, Office of Parental Representation, and the OLG. The Subcommittee recommended that the hearsay exceptions in Titles 9 and 30 not be incorporated into the Evidence Rules, and the full Committee agreed, unanimously, with the recommendation.

Pursuant to the Court's request, the Committee reviewed its prior recommendation and the comments of the OLG. As the Committee noted in its 2021 Report, the New Jersey Rules of Evidence have broad application and generally do not address practice-specific scenarios. The hearsay rule already has numerous exceptions; the Committee is not inclined to recommend additional exceptions that merely harmonize statutory provisions. Any subsequent legislative amendments to Titles 9 and 30 would render the corresponding Rule of Evidence out-of-date. Further, the legislative history of these statutory hearsay exceptions

² An uncorroborated statement, while admitted into evidence under the statutory hearsay exceptions in Titles 9 and 30, is not sufficient to make a fact finding of abuse or neglect. N.J.S.A. 9:6-8.46(a)(4); N.J.S.A. 30:4C-15.1a(b).

was thin and did not provide extrinsic information to support (or oppose) the enactments. The Legislature apparently weighed the issues attendant to child statements related to abuse and neglect, including potential trauma suffered by the child while testifying and the reliability of the child's statements, and made its policy decision. The Committee, however, found little on which to base an informed decision that the hearsay is intrinsically reliable and warrants an exception to the hearsay rule.

The Committee also observed that the hearsay exceptions in Title 30 and Title 9 were not adopted in accordance with the Evidence Act, N.J.S.A. 2A:84A-33 to -44. The Evidence Act sets forth the framework for adopting or amending rules of evidence; there is no statutory mechanism by which the Legislature has the authority to adopt evidence rules on its own. The Committee, however, acknowledges that the hearsay exception contained in Title 9 has been observed by the bench and bar alike throughout its existence.³

After reviewing the OLG's comments and its prior recommendation, the Committee decided, unanimously, not to alter its conclusion that the New Jersey Rules of Evidence should not be amended to integrate the hearsay exceptions set forth in N.J.S.A. 9:6-8.46 and N.J.S.A. 30:4C-15.1a. While the statutory hearsay

³ The hearsay exception in Title 9 was enacted in 1974. L. 1974, c. 119, § 26. The hearsay exception in Title 30 was enacted much more recently, effective January 21, 2020. L. 2019, c. 379, § 1.

exceptions can conflict with Rule 803(c)(27) in specific cases, judges and lawyers have applied the exceptions in Title 9 cases for many years. The Committee notes that courts can continue to address this inconsistency as it arises, on a case-by-case basis.

II. ACKNOWLEDGMENT

The 2021-2023 Rules Cycle marks the final term of the Committee Chair, Honorable Carmen Messano, C.J.A.D. The members of the Supreme Court Committee on the Rules of Evidence would like to acknowledge and thank Judge Messano for his years of service and leadership on the Committee. Throughout his career as a jurist, Judge Messano demonstrated a remarkable work ethic, support of his colleagues, and fairness to advance justice in line with the core values of the New Jersey Judiciary: independence, integrity, fairness, and quality service.

III. CONCLUSION

The members of the Supreme Court Committee on the Rules of Evidence appreciate the opportunity to serve the Supreme Court.

Respectfully submitted,

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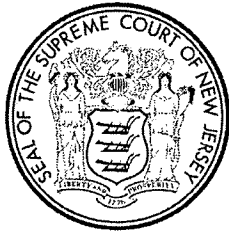
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Dated: January 2023

LMJG

IV. STATE V. HANNAH SUBCOMMITTEE REPORT

The State v. Hanna Subcommittee Report follows.



SUPREME COURT COMMITTEE ON THE RULES OF EVIDENCE

TO: Committee on the Rules of Evidence

FROM: State v. Hannah (N.J.R.E. 803(c)(25)) Subcommittee

DATE: September 12, 2022

RE: State v. Hannah (N.J.R.E. 803(c)(25))
Subcommittee Report

In his concurring opinion in State v. Hannah, 248 N.J. 148, 191-92 (2021), Chief Justice Rabner recommended the Committee on the Rules of Evidence consider whether N.J.R.E. 803(c)(25), the hearsay exception for statements against interest, should be amended. Specifically, the Chief Justice requested the Committee consider whether a corroboration requirement should be added to N.J.R.E. 803(c)(25) to ensure the reliability of these hearsay statements.

N.J.R.E. 803(c)(25) currently provides:

A statement which was at the time of its making so far contrary to the declarant's pecuniary, proprietary, or social interest, or so far tended to subject declarant to civil or criminal liability, or to render invalid declarant's claim against another, that a reasonable

person in declarant's position would not have made the statement unless the person believed it to be true. Such a statement is admissible against a defendant in a criminal proceeding only if the defendant was the declarant.

Under its federal counterpart, Fed. R. Evid. 804(b)(3), a statement against interest is admissible in a criminal case only if it is: 1) against the declarant's interest, and 2) "supported by corroborating circumstances that clearly indicate its trustworthiness." In his concurrence, the Chief Justice explained that the purpose of the second requirement is to "assure both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception." Hannah, 248 N.J. at 191 (quoting Advisory Committee Note to 2010 Amendment, Fed. R. Evid. 804(b)(3)).

In Hannah, 248 N.J. at 183-84, our Supreme Court granted defendant's petition for post-conviction relief after concluding that statements made by a co-defendant to his mother were admissible statements against interest under N.J.R.E. 803(c)(25). Those statements, according to the co-defendant's mother, "inferentially implicated her son in the murders, [and] provided a motion for her son to frame [defendant]." Id. at 163. The Court determined that the trial court erred in excluding these statements, and the Appellate Division mistakenly characterized the statements as inadmissible when it reasoned that N.J.R.E. 803(c)(25) only applied if the

statements were made "against an accused in a criminal action [and] only if the accused was a declarant." Id. at 72. As the Court clarified, the appropriate test is whether:

in the context of the whole statement, the particular remark was plausibly against the declarant's penal interest, even though it might be neutral or even self-serving if considered alone. The declarant, however, need not be a party to the action in which the statement is admitted, nor must the declarant be unavailable. The rule requires only that the statement so far subjected (the declarant) to a . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true.

[Ibid. (internal quotations and citations omitted).]

The Court concluded defendant's inability to present his co-defendant's inculpatory statements under N.J.R.E. 803(c)(25) improperly denied him the opportunity to present a complete defense. Accordingly, the Court granted defendant's position, vacated his conviction and remanded for a new trial.

Professor J.C. Lore, a member of the Subcommittee, prepared a research report detailing the history and development of Fed. R. Evid. 804(b)(3) and N.J.R.E. 803(c)(25), and the rationale behind both rules. The Subcommittee met on May 26, 2022 to deliberate and discuss the report. That report is attached, and the Subcommittee's deliberations are summarized below. For the reasons that follow,

and after thorough consideration, the Subcommittee has concluded that New Jersey should remain in the minority and the Rule should remain unchanged.

Fed. R. Evid. 804(b)(3) was developed as a hearsay exception based upon the inherent trustworthiness of a declaration made against one's own interest, as the exception assumes "persons do not make statements which are damaging to themselves unless satisfied for good reasons that they are true." Fed. R. Evid. 804 Advisory Committee's Note. Acknowledging the potential for fabrication surrounding a statement against one's penal interest, particularly when a third-party statement is offered to exculpate the accused in a criminal case, the drafters added the requirement for corroborating circumstances. See ibid. The Federal Rule also requires that the declarant be unavailable in order for the exception to apply.

N.J.R.E. 803(c)(25) follows the same logic of the Federal Rule, as it assumes the trustworthiness of a statement against interest. The New Jersey Rule differs from the Federal Rule, however, as it lacks a corroboration requirement. The Rule hinges on the rationale that "a statement having such negative consequences would be made only if the speaker believed it was accurate." E. Judson Jennings & Glen Weissenberger, New Jersey Evidence Courtroom Manual, Chapter 803(c) § 1 (release no. 2022, 2021). In other words, "'by human nature, individuals will neither assert, concede, nor admit to facts that would affect them unfavorably' and

accordingly, 'statements that so disserve the declarant are deemed inherently trustworthy and reliable.'" Rowe v. Bell & Gossett Co., 239 N.J. 531, 558 (2019) (quoting State v. Brown, 170 N.J. 138, 148-49 (2001)).

New Jersey is one of only six states that permits statements against interest without requiring additional corroborating evidence. New Jersey considers any corroborating evidence – or the lack thereof – as part of the statement's probative value for the trier of fact to consider. See New Jersey Institute for Continuing Legal Education, New Jersey Trial & Evidence § 10.8.E (2019). New Jersey entrusts decisions regarding the trustworthiness of such statements to the fact-finder.

Indeed, New Jersey courts have consistently held that reliability of a third-party declarant's inculpatory statement is properly left to the jury's consideration. Once such a statement is admitted, and where the declarant is unavailable, "[t]he jury should undertake an unfettered and full consideration of all the circumstances surrounding the declarant's confession and disregard the statement or any part thereof if it finds the statement not credible." State v. White, 158 N.J. 230, 246 (1999). Where the declarant testifies and denies making the statement, the jury has "the opportunity to hear, weigh, and evaluate the testimony." Hill v. New Jersey Dep't of Corr. Com'r Fauver, 342 N.J. Super. 273, 301 (App. Div. 2001).

In addition, unlike the Federal Rule, New Jersey does not require a declarant be unavailable for a statement against interest to be admitted, considering the declarant's availability irrelevant to its trustworthiness. Of the six states without a corroboration requirement, only New Jersey and Kansas allow statements against interest to be admitted without regard to the declarant's availability.

New Jersey considers an out-of-court statement against interest be just as reliable as one made on the stand. The drafters reasoned that some other less trustworthy exceptions, such as excited utterances or statements of mental or physical condition, were admissible regardless of the declarant's availability, and therefore did not deem an availability requirement necessary for statements against interest. See New Jersey Supreme Court Committee on Evidence, 1963 Report of the New Jersey Supreme Court Committee on Evidence (1963). In 1991, the Committee on Evidence, considering whether to adopt the Federal Rules of Evidence, "rejected the federal requirement of corroborating circumstances" as part of Rule 803(c)(25) because the "inherent reliability of such statements was deemed sufficient to justify their admission even if the declarant is available as a witness." New Jersey Supreme Court Committee on Evidence, 1991 Report of the New Jersey Supreme Court Committee on Evidence 44 (1991).

When a statement against interest is offered by the State against a criminal defendant, the New Jersey Rule permits its introduction "only if the defendant was the declarant." N.J.R.E. 803(c)(25); see also State v. Rucki, 367 N.J. Super. 200, 206-07 n.1 (App. Div. 2004) (explaining that the guilty plea of defendant's alleged accomplice was not admissible against defendant under the 803(c)(25) exception, because defendant was not the declarant). In this situation, the statement is also admissible under Rule 803(b)(1)(A) as a party-admission. As such, the Rule has primary utility in a criminal case when the defendant offers an inculpatory statement made by a third-party declarant as a third-party guilt defense.

As the Court explained in Hannah, a third-party guilt defense is "admissible so long as 'the proof offered has a rational tendency to engender a reasonable doubt with respect to an essential feature of the State's case.'" 248 N.J. at 181 (quoting State v. Perry, 225 N.J. 222, 238 (2016)). Generally, these statements are admissible "where 'the proffered evidence [draws] a direct connection between the third party and the commission of the crime.'" Ibid. (alteration in original) (quoting State v. Koedatich, 112 N.J. 225, 300-01 (1988)).

As noted, "[t]he declarant . . . need not be a party to the action in which the statement is admitted." Rowe, 239 N.J. at 559; see Hannah, 248 N.J. at 184 (reversing defendant's conviction and concluding that third-party guilt testimony

was improperly excluded as a result of a "clearly erroneous interpretation" of N.J.R.E. 803(c)(25) "that a statement against interest could be introduced only 'against an accused in a criminal action [and] only if the accused was a declarant"; State v. Cope, 224 N.J. 530, 556 (2016) (reversing defendant's conviction based on the trial court's erroneous exclusion of a third-party's statement accepting criminal responsibility); State v. Tormasi, 443 N.J. Super. 146, 151 (App. Div. 2015) (reversing the trial court's exclusion of a third-party confession as a "misinterpretation of N.J.R.E. 803(c)(25)").

At the May 26, 2022 meeting, the Subcommittee discussed the report and the implications and burdens attendant to adding a corroboration requirement upon the parties and the courts, with a particular focus on defendants in criminal trials. Two Subcommittee members, a judicial member and representative from the State, expressed concern that New Jersey's iteration of the Rule, which requires neither unavailability nor a corroboration component, represented a small minority of states with such approach. Those members supported amending the Rule to mirror Fed. R. Evid. 804(b)(3), while acknowledging, however, that including a corroboration requirement could conceivably increase the pretrial burden on trial courts in the form of additional Rule 104 hearings. Those members expressed concern that without some form of governor on the introduction of hearsay evidence encompassed by the

Rule, particularly related to third-party guilt evidence in criminal trials, defendants could introduce false confessions with little ability of the State to effectively challenge those proofs.

The majority of the Subcommittee, however, disagreed with amending the Rule, and pointed out that a change would likely not lead to a pretrial motion burden, as trial courts must necessarily evaluate the admission of any disputed evidence for relevance under N.J.R.E. 401 and for undue prejudice, confusion, or waste of time under N.J.R.E. 403. Defense advocates on the Subcommittee also noted that requiring corroboration could place an unnecessary obstacle upon defendants who assert a third-party guilt defense. As noted, the Rule as currently drafted has greatest utility in a criminal case where such a defense is proffered.

Another member noted that, as Professor Lore's report explains, statements against interest are inherently reliable, given the tendency to avoid admitting to facts that do not serve one's own interest, and an appropriate N.J.R.E. 403 analysis conducted by the court can exclude any unreliable statements. Further, other Subcommittee members stressed that jurors are best equipped to make credibility determinations for these hearsay statements. In sum, the majority of the Subcommittee concluded that requiring corroboration was unnecessary, and potentially detrimental, particularly to criminal defendants.

September 12, 2022

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Declarations Against Interest: The History, Development, and Rationale Supporting Federal Rule
of Evidence 804(b)(3) and New Jersey Rule of Evidence 803(c)(25)

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**Declarations Against Interest: The History, Development, and Rationale Supporting
Federal Rule of Evidence 804(b)(3) and New Jersey Rule of Evidence 803(c)(25)**

In general, statements made out of court are inadmissible as hearsay. The rules governing hearsay vary from state to state, but exceptions are commonly recognized. One of these is an exception for statements contrary to the declarant's interest. The following will discuss the development of the exception in both the Federal Rules of Evidence and the New Jersey Rules of Evidence. It will examine the rationale behind the rule generally, as well as the rationale for and against an additional corroboration requirement when statements against the declarant's penal interest are offered to exculpate a criminal defendant. Finally, it will briefly address the approaches taken by other states.

The Common Law Rule

At common law, an exception to the general rule excluding hearsay statements was made for declarations against the declarant's pecuniary or proprietary interest, but not statements exposing the declarant to criminal liability.¹ The rule relied on necessity, because the declarant must be unavailable, as well as the inherent trustworthiness of statements against interest.² Declarations against one's interest are considered inherently reliable because most people would not make them unless believing the statement to be true.³ One of the most well-known statements of the rule came from the House of Lords in 1844 in the *Sussex Peerage Case*.⁴ There, the House of Lords excluded a criminal confession made by a declarant who was unavailable to

¹ 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, 5-6 (2002) (describing the evolution of the common law rule).

² *Id.*

³ *Id.*

⁴ *Id.*

testify.⁵ This rule persisted until the adoption of the Federal Rules of Evidence, but not without some questioning from courts.⁶

In *Donnelly v. United States*, the United States Supreme Court relied on the Sussex Peerage Case to affirm the exclusion of a third party's confession to the murder for which the defendant was being tried.⁷ The Court reasoned that statements subjecting the declarant to criminal liability were not recognized as an exception by either the English courts nor most state courts.⁸ However, *Donnelly* is more well-recognized for Justice Holmes' dissent, which questioned the inconsistency in the rule.⁹ Justice Holmes noted that the rules of evidence generally were "based on experience, logic, and common sense" and that there was no logical reason to exclude statements against penal interest from the general against-interest exception.¹⁰ After all, Justice Holmes wrote, "no other statement is so much against interest as a confession of murder."¹¹ When considering all the procedural safeguards to protect the accused, it seemed illogical to exclude a confession that could have the weight to convince the finder of fact.¹² This dissent was a key consideration in the development of uniform evidentiary rules.

The Federal Rule: 804(b)(3)

In the Federal Rules of Evidence, the common law exception for declarations against interest is codified in and expanded by Rule 804(b)(3). After establishing that the witness is

⁵ *Id.*

⁶ *Id.*

⁷ *Donnelly v. U.S.*, 228 U.S. 243, 273, 33 S. Ct. 449, 459-460 (1913).

⁸ *Id.*

⁹ *Id.* at 277-278 (Holmes, J., dissenting).

¹⁰ *Id.*

¹¹ *Id.* at 278 (Holmes, J., dissenting).

¹² *Id.*

unavailable, as required by Rule 804(a), the statement's proponent must establish that the statement is one that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

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

Like its common law counterpart, the federal rule contemplates financial or proprietary interest, and statements that subject the declarant to civil liability. However, by including statements that subject the declarant to criminal liability, the federal rule expands the common law exception.

Development of the Federal Rule

The Federal Rules of Evidence were created in response to a need for increased uniformity and accessibility.¹³ Evidentiary case law varied from circuit to circuit, and courts sitting in diversity jurisdiction also had to consider if there was a federal rule overriding state law.¹⁴ Because evidentiary decisions often must be made quickly during a hearing or trial, rules that are easy to locate and apply would reduce confusion and difficulty for judges and litigants

¹³ 120 CONG. REC. 36926 (1974).

¹⁴ *Id.*

alike.¹⁵ Federal Rule of Evidence 102 provides the purpose of the rules—“to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.”¹⁶

The Federal Rules of Evidence were not the first attempt to create a uniform evidentiary code. The American Law Institute adopted its Model Code of Evidence in 1942, intended to serve as model legislation for the states.¹⁷ The Model Code would allow any hearsay statement if the declarant is found to be unavailable, without consideration of further circumstances.¹⁸ In 1953, the National Conference of Commissioners on Uniform State Laws published their Uniform Rules of Evidence with similar goals.¹⁹ The Uniform Rule was more limited than the Model Code, not allowing *any* hearsay statement from unavailable declarants.²⁰ However, the Uniform Rule also expanded on the common law rule by including statements that expose the declarant to criminal liability and by abandoning the unavailability requirement.²¹ The Model Code was not adopted anywhere, and the Uniform Rules were adopted only in Kansas, New Jersey, and Utah.²² However, these early efforts led to what would become the Federal Rules of Evidence.

The Judicial Conference of the United States authorized then-Chief Justice Warren to appoint a special advisory committee to determine if federal uniform rules would be advisable or

¹⁵ *Id.*

¹⁶ FED. R. EVID. 102.

¹⁷ L. Kinvin Wroth, *The Federal Rules of Evidence in the States: A Ten-Year Perspective*, 30 VILL. L. REV. 1315, 1317 (1985).

¹⁸ G.D. Nokes, *American Uniform Rules of Evidence*, 4 THE INT’L AND COMPARATIVE LAW QUARTERLY 1, 48-52 (1955).

¹⁹ Kinvin Wroth, *supra* note 17.

²⁰ Nokes, *supra* note 18.

²¹ *Id.*

²² Kinvin Wroth, *supra* note 17.

feasible in 1961.²³ The committee found uniform rules to be both advisable and feasible, and recommended their prompt promulgation.²⁴ In 1963, an Advisory Committee consisting of professors, attorneys, and judges began to develop what would become the Federal Rules.²⁵ In 1969, the Judicial Committee on Rules of Practice and Procedure (“The Committee”) finalized its proposal for uniform federal rules of evidence, which was circulated widely for comment.²⁶ After some additional revisions, a draft was submitted to the United States Supreme Court in 1971.²⁷ The Supreme Court promulgated its final version of the Federal Rules in 1973.²⁸

While typically the rules would have taken effect in 90 days, Congress enacted Public Law 93-12 to give it an opportunity to review the rules, particularly those regarding privilege, more fully.²⁹ This required Congressional approval of the rules before their implementation.³⁰ The House Judiciary Committee’s Subcommittee on Criminal Justice published its first version of H.R. 5463—“A bill to establish rules of evidence for certain courts and proceedings”—after extensive hearings.³¹ The bill was signed into law by President Ford in January 1975.³² The final Federal Rules approved by Congress retained more than half of the original rules as promulgated by the Supreme Court.³³

²³ 120 CONG. REC., *supra* note 13.

²⁴ *Id.*

²⁵ *Id.*

²⁶ PROPOSED RULES OF EVIDENCE FOR THE U.S. DIST. COURTS AND MAGISTRATES (Judicial Conference of the United States Committee on Rules of Practice and Procedure, Preliminary Draft 1969) [hereinafter “1969 Proposed Rules”].

²⁷ 120 CONG. REC. *supra* note 13.

²⁸ 120 CONG. REC. 40890 (1974).

²⁹ 120 CONG. REC. *supra* note 13.

³⁰ *Id.*

³¹ *Id.*; 120 CONG. REC. 37064 (1974).

³² 120 CONG. REC. 41995 (1975).

³³ 120 CONG. REC., *supra* note 13.

The Federal Rules delineated two general categories of hearsay exceptions: statements that are admissible regardless of the availability of the declarant (Rule 803) and statements that are admissible only if the declarant is unavailable (Rule 804)³⁴. Those in the first category are considered sufficiently trustworthy to be admitted, while those in the second category are considered somewhat less trustworthy, but the declarant's unavailability establishes some necessity for resorting to hearsay³⁵. Although hearsay is less desirable than in-person testimony, it is preferred over the complete loss of evidence.³⁶ Originally, the exceptions in Rule 804 were not intended to "fix its outer limits", but as illustrations drawing from the common law to encourage "growth and development in practical application" of Rule 804(a).³⁷

Like the common law rule before it, the trustworthiness of a declaration of interest under Rule 804(b)(3) assumes that "persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true."³⁸ The unavailability of the declarant also establishes the need for resorting to hearsay.³⁹ However, the rule departs from its predecessor by including statements against one's penal interest. Citing Justice Holmes' dissent in *Donnelly v. United States*, the Committee determined that the common law's exclusion of statements exposing the declarant to criminal liability was "indefensible in logic".⁴⁰ The Committee considered exposure to criminal punishment to be a sufficient stake making such statements trustworthy.⁴¹ As Justice Holmes wrote, "no other statement is so much against interest as a

³⁴ 1969 Proposed Rules, *supra* note 26.

³⁵ CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE (5th ed. 2012).

³⁶ 1969 Proposed Rules, *supra* note 26.

³⁷ *Id.*

³⁸ FED. R. EVID. 804 advisory committee's note; *see also* 1969 Proposed Rules, *supra* note 26.

³⁹ MUELLER & KIRKPATRICK, *supra* note 35.

⁴⁰ 1969 Proposed Rules (citing *Donnelly*, 228 U.S. at 277-78 (Holmes, J., dissenting)).

⁴¹ 1969 Proposed Rules, *supra* note 26.

confession of murder.”⁴² Even a person who is not especially honest generally will not make such a potentially damaging statement unless they believe it to be true.⁴³

During Congressional consideration of Rule 804(b)(3), debate centered around a provision in the original proposal that excluded third-party statements implicating both the declarant and the accused when such statement is offered against the accused in a criminal case.⁴⁴ Such statements create a Confrontation Clause issue because the declarant is unavailable to be confronted.⁴⁵ This provision was ultimately removed from the rule, following the “general approach in the Rules of Evidence to avoid attempting to codify constitutional evidentiary principles.”⁴⁶ However, Rule 804(b)(3) was not a particularly contentious provision of Congressional debate.

The Corroboration Requirement

The Committee also acknowledged the potential for fabrication in either the facts of a statement against one’s penal interest, or the making of it, particularly when a third party statement is offered to exculpate the accused in a criminal case.⁴⁷ Some expressed concern that people would falsely confess to shift blame, save others, curry favor with the authorities, or seek publicity or notoriety.⁴⁸ Others argued that a plausible confession could be fabricated by the defense while the unavailable declarant would be shielded from perjury charges.⁴⁹ Finally, there

⁴² *Donnelly v. U.S.*, 228 U.S. at 278 (Holmes, J., dissenting).

⁴³ 3 GEORGE E. GOLOMB, ET. AL., FEDERAL TRIAL GUIDE § 40.82 (release no. 29, 2021) (citing *Davis v. Velez*, 797 F.3d 192, 201 (2d Cir. 2015)).

⁴⁴ 120 CONG. REC. 39942 (1974).

⁴⁵ 1 EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS § 10.15 (release no. 11, 2020).

⁴⁶ 120 CONG. REC., *supra* note 44.

⁴⁷ 1969 Proposed Rules, *supra* note 26.

⁴⁸ John J. Capowski, *Statements Against Interest, Reliability, and the Confrontation Clause*, 28 SETON HALL L. REV. 471, 476-477 (1997).

⁴⁹ MUELLER & KIRKPATRICK, *supra* note 35.

were apprehensions about judicial economy when third party confessions needed to be attacked or explained during a trial.⁵⁰

“[C]orroborating circumstances that clearly indicate its trustworthiness” are a preliminary requirement for admission of a statement exposing the declarant to criminal liability, when offered in a criminal case.⁵¹ This was intended as an accommodation between the inherent trustworthiness of a declaration against one’s interest and the concern for fabrication, particularly in criminal cases and to “be construed in such a manner as to effectuate its purpose of circumventing fabrication.”⁵² The original 1969 Proposed Rules did not contain the corroboration requirement present in the current version.⁵³ The Committee suggested that juries were competent to address potential fabrication more efficiently than a rule.⁵⁴ The corroboration requirement was added as subsection (B) during revisions prior to the Supreme Court’s promulgation of the rule.⁵⁵ Requiring “corroborating circumstances that clearly indicate [the statement’s] trustworthiness” was thought to provide the appropriate standard and degree of discretion for the rule’s wide application.⁵⁶ The Committee went beyond simple corroboration, noting the possibility that the defendant’s own testimony could provide that corroboration without making the statement itself reliable.⁵⁷

⁵⁰ *Id.*

⁵¹ FED. R. EVID. 804 advisory committee’s note.

⁵² *Id.*

⁵³ 1969 Proposed Rules, *supra* note 26.

⁵⁴ *Id.*

⁵⁵ FED. R. EVID. 804(b)(3)(B); *see also* FED. R. EVID. 804 advisory committee’s note.

⁵⁶ *Id.*

⁵⁷ *Id.*

In 2010, Rule 804(b)(3)(B) was amended to require both the criminal defendant and the prosecution to meet the corroboration requirement.⁵⁸ Originally, the rule imposed the corroboration requirement only when the statement was offered by the defendant, however some courts did hold the prosecution to the same standard.⁵⁹ The aims of the amendment were to apply the rule more uniformly, avoid abuse, and ensure reliability of the admitted statements.⁶⁰

The New Jersey Rule: 803(c)(25)

In New Jersey, the rule governing the hearsay exception for statements against interest differs from the federal rule in some respects. New Jersey Rules of Evidence Rule 803(c) delineates exceptions that “are not excluded by the rule against hearsay, regardless of if the declarant is available as a witness.”⁶¹ N.J. R. Evid. 803(c)(25) provides one of the exceptions:

A statement which was at the time of its making so far contrary to the declarant’s pecuniary, proprietary, or social interest, or so far tended to subject declarant to civil or criminal liability, or to render invalid declarant’s claim against another, that a reasonable person in declarant’s position would not have made the statement unless the person believed it to be true. Such a statement is admissible against a defendant in a criminal proceeding only if the defendant was the declarant.

N.J. R. EVID. 803(c)(25)

The rationale for the New Jersey rule follows the common law and federal rules. A statement against interest is considered trustworthy because of its high probability that “a

⁵⁸ FED. R. EVID. 804 advisory committee’s note on 2010 amendments; 1 GLEN WEISSENBERGER & A.J. STEPHANI, FEDERAL EVIDENCE COURTROOM MANUAL, Chapter 804 § 1 (2021).

⁵⁹ *Id.*

⁶⁰ FED. R. EVID. 804 advisory committee’s note on 2010 amendments.

⁶¹ N.J. R. EVID. 803(c).

statement having such negative consequences would be made only if the speaker believed it was accurate.”⁶² People generally do not “assert, concede, nor admit to facts that would affect them unfavorably” so statements that do are “inherently trustworthy and reliable.”⁶³ New Jersey jurisprudence considers declarations against interest to be so trustworthy that the declarant’s availability is irrelevant.⁶⁴

Like its federal counterpart, the New Jersey rule contemplates statements implicating the declarant’s pecuniary or proprietary interest, as well as those exposing the declarant to civil or criminal liability.⁶⁵ The New Jersey rule also adds an exception for statements against the declarant’s social interest, a provision contemplated but ultimately removed from the federal rule.⁶⁶ A statement against one’s penal interest need not be supported by corroborating circumstances as required in the federal rule.⁶⁷ Significantly, the New Jersey rule does not require the declarant be unavailable as a condition to admission, deeming a statement against interest to be sufficiently inherently reliable even if the declarant is available.⁶⁸

Development of the New Jersey Rule

Common law in New Jersey recognized declarations against interest as an exception to the general hearsay rule.⁶⁹ Only statements adverse to one’s pecuniary or proprietary interest were admissible, and the declarant was required to be unavailable.⁷⁰ The declarant must also

⁶² 1 E. JUDSON JENNINGS & GLEN WEISSENBERGER, NEW JERSEY EVIDENCE COURTROOM MANUAL Chapter 803(c) §1 (release no. 2022, 2021).

⁶³ NEW JERSEY INSTITUTE FOR CONTINUING LEGAL EDUCATION, NEW JERSEY TRIAL & EVIDENCE § 10.8.E (2019).

⁶⁴ N.J. R. EVID. 804 official comment.

⁶⁵ N.J. R. EVID. 803(c).

⁶⁶ *Id.*; 1969 Proposed Rules *supra* note 26.

⁶⁷ N.J. R. EVID. 803 official comment.

⁶⁸ *Id.*; N.J. R. EVID. 804 official comment.

⁶⁹ 2D JOHN H. KLOCK, NEW JERSEY PRACTICE: EVIDENCE RULES ANNOTATED (3d ed. 2009).

⁷⁰ *Id.*

have had no reason to make a false statement.⁷¹ Because “no one would knowingly make a statement that would harm oneself unless it were true,” these statements were “considered inherently trustworthy.”⁷²

New Jersey began to develop its own uniform evidentiary rules during the 1950s.⁷³ The Committee on Revision of the Law of Evidence to the Supreme Court of New Jersey, also known as the Jacobs Committee, was formed in 1954.⁷⁴ The Jacobs Committee recommended adopting most of the Uniform Rules of Evidence as drafted by the National Conference of Commissioners on Uniform State Laws.⁷⁵

The Jacobs Committee recommended adopting the Uniform Rule on declarations against interest.⁷⁶ The Uniform Rule differed in some respects from the common law in New Jersey. First, it extended the exception to include statements that affect the declarant’s penal and social interest.⁷⁷ The Jacobs Committee gave weight to Justice Holmes’ dissent in *Donnelly v. U.S.*, which pointed out the illogicality of excluding penal interest from the exception, advocacy for expansion of the rule by evidence scholar John H. Wigmore, and the fact that similar provisions had been adopted in other states.⁷⁸ Next, the exception did not require the declarant’s unavailability.⁷⁹ The Jacobs Committee thought this appropriate in light of “the inherent trustworthiness of such declarations [against interest]” which was perhaps even greater than

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ KLOCK, *supra* note 69 (recounting the 1955 Jacobs Committee’s advisory note).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

statements against interest made in open court.⁸⁰ The Uniform Rules also broadened the scope of exceptions to the hearsay rule more generally; the Jacobs Committee found this expansion of the exception for declarations against interest appropriate in keeping with that general approach.⁸¹

After further research and debate, the New Jersey Legislature passed the Evidence Act of 1960, which adopted the definitions and scope of the proposed rules.⁸² The proposed rule regarding statements against interest was not included at this time. The Evidence Act also created a provision for the remaining rules to be proposed by the New Jersey Supreme Court and approved by the legislature and Governor.⁸³ The New Jersey Supreme Court established its Committee on the Revision of Rules of Evidence (“The NJ Committee”) in 1960, which re-examined the Uniform Rules and compared the previous proposals.⁸⁴ In 1963, The NJ Committee submitted its final draft of evidentiary rules to the New Jersey Supreme Court.⁸⁵ After approval by the New Jersey Supreme Court, the rules were then revised by the Legislature’s Rules of Evidence Study Commission, which issued its report in 1967.⁸⁶ The New Jersey Rules of Evidence became effective later that year.⁸⁷ The hearsay exceptions for declarations against interest was codified in Rule 63(10).⁸⁸ In 1992 and 1993, the New Jersey

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ Charles J. Walsh & Gwen L. Posner, *Presenting and Challenging Witnesses Under New Jersey Rules of Evidence 607, 611(c), and 803(a)(1): Should We Vouch for the Credibility of These Rules?*, 27 SETON HALL L. REV. 399 (1997) (describing the history of the New Jersey Rules of Evidence).

⁸⁴ *Id.*

⁸⁵ NEW JERSEY SUPREME COURT COMMITTEE ON EVIDENCE, 1963 REPORT OF THE NEW JERSEY SUPREME COURT COMMITTEE ON EVIDENCE (1963). [hereinafter “1963 Report”]

⁸⁶ Walsh & Posner, *supra* note 83.

⁸⁷ KLOCK, *supra* note 69.

⁸⁸ N.J. R. EVID. 803 official comment.

Rules were re-numbered to match the Federal Rules.⁸⁹ Substantively, the new Rule 803(c)(25) was not changed from its predecessor, Rule 63(10).⁹⁰

Unlike the Federal Rules, New Jersey originally placed all hearsay exceptions in Rule 63 without division based on the declarant's availability.⁹¹ The NJ Committee placed the formulation of rules applicable to New Jersey's needs above the maintenance of uniformity between the state and federal rules for uniformity's sake.⁹² Some on the NJ Committee believed that the historical unavailability requirement should be maintained.⁹³ The unavailability proponents wanted to espouse a preference for live testimony over hearsay statements whenever possible; additionally, they raised concerns that some statements may not be sufficiently trustworthy.⁹⁴

Ultimately, unavailability continued to be a condition for certain exceptions, including dying declarations and prior testimony, but not declarations against interest.⁹⁵ The NJ Committee noted that evidence scholars generally consider statements against interest to be one of the most reliable exceptions, with one of the most effective guarantees of trustworthiness.⁹⁶ An out-of-court statement against interest had the same trustworthiness as one made on the stand, the NJ Committee wrote.⁹⁷ It reasoned that relatively less trustworthy exceptions, such as excited utterances and statements of mental or physical condition, were admissible regardless of the

⁸⁹ KLOCK, *supra* note 69.

⁹⁰ *Id.*

⁹¹ N.J. R. EVID. 804 official comment.

⁹² 1963 Report, *supra* note 85.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ N.J. R. EVID. 804 official comment.

⁹⁶ 1963 Report, *supra* note 85.

⁹⁷ *Id.*

declarant's availability, and therefore an unavailability requirement was not necessary to ensure the reliability of a declaration against interest.⁹⁸

New Jersey Rule 63(10) followed its federal counterpart in including statements that exposed the declarant to criminal liability, but went beyond the Federal Rule by also including statements against one's social interest.⁹⁹ New Jersey specifically considered the use of statements against a penal interest when used to exculpate a criminal defendant, and decided that "criminal defendants as a class should be able to use such statements on the basis that an innocent man would otherwise be denied the necessary evidence of a statement which clears him of the crime."¹⁰⁰ The NJ Committee considered such declarations as reliable, or even more reliable, than the traditional exceptions for statements against pecuniary or proprietary interest.¹⁰¹ Given this great trust in statements against one's penal interest, the New Jersey Rule does not require additional corroboration when such a statement is offered to exculpate the accused in a criminal case.¹⁰²

Rationale Against the Corroboration Requirement

Instead of requiring corroboration as a condition of admission like the Federal Rule, New Jersey considers any corroboration—or the lack thereof—to go to the probative value of the statement.¹⁰³ The admissibility of a statement against interest looks only to the words of the statement itself.¹⁰⁴ Once the statement has been admitted, the extrinsic circumstances surrounding it are introduced so that the trier of fact may determine the statement's appropriate

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² N.J. R. EVID. 803 official comment.

¹⁰³ NEW JERSEY INSTITUTE FOR CONTINUING LEGAL EDUCATION, *supra* note 63.

¹⁰⁴ *Id.*

probative weight.¹⁰⁵ The fact-finder is generally trusted to determine credibility and the weight to be given to evidence throughout a trial. The New Jersey rule, therefore, entrusts decisions regarding the trustworthiness or fabrication of such statements to the fact-finder, similar to the original proposed federal rule.¹⁰⁶ The policy behind inclusion of penal interest in the rule also supports New Jersey's approach to corroboration. In the interest of protecting innocent people from wrongful convictions, New Jersey's rule allows statements implicating a third party to be admitted to exculpate the accused, even if few or no corroborating circumstances exist.¹⁰⁷ This also follows New Jersey's general view of statements against interest as highly inherently reliable and trustworthy.¹⁰⁸

Other States' Approaches

Most states have modeled their rules after Federal Rule 804(b)(3), with many adopting it verbatim.¹⁰⁹ Only six states (California, Indiana, Kansas, Missouri, New Jersey, and Tennessee) permit statements against the declarant's penal interest to be admitted in a criminal case to exculpate the accused with no additional corroboration requirement.¹¹⁰ Of these, only New Jersey and Kansas also admit such statements without regard to the declarant's availability.¹¹¹ This similarity is likely derived from the Uniform Rules, which both Kansas and New Jersey adopted as the basis for their rules.¹¹² The original Uniform Rule 63(10) recognized penal interest without additional corroboration and did not require unavailability.¹¹³ Texas is the only

¹⁰⁵ *Id.*

¹⁰⁶ 1969 Proposed Rules, *supra* note 26.

¹⁰⁷ 1963 Report, *supra* note 85.

¹⁰⁸ *Id.*

¹⁰⁹ *See infra* Table 1.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Kinvin Wroth, *supra* note 17.

¹¹³ Nokes, *supra* note 18.

other state to not require the declarant's unavailability, but its rule does impose a corroboration requirement.¹¹⁴ Alabama is the only state to continue the common law exclusion of penal interest from the exception, while Missouri admits statements against penal interest only in narrow circumstances.¹¹⁵

Conclusion

The common law exception to the general exclusion of hearsay statements for declarations contrary to one's interest heavily influenced both the federal and New Jersey codifications of the rule. The rule is premised on the idea that people do not typically say things that could injure them unless they believe those things to be true, establishing an inherent trustworthiness. Because the declarant must also be unavailable, resorting to hearsay is necessary. While both rules deviated from the common law rule by including statements subjecting the declarant to criminal liability, they diverge on what is required to admit those statements to exculpate a criminal defendant.

Federal Rule of Evidence 804(b)(3) conditions admissibility on the declarant's unavailability and on corroborating circumstances that clearly indicate the statement's trustworthiness. The federal rule relied on concerns that confessions could be fabricated to shift blame, curry favor with the authorities, or seek publicity or notoriety. This rule is also the approach taken by most states.

On the other hand, New Jersey Rule of Evidence 803(c)(25) imposes neither requirement, instead leaving the credibility of the statement to be determined by the finder of fact. With roots in the Uniform Rules of Evidence, a model legislation originally proposed in 1953, the New

¹¹⁴ See *infra* Table 1.

¹¹⁵ *Id.*

Jersey rule considered declarations against penal interest to be one of the most reliable among recognized hearsay exceptions, and thought the finder of fact competent to determine the proper weight to be given to this type of evidence. New Jersey is joined by only one other state, Kansas, in imposing neither an unavailability nor a corroboration requirement. While New Jersey's rule is the minority approach, its drafters simply took a different approach to the concerns behind the federal rule.

Table 1

State Rules Regarding Hearsay Statements Against Interest

State	Citation	Corroboration Requirement	Unavailability Requirement
Alabama	Ala. R. Evid. Rule 804(b)(3)	No*	Yes
Alaska	Alaska R. Evid. 804(b)(3)	Yes	Yes
Arizona	Ariz. R. Evid. R. 804	Yes	Yes
Arkansas	Ark. R. Evid. 804(b)(3)	Yes	Yes
California	Cal Evid Code § 1230	No	Yes
Colorado	C.R.E. 804(b)(3)	Yes	Yes
Connecticut	Conn. Code of Evidence 8-6(4)	Yes	Yes
Delaware	D.R.E. 804(b)(3)	Yes	Yes
Florida	Fla. Stat. § 90.804(2)(c)	Yes	Yes
Georgia	O.C.G.A. § 24-8-804(b)(3)	Yes	Yes
Hawaii	HRS chap. 626, HRS Rule 804(b)(3)	Yes	Yes
Idaho	I.R.E. Rule 804(b)(3)	Yes	Yes
Illinois	Ill. R. Evid. 804(b)(3)	Yes	Yes
Indiana	Ind. R. Evid. 804(b)(3)	No	Yes
Iowa	Iowa R. Evid. 5.804(b)(3)	Yes	Yes
Kansas	K.S.A § 60-460(j)	No	No
Kentucky	KRE Rule 804(b)(3)	Yes	Yes
Louisiana	La. C.E. Art. 804(B)(3)	Yes	Yes
Maine	Me. R. Evid. 804(b)(3)	Yes	Yes
Maryland	Md. Rule 5-804(b)(3)	Yes	Yes
Massachusetts	ALM G. Evid. § 804(b)(3)	Yes	Yes
Michigan	MRE 804(b)(3)	Yes	Yes
Minnesota	Minn. R. Evid. 804(b)(3)	Yes	Yes
Mississippi	Miss. R. Evid. 804(b)(3)	Yes	Yes
Missouri	<i>See Note**</i>	No**	Yes**
Montana	Title 26, Ch. 10, Rule 804(b)(3), MCA	Yes	Yes
Nebraska	R.R.S. Neb. § 27-804(2)(c)	Yes	Yes
Nevada	Nev. Rev. Stat. Ann. § 51.345	Yes	Yes
New Hampshire	N.H. Evid. Rule 804(b)(3)	Yes	Yes
New Jersey	NJ R. Evid. Rule 803(c)(25)	No	No
New Mexico	11-804 NMRA(B)(3)	Yes	Yes
New York	Guide to NY Evid rule 8.11	Yes	Yes
North Carolina	N.C. Gen. Stat. § 8C-1, R. 804(b)(3)	Yes	Yes
North Dakota	N.D.R. Ev. Rule 804(b)(3)	Yes	Yes
Ohio	Ohio Evid. R. 804(B)(3)	Yes	Yes

Oklahoma	12 Okl. St. § 2804(B)(3)	Yes	Yes
Oregon	ORS §40.465(3)(c)	Yes	Yes
Pennsylvania	Pa.R.E. 804(b)(3)	Yes	Yes
Rhode Island	R.I. R. Evid. 804(b)(3)	Yes	Yes
South Carolina	Rule 804(b)(3), SCRE	Yes	Yes
South Dakota	S.D. Codified Laws § 19-19-804(b)(3)	Yes	Yes
Tennessee	Tenn. R. Evid. Rule 804(b)(3)	No	Yes
Texas	Tex. Evid. R. 803(24)	Yes	No
Utah	Utah R. Evid. Rule 804(b)(3)	Yes	Yes
Vermont	V.R.E. Rule 804(b)(3)	Yes	Yes
Virginia	Va. Sup. Ct. R. 2:804(b)(3)	Yes	Yes
Washington	Wash. ER 804(b)(3)	Yes	Yes
West Virginia	W.V.R.E. Rule 804(b)(3)	Yes	Yes
Wisconsin	Wis. Stat. § 908.045(4)	Yes	Yes
Wyoming	WY R. Evid. Rule 804(b)(3)	Yes	Yes

Notes: 43 states include a corroboration requirement in their rules, and 6 states do not (California, Indiana, Kansas, Missouri, New Jersey, and Tennessee). Alabama was not counted as it does not include statements against penal interest in its rule. Only 3 states (Kansas, New Jersey, and Texas) allow admission regardless of the declarant's availability. Kansas and New Jersey are the only states that do not have either a corroboration requirement or an unavailability requirement.

* Alabama does not include penal interest in the exception. *See* ALA. R. EVID. RULE 804, advisory committee's notes.

** Missouri does not include declarations against penal interest in the exception unless due process is implicated and the statement meets additional reliability requirements. Missouri does not have codified rules of evidence. *See* THE MO. BAR, MISSOURI EVIDENCE RESTATED § 804 (6th ed. 2021).