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# WILLIAM AND MARY BILL OF RIGHTS JOURNAL

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## ACCOMPLICES' CONFESSIONS AND THE CONFRONTATION CLAUSE

Welsh S. White\*

*The admissibility of an accomplice's confession against a criminal defendant has long been a subject of concern in Anglo-American law. The Supreme Court has held that accomplices' confessions to the police are presumptively unreliable under the Confrontation Clause, without clearly expressing what facts would lend to the reliability of such statements. However, Professor White argues that in Williamson v. United States, the Court adopted an empirical framework that will make such confessions more likely to be admissible against an accused.*

*In this Article, Professor White first explores the traditional skepticism towards accomplices' confessions and explains the nature of the current Confrontation Clause test. He then focuses on Williamson and its analysis of an accomplice's confession's admissibility under Federal Rule of Evidence 804(b)(3). Professor White argues that in Williamson, a majority of the Court adopted the position that a confession may be admissible if it is inculpatory, and not given as the result of a police inducement, such as a promise of leniency. He then attacks the empirical premises underlying this position, basing his arguments on the practical realities of police questioning and human nature. Professor White concludes that an accomplice's confession to the police is per se unreliable, and should never be introduced as evidence of the guilt of an accused.*

\* \* \*

*"I would be prepared to hold as a matter of due process that a confession of an accomplice resulting from formal police interrogation cannot be introduced as evidence of the guilt of an accused . . . ."*<sup>1</sup>

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\* Professor of Law, University of Pittsburgh. I would like to thank Albert Alschuler, Craig Bradley, Yale Kamisar, and Roger Park for their valuable comments on earlier drafts of this Article, and Melanie Bradish and Terry Stadtmuller for their excellent research assistance.

<sup>1</sup> Dutton v. Evans, 400 U.S. 74, 98 (1970) (Harlan, J., concurring).

"Even the confessions of arrested accomplices may be admissible if they are truly self-inculpatory, rather than merely attempts to shift blame or curry favor."<sup>2</sup>

### INTRODUCTION

During the Burger Court era, commentators observed that the criminal procedure revolution effected by the Warren Court remained undisturbed.<sup>3</sup> Although the Rehnquist Court has also been reluctant to overrule such landmark Warren Court decisions as *Miranda v. Arizona*<sup>4</sup> or *Mapp v. Ohio*,<sup>5</sup> it has been more inclined than the Burger Court to reconsider important constitutional principles, including some that were in effect prior to the Warren Court revolution<sup>6</sup> or endorsed by conservative Justices not associated with that revolution.<sup>7</sup> In *Williamson v. United States*,<sup>8</sup> a case that ostensibly deals with the interpretation of a federal rule of evidence, the Court indicated that it may be inclined to reconsider the principles to be applied in determining the constitutional admissibility of statements contained in an accomplice's confession to the police. At a minimum, *Williamson's* analysis—particularly the apparent assumptions of the pivotal opinions in that

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<sup>2</sup> *Williamson v. United States*, 114 S. Ct. 2431, 2436 (1994).

<sup>3</sup> See Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?), the Burger Court (Is It Really So Prosecution-Oriented?), and Police Investigatory Practices*, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* 62, 62-63 (Vincent Blasi ed., 1983); Stephen A. Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 *GEO. L.J.* 151, 208-09 (1980). *But see* Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 *GEO. L.J.* 185, 187 (1983).

<sup>4</sup> 384 U.S. 436 (1966).

<sup>5</sup> 367 U.S. 643 (1961).

<sup>6</sup> For example, *Arizona v. Fulminante*, 499 U.S. 279 (1991), reversed a line of precedents extending over 40 years that held that the introduction of a coerced confession at a criminal trial can never be harmless error. *See, e.g., Lyons v. Oklahoma*, 322 U.S. 596, 597 (1944). *See generally* Charles J. Ogletree, Jr., *Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 *HARV. L. REV.* 152 (1991).

<sup>7</sup> In *Teague v. Lane*, 489 U.S. 288 (1989), the Rehnquist Court purported to adopt principles of finality endorsed by Justice John Harlan, a conservative critic of the Warren Court revolution. *Id.* at 310. In fact, however, *Teague* reinterpreted Justice Harlan's finality principles so that the writ of habeas corpus would afford significantly less protection to criminal defendants. *See generally* Kathleen Patchel, *The New Habeas*, 42 *HASTINGS L.J.* 941, 990-1001 (1991); Robert Weisberg, *A Great Writ While It Lasted*, 81 *J. CRIM. L. & CRIMINOLOGY* 9, 24-25 (1990); Larry W. Yackle, *The Habeas Hagioscope*, 66 *S. CAL. L. REV.* 2331, 2385-99 (1993).

<sup>8</sup> 114 S. Ct. 2431 (1994).

case—provokes the need for an examination of some of the critical questions relating to the admissibility of an accomplice's confession.

Although cases addressing the constitutional admissibility of an accomplice's confession against a criminal defendant are relatively recent,<sup>9</sup> Anglo-American jurisprudence's concern for the trustworthiness of statements contained in an unexamined accomplice's confession predates the Warren Court revolution by at least three centuries. In Sir Walter Raleigh's case, which is often presented as a paradigm example of the evil the Confrontation Clause was designed to prevent,<sup>10</sup> the defendant Walter Raleigh was convicted on the basis of a sworn statement by Lord Cobham in which Cobham implicated both himself and Raleigh in a conspiracy relating to the dethroning of Queen Elizabeth.<sup>11</sup> Moreover, by the mid-17th century, it was established in England that, at least in treason cases, the confession of a conspirator could be used as evidence against the conspirator who confessed, "but [could not] be made use of as evidence against any others whom on his examination he confessed to be in the treason."<sup>12</sup>

When a suspected accomplice makes statements to government authorities that inculcate both himself and the accused, the reliability of the statements inculcating the accused is suspect because the statements may have been shaped by "police interrogators playing on the [accomplice's] desire to shift blame."<sup>13</sup> Thus, admitting the accomplice's hearsay statement against the accused raises serious evidentiary and constitutional issues. The evidentiary issues relate to determining the circumstances under which a hearsay statement may be admitted under an exception to the hearsay rule.<sup>14</sup> Under current constitutional doctrine, the constitutional issue concerns the scope of the accused's rights under the Confrontation Clause of the Sixth Amendment.<sup>15</sup>

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<sup>9</sup> See *infra* notes 16-33 and accompanying text.

<sup>10</sup> See, e.g., Charles R. Nesson & Yochai Benkler, *Constitutional Hearsay: Requiring Foundational Testing and Corroboration Under the Confrontation Clause*, 81 VA. L. REV. 149, 163 (1995).

<sup>11</sup> See JON R. WALTZ & ROGER C. PARK, EVIDENCE: CASES AND MATERIALS 82-83 (8th ed. 1995) (citing J.G. PHILLIMORE, HISTORY AND PRINCIPLES OF THE LAW OF EVIDENCE 157 (London, W. Benning 1850)).

<sup>12</sup> *Tong's Case*, 84 Eng. Rep. 1061, 1062 (K.B. 1663).

<sup>13</sup> Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 95 (1987).

<sup>14</sup> Prosecutors may seek to introduce the accomplice's hearsay statement against the accused under several exceptions to the hearsay rule. Depending on the circumstances, the prosecutor may claim that the statement qualifies as a declaration against interest, see, e.g., FED. R. EVID. 804(b)(3), or a statement made by a co-conspirator during the course and in furtherance of the conspiracy, see, e.g., FED. R. EVID. 801(d)(2)(E), or that the statement falls within one of the residual exceptions to the hearsay rule, see, e.g., FED. R. EVID. 803(24), 804(b)(5).

<sup>15</sup> The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused

In the landmark case of *Bruton v. United States*<sup>16</sup> the Supreme Court addressed one Confrontation Clause issue. In *Bruton*, the prosecutor introduced Evans's confession at a joint trial in which Evans and Bruton were convicted of robbery.<sup>17</sup> Although the trial judge had instructed the jury that Evans's confession was to be considered only against Evans, the Court held that the government's introduction of the parts of Evans's confession that incriminated Bruton violated Bruton's rights under the Confrontation Clause.<sup>18</sup> The Court concluded that "introduction of Evans' confession posed a substantial threat to [Bruton's] right to confront the witnesses against him,"<sup>19</sup> and the trial judge's limiting instructions to the jury did not adequately ameliorate that threat.<sup>20</sup>

*Bruton* did not hold that admitting the hearsay statement of a co-defendant or alleged accomplice would violate the defendant's right to confrontation in *all* situations. As the Court later noted, the prosecutor in *Bruton* did not claim that Evans's confession could be introduced against Bruton on the basis of an exception to the hearsay rule, and the Court did not consider whether admitting an accomplice's confession on the basis of a new or recognized exception to the hearsay rule would violate the defendant's constitutional right to confrontation.<sup>21</sup>

Seven years after the *Bruton* decision, Congress adopted the Federal Rules of Evidence.<sup>22</sup> Rule 804(b)(3) allows the admission of "[a] statement which . . . so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the

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shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. As the frontpiece to this Article indicates, earlier authorities suggested that admitting accomplices' confessions into evidence against a criminal defendant might present problems under the Due Process Clause of the Fourteenth Amendment.

<sup>16</sup> 391 U.S. 123 (1968).

<sup>17</sup> *Id.* at 123, 125.

<sup>18</sup> *Id.* at 137.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> See, e.g., *Lee v. Illinois*, 476 U.S. 530, 552 n.5 (1986) (Blackmun, J., dissenting); *Dutton v. Evans*, 400 U.S. 74, 86 (1970) (dictum); see also FED. R. EVID. 804(b)(3) advisory committee's note (stating that neither *Douglas v. Alabama*, 380 U.S. 415 (1965), nor *Bruton* "require that all statements implicating another person be excluded from the category of declarations against interest"). In *Douglas*, an alleged accomplice, called as a state witness, refused to testify. *Douglas*, 380 U.S. at 416. The state was allowed to treat him as a hostile witness, and in the course of cross-examination read his confession—which implicated *Douglas*—to the jury. *Id.* at 419. *Douglas* was not allowed to cross-examine the accomplice, and the Court held that this violated *Douglas*'s rights under the Confrontation Clause. *Id.*

<sup>22</sup> Federal Rules of Evidence, Pub. L. No. 93-595, 88 Stat. 1926 (codified as amended in scattered sections of 28 U.S.C.).

statement unless believing it to be true."<sup>23</sup> This rule and its state counterparts<sup>24</sup> provide the most plausible basis for admitting some or all of an accomplice's confession against the accused in a criminal case.<sup>25</sup> Arguably, a suspect who makes a confession that implicates both himself and another party would recognize that all or part of his confession could be used to subject him to criminal liability.

The congressional committee that drafted the Federal Rules of Evidence was aware that admitting an accomplice's confession as a declaration against interest might infringe a defendant's rights under the Confrontation Clause. Earlier drafts of Rule 804(b)(3) provided that "[a] statement or confession offered against the accused in a criminal case, made by a . . . person implicating both himself and the accused, is not admissible."<sup>26</sup> Although this

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<sup>23</sup> FED. R. EVID. 804(b)(3).

<sup>24</sup> More than 40 states have adopted some version of Rule 804(b)(3). Of these, 23 states have adopted the federal rule verbatim. *See, e.g.*, ARIZ. R. EVID. 804; OR. EVID. CODE R. 804. Approximately 10 states have variations of Rule 804(b)(3) with slight differences from the federal rule, sometimes requiring corroboration for inculpatory and exculpatory statements. *See, e.g.*, MONT. R. EVID. 804; TEX. R. CRIM. EVID. 803. Other states have more significant differences, including the omission of the federal rule's last sentence, which provides that "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." *See, e.g.*, KAN. CRIM. P. CODE ANN. § 60-460 (Vernon 1995); TENN. R. EVID. 804. Moreover, five states have enacted a version of Rule 804(b)(3) that includes the "*Bruton* sentence." *See, e.g.*, ARK. R. EVID. 804; IND. R. EVID. 804; ME. R. EVID. 804; N.D. R. EVID. 804; VT. R. EVID. 804; *see also infra* notes 27-29 and accompanying text. Vermont comments in its historical notes to the statute that the sentence was included with the intention of codifying the Sixth Amendment right in *Bruton*. VT. R. EVID. 804.

<sup>25</sup> Although declarations against interest have long been recognized as an exception to the hearsay rule, *see* MCCORMICK ON EVIDENCE § 317, at 529 (John W. Strong ed. 4th ed. hornbook series 1992); 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1455, at 324 (Chadbourne rev. 1974), until the first half of this century, the exception generally encompassed only declarations against pecuniary or proprietary interest, *see* MCCORMICK ON EVIDENCE, *supra*, § 317, at 529; 5 WIGMORE, *supra*, § 1476, at 350. Relying upon English common law authority, *Donnelly v. United States*, 228 U.S. 243 (1913), held that the declaration against interest exception did not include declarations against penal interest. *Donnelly* established the rule for the federal courts that also was generally followed in the states. *See, e.g.*, MCCORMICK ON EVIDENCE, *supra*, § 318, at 530; 5 WIGMORE, *supra*, § 1476, at 352; Prodded by Wigmore and other commentators, *see* 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1477, at 288-89 (3d ed. 1940); Bernard S. Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 HARV. L. REV. 1, 39 (1944), cases and evidence codes began to abandon *Donnelly*'s illogical limitation during the fifties and sixties, *see* *People v. Spriggs*, 389 P.2d 377 (Cal. 1964); *Brady v. State*, 174 A.2d 167 (Md. 1961), *aff'd*, 373 U.S. 83 (1963); *State v. Sejuelas*, 229 A.2d 659 (N.J. Super. Ct. App. Div. 1967); MODEL CODE OF EVIDENCE Rule 509(1) (1942).

<sup>26</sup> *See* Peter W. Tague, *Perils of the Rulemaking Process: The Development, Appli-*

language has been referred to as the "*Bruton* sentence,"<sup>27</sup> it is not clear whether the sentence was intended to incorporate *Bruton*'s holding or simply to reflect the view that an accomplice's statement implicating an accused would never truly be against the accomplice's interest.<sup>28</sup> In any event, in the course of the byzantine legislative process that led to Rule 804(b)(3)'s adoption, this sentence was deleted.<sup>29</sup> Thus, Federal Rule 804(b)(3) left open the possibility that part or all of an accomplice's confession to the police could be admitted against an accused as a declaration against penal interest.

In *Lee v. Illinois*,<sup>30</sup> the Court considered whether admitting a co-defendant's confession to the police as a declaration against penal interest violated the accused's constitutional right to confrontation. Reflecting Anglo-American jurisprudence's traditional skepticism of accomplices' confessions,<sup>31</sup> the Court held that on the facts presented in that case<sup>32</sup> the co-defendant's hearsay statement, "as the confession of an accomplice, was presumptively unreliable and . . . did not bear sufficient independent 'indicia of reliability' to overcome that presumption."<sup>33</sup> *Lee* thus established that statements contained in an accomplice's confession to the police are *presumptively unreliable* but did not elaborate as to the type of evidence that would be sufficient to rebut the presumption of unreliability.

In *Williamson*, the Court addressed the question of when statements contained in an accomplice's confession may be properly admitted under Federal Rule 804(b)(3).<sup>34</sup> Although the Court did not address the Confrontation Clause issue, its ultimate disposition of the case, as well as language in its pivotal opinions indicated that a majority of the Court might be adopting empirical premises that would make it easier for the prosecutor to admit statements contained in an accomplice's confession without violating the Confrontation Clause.<sup>35</sup> This Article will discuss and challenge the empiri-

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*cation, and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception*, 69 GEO. L.J. 851, 894 (1981).

<sup>27</sup> See, e.g., *id.*

<sup>28</sup> Based on a thorough examination of the Advisory Committee's Preliminary Drafts to Rule 804(b)(3), Professor Tague concludes that the "Advisory Committee did not include the '*Bruton* sentence' on the supposition that *Bruton* constitutionally mandated exclusion [of statements contained in a co-defendant's confession]." *Id.* at 892-93.

<sup>29</sup> For an account of the legislative history, see *id.* at 866-99.

<sup>30</sup> 476 U.S. 530 (1986).

<sup>31</sup> See *supra* notes 10-12 and accompanying text.

<sup>32</sup> For a discussion of *Lee*'s facts, see *infra* notes 42-47 and accompanying text.

<sup>33</sup> *Lee*, 476 U.S. at 539.

<sup>34</sup> *Williamson v. United States*, 114 S. Ct. 2431, 2434-37 (1994).

<sup>35</sup> As to the analysis to be adopted in assessing the admissibility of statements contained in an accomplice's confession, the Court was fragmented, with no Justice speaking for a majority. For an elaboration as to the break-down of the Justices' opinions, see *infra* note 78.

cal judgments that seem to be reflected in the pivotal *Williamson* opinions. Contrary to the tenor of these opinions, the admissibility of statements in an accomplice's confession should depend primarily on the circumstances under which the confession was given, not the extent to which the accomplice's particular statements were inculpatory. My ultimate position is consistent with that of Justice Harlan: barring unusual circumstances, statements contained in the "confession of an accomplice resulting from formal police interrogation"<sup>36</sup> should not be admissible under the Confrontation Clause.

In developing this thesis, Part I will explain the nature of the current Confrontation Clause test. Focusing particularly on the Court's decision in *Lee*, Part I will also identify the issues that a court must address in determining whether a statement contained in an accomplice's confession is sufficiently reliable to be admissible under the Confrontation Clause. Part II, which focuses on the Court's decision in *Williamson*, will explore the meaning of the pivotal opinions in that case and explain how the empirical judgments reflected in those opinions may bear on the issues that must be addressed in determining whether statements in an accomplice's confession are admissible under the Confrontation Clause. Part III will then challenge two of the *Williamson* opinions' empirical judgments. Based on material relating to the nature of police interrogation, this Part will argue that these judgments should be replaced by ones that lead to the adoption of Justice Harlan's conclusion concerning the reliability and constitutional admissibility of statements contained in an accomplice's confession.

## I. LEE'S PRESUMPTION OF UNRELIABILITY

### A. *The Confrontation Clause Test*

Over the past quarter century, the Court has developed various tests for determining the admissibility of hearsay evidence under the Confrontation Clause. Under its most recent test, the critical inquiry in most instances is whether the hearsay evidence has sufficient "indicia of reliability" to be admissible.<sup>37</sup> In order to establish such reliability, the government must

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<sup>36</sup> *Dutton v. Evans*, 400 U.S. 74, 98 (1970) (Harlan, J., concurring).

<sup>37</sup> *Idaho v. Wright*, 497 U.S. 805, 815 (1990) (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)). In *Roberts*, a case addressing the constitutional admissibility of a witness's testimony at the defendant's preliminary hearing, the Court stated that the Confrontation Clause generally requires that a declarant either be produced at trial or be found unavailable before his out-of-court statement may be admitted into evidence. *Roberts*, 448 U.S. at 66; see also *White v. Illinois*, 502 U.S. 346, 353 (1992). In subsequent cases, however, the Court limited *Roberts* so that the government's requirement to produce or



show either that the hearsay “falls within a firmly rooted hearsay exception”<sup>38</sup> or that it has “particularized guarantees of trustworthiness.”<sup>39</sup> In *Idaho v. Wright*,<sup>40</sup> the Court refined the latter part of the test by observing that the hearsay evidence “must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.”<sup>41</sup>

Based on this test, two critical questions arise when the government seeks to introduce statements contained in an accomplice’s confession as a declaration against penal interest. First, is a declaration against penal interest a firmly rooted hearsay exception? If not, are the particular statements sought to be introduced sufficiently reliable—on the basis of their “inherent trustworthiness”—to satisfy the indicia of reliability test?

#### B. *Lee v. Illinois*

In *Lee v. Illinois*, the Court addressed these questions in a context where the government sought to introduce an accomplice’s entire confession as a declaration against penal interest. In *Lee*, the police arrested Lee and her friend Thomas for their joint participation in a double murder.<sup>42</sup> Lee, who was interrogated first, gave a confession in which she implicated herself and Thomas.<sup>43</sup> After Thomas was arrested and given *Miranda* warnings, Lee and Thomas met and hugged. One of the police officers then asked Lee about her statement implicating Thomas. At that point, Lee said to Thomas, “didn’t you in fact say . . . that we wouldn’t let one or the other take the rap alone.”<sup>44</sup> Thomas then gave the police a statement implicating himself and Lee, which he later signed.<sup>45</sup> Thomas’s statement was similar to Lee’s in some respects, but in other respects it deviated and made Lee more culpable.<sup>46</sup> At Lee’s and Thomas’s joint trial, Thomas’s confession was admitted against Lee as a declaration against penal interest.<sup>47</sup>

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demonstrate the unavailability of the declarant seems to apply only in cases “where the out-of-court statements sought to be introduced were themselves made in the course of a judicial proceeding.” *White*, 502 U.S. at 356. In other situations, admission of hearsay evidence will not violate the Confrontation Clause so long as the hearsay evidence has sufficient “indicia of reliability.” *See id.*

<sup>38</sup> *Wright*, 497 U.S. at 815.

<sup>39</sup> *White*, 502 U.S. at 363; *Wright*, 497 U.S. at 815.

<sup>40</sup> 497 U.S. 805 (1990).

<sup>41</sup> *Id.* at 822.

<sup>42</sup> *Lee v. Illinois*, 476 U.S. 530, 531 (1986).

<sup>43</sup> *Id.* at 532.

<sup>44</sup> *Id.* at 533.

<sup>45</sup> *Id.*

<sup>46</sup> In particular, he indicated that he and Lee had previously discussed killing one of the victims and referred to conversations before the killing which suggested that the killing was premeditated. *Id.* at 534-35.

<sup>47</sup> *Id.* at 536-37. In explaining its verdict as to Lee, the trial court observed that it

By a bare majority, the Court held that admitting Thomas's confession violated Lee's right to confrontation.<sup>48</sup> The majority rejected the government's claim that the hearsay exception for a "declaration against penal interest" constituted a firmly rooted exception.<sup>49</sup> Viewing the case as one "involving a confession by an accomplice which incriminates a criminal defendant,"<sup>50</sup> the Court decided that such confessions are "presumptively unreliable"<sup>51</sup> and that, although the presumption could be rebutted, the government failed to do so in *Lee*.<sup>52</sup>

What kind of evidence would suffice to rebut the presumption of unreliability? Although *Lee* did not directly address this question, Justice Brennan's majority opinion did discuss the significance of the circumstances under which the accomplice's confession was made. In particular, Justice Brennan observed that Thomas, the accomplice, "was actively considering the possibility of becoming [the defendant's] adversary: prior to trial, [he] contemplated becoming a witness for the State against [the defendant]."<sup>53</sup> The Court thus viewed the record in *Lee* as "document[ing] a reality of the criminal process, namely, that once partners in a crime recognize that the 'jig is up,' they tend to lose any identity of interest and immediately become antagonists, rather than accomplices."<sup>54</sup>

*Lee*'s analysis could be read as suggesting that arrested accomplices' confessions to the police are so inherently unreliable<sup>55</sup> that, barring unusual circumstances, such as the accused's adoption of the accomplice's confession,<sup>56</sup> the admission of any statement contained in such a confession will violate the accused's Confrontation Clause rights. The Court's holding, however, did not go so far. *Lee* merely held that on the facts presented in that case, admission of the accomplice's confession violated the accused's

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had expressly relied on Thomas's confession and that Thomas's statement contradicted Lee's version of the events. *Id.* at 538.

<sup>48</sup> *Id.* at 547.

<sup>49</sup> *Id.* at 544 n.5.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 543.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 544.

<sup>54</sup> *Id.* at 544-45.

<sup>55</sup> Citing language from *Bruton* and *Douglas*, Justice Brennan's majority opinion observed that the "truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination." *Id.* at 541.

<sup>56</sup> In *Dutton v. Evans*, Justice Harlan identified the accused's adoption of the accomplice's confession as the one situation in which the constitutional rule he advocated would not apply. *Dutton v. Evans*, 400 U.S. 74, 98 (1970) (Harlan, J., concurring). Of course, when the accused adopts the accomplice's statement, that statement may be properly admitted as the accused's own statement without regard to whether the statement was initially made by the accomplice. See FED. R. EVID. 801(d)(2)(B).

right to confrontation.<sup>57</sup> The Court thus left open the question of whether differences relating to either the circumstances under which the accomplice's confession was given<sup>58</sup> or the content of the specific statements offered by the government<sup>59</sup> would be sufficient to rebut the presumption of unreliability established in *Lee*.

## II. WILLIAMSON'S EMPIRICAL PREMISES

In *Williamson*, the Court addressed the question of whether statements contained in an accomplice's confession constituted declarations against penal interest within the meaning of Federal Rule 804(b)(3).<sup>60</sup> Although the Court did not explicitly address the Confrontation Clause issue presented in that case, *Williamson's* discussion of the evidentiary issue has important implications for determining when a declaration against penal interest will have sufficient "indicia of reliability" to be admissible under the Confrontation Clause. In particular, a majority of the Court seemed to adopt empirical premises that will make it easier for the government to introduce portions of an accomplice's confession without violating the accused's right to confrontation.<sup>61</sup>

*Williamson* is a cryptic decision, however. As the concurring Justices make clear,<sup>62</sup> some of the majority's critical language is subject to widely different interpretations. Moreover, the Court was fragmented as to the ulti-

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<sup>57</sup> *Lee*, 476 U.S. at 546.

<sup>58</sup> See *United States v. Vernor*, 902 F.2d 1182, 1187-88 (5th Cir.) (noting that accomplice's confession implicating defendant bore sufficient indicia of reliability to satisfy requirements of Confrontation Clause because the accomplice made no attempt to minimize his own role in the crime and there was no indication that statements were made involuntarily or for an ulterior motive), *cert. denied*, 498 U.S. 922 (1990); *State v. Gilliam*, 635 N.E.2d 1242, 1246 (Ohio 1994) (finding that admission of co-defendant's taped statement did not violate Confrontation Clause because co-defendant did not attempt to exonerate himself or shift blame, and was fully advised of his rights), *cert. denied*, 115 S. Ct. 750 (1995).

<sup>59</sup> See *Glock v. Dugger*, 752 F. Supp. 1027, 1030 (M.D. Fla. 1990) (finding that co-defendants had made separate statements and also a joint statement in which they resolved discrepancies and which they both adopted; all three statements were admitted), *aff'd in part and rev'd in part sub nom.* *Glock v. Singletary*, 36 F.3d 1014 (11th Cir. 1994).

<sup>60</sup> *Williamson v. United States*, 114 S. Ct. 2431, 2432 (1994).

<sup>61</sup> *Id.* at 2436-37.

<sup>62</sup> The concurring Justices differed widely with respect to the scope of the Court's decision. Justice Kennedy concluded that *Williamson's* effect would be to make it difficult for either the government or defense to ever introduce a declaration against penal interest. See *id.* at 2443 (Kennedy, J., concurring in judgment). Justice Scalia disagreed. See *id.* at 2438 (Scalia, J., concurring).

mate disposition of the case; although a majority agreed that the lower courts should determine whether particular statements contained in the accomplice's confession should be admissible as declarations against penal interest, they did not agree as to the approach that the lower courts should utilize in making this determination.<sup>63</sup>

Part of the reason for *Williamson's* obscurity is that the Court did not clearly identify the various questions that need to be addressed in deciding whether a statement in an accomplice's confession will qualify as a declaration against interest. Before examining *Williamson*, I will discuss these questions.

### A. *The Relevant Questions*

The premise that underlies the hearsay exception admitting declarations against interest is that a declarant would not be likely to make a statement against his own interest unless he believed it to be true.<sup>64</sup> As with the assumptions that underlie other hearsay exceptions, this premise has not been subjected to exacting empirical scrutiny.<sup>65</sup> Nevertheless, the premise has intuitive appeal. In common experience, people do not wantonly make statements that will place them at a disadvantage. Therefore, it is plausible to believe that a person would not say something against his own interest—in this case, make a statement that would subject him to criminal liability—unless he believed the statement to be true.<sup>66</sup>

But when should the declarant's statement be viewed as contrary to his interest? In dealing with this problem, commentators have identified at least six questions that need to be addressed.<sup>67</sup> In determining when statements

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<sup>63</sup> See *infra* notes 100-16 and accompanying text.

<sup>64</sup> MCCORMICK ON EVIDENCE, *supra* note 25, §316, at 528; 5 WIGMORE, *supra* note 25, § 1457, at 329 (Chadbourn rev. 1974).

<sup>65</sup> Cf. Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence*, 28 COLUM. L. REV. 432, 436-39 (1928) (observing that the premise underlying the excited utterance exception to the hearsay rule—that people are more likely to speak accurately when they are under the stress of a startling event—is not supported by either empirical experiments or common sense).

<sup>66</sup> Under Rule 804(b)(3), the statement must "so far . . . subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." FED. R. EVID. 804(b)(3).

<sup>67</sup> Professor Tague identifies six questions that need to be addressed in determining whether a declarant's statement is contrary to his interest. First, must the statement have been against the declarant's penal interest because of the plain meaning of the words spoken, the litigation effect of the statement, or the declarant's motivation to tell the truth? Second, must the statement have been "against interest" at the time the declarant made it? Third, must the declarant have understood that his statement was against interest? Fourth, if the statement is offered by the defendant, must the statement substitute the declarant for the defendant as the culprit? Fifth, may the government use the excep-

contained in an accomplice's confession are against the accomplice's penal interest, three of these questions are particularly significant.

First, what methodology should be adopted for evaluating the words of the statement? At one extreme, some courts and commentators have asserted that it must be plain on the face of the statement that the facts stated are against the declarant's interest.<sup>68</sup> At the other extreme, at least two circuit courts have held that it is sufficient if the facts stated could be used to adversely affect the declarant.<sup>69</sup> Under the first view, the statement, "I robbed the bank," would qualify as a declaration against interest because it directly incriminates the declarant for the bank robbery, but the statement, "I was in the bank on June 8," the day when the bank robbery occurred, would not qualify because it does not incriminate the declarant on its face. Under the second view, however, the latter statement would qualify because it could be used to incriminate the declarant for the bank robbery.<sup>70</sup> Between these two extremes, a range of intermediate approaches could be adopted.<sup>71</sup>

Second, assuming that the facts stated in the declarant's statement are against his interest, to what extent should the context in which the statement

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tion to introduce a statement that implicates both the declarant and the defendant? Finally, must the proponent introduce other evidence to support the truthfulness of either the witness's report of the statement or the statement itself? Tague, *supra* note 26, at 862-63. An additional question posited by other commentators is whether the declarant had a probable motive to falsify the fact declared. See EDMUND M. MORGAN, BASIC PROBLEMS OF EVIDENCE 290 (1962); Jefferson, *supra* note 25, at 52-57.

<sup>68</sup> See *United States v. Boyce*, 849 F.2d 833, 836 (3d Cir. 1988) (noting that statement of declarant "on its face" appears contrary to penal interest). *But see* Jefferson, *supra* note 25, at 44-46 ("The American courts do not seem to have adopted the *prima facie* test [i.e. "natural meaning of the entry standing alone"] for determining the interest of the declarant."); Edmund M. Morgan, *Declarations Against Interest*, 5 VAND. L. REV. 451, 476 (1952) ("[No cases have been found accepting the] notion that the test of admissibility is not whether the statement when made was actually disserving, but whether, taking it at face value . . . its natural meaning was against interest.").

<sup>69</sup> See *United States v. Thomas*, 571 F.2d 285, 288 (5th Cir. 1978) (holding that Rule 804(b)(3) encompasses disserving statements by a declarant that would have probative value against the declarant); *United States v. Barrett*, 539 F.2d 244, 251 (1st Cir. 1976) (holding that Rule 804(b)(3) encompasses statements that would be important evidence against the declarant if he were on trial).

<sup>70</sup> In *Barrett*, the First Circuit seemed to indicate that any statement that would be admitted as an admission against the declarant if he himself were on trial would qualify as a statement against interest. Thus, the declarant's statement, "Joe robbed the bank on June 8," would be against the declarant's interest because it would tend to show the declarant's personal knowledge of the bank robbery. *Barrett*, 539 F.2d at 251; *see also* Tague, *supra* note 26, at 862.

<sup>71</sup> For discussion of one intermediate approach, see *infra* text accompanying notes 94-99. For a general discussion of the problems involved in evaluating language contained in hearsay statements, see Craig R. Callen, *Hearsay and Informal Reasoning*, 47 VAND. L. REV. 43, 73-100 (1994).

was made be taken into account in determining whether the declarant would believe that the statement is truly against his interest? When dealing with accomplices' statements, this question is critical. An individual who has been arrested by the police may believe that inculpatory statements will be to his advantage rather than contrary to his penal interest. He may believe that admitting a crime as to which he has already been apprehended cannot harm him, and supplying the police with information, such as the name of another party to the criminal transaction, will improve his situation vis-à-vis law enforcement because the police will reward him for his cooperation. To what extent should the accomplice's probable expectations vis-à-vis government authorities bear on the question of whether statements contained in his confession to those authorities "so far tended to subject [him] to . . . criminal liability . . . that a reasonable person in the [accomplice's] position would not have made the statement unless believing it to be true"?<sup>72</sup>

Third, should a declarant's statement that is not in itself against his interest but closely connected to a statement that is against his interest be admitted under the hearsay exception? For example, suppose a declarant confesses to committing stamp theft, names various other people who were involved, and then, in response to a question asking for clarification as to the names of the participants, states that a particular individual was not involved in the theft.<sup>73</sup> Should the statement exonerating that individual be admitted as a declaration against interest because it is closely related to another statement in which the declarant admits his culpability?<sup>74</sup>

These three questions are interconnected, at least in the sense that the answers to either the first or second question may affect the significance of the remaining two. Accordingly, if a court decides that any words that could be used to adversely affect the declarant constitute a declaration against interest,<sup>75</sup> then the significance of its methodology for evaluating a statement connected to a statement against interest will be minimized; statements connected to statements that adversely affect the declarant's penal liability are likely to qualify as declarations against interest on the ground that they

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<sup>72</sup> FED. R. EVID. 804(b)(3).

<sup>73</sup> See *Barrett*, 539 F.2d at 249.

<sup>74</sup> Even if these three questions are answered so that the hearsay statement should be admitted as a declaration against interest, the last sentence of Rule 804(b)(3) presents an additional issue that needs to be addressed in some cases. That sentence provides that a statement against penal interest presented by the defense will not be admissible "unless corroborating circumstances clearly indicate [its] trustworthiness." FED. R. EVID. 804(b)(3). Should this sentence be interpreted to impose the same additional barrier to admissibility when an accomplice's statement against penal interest is offered by the prosecution rather than the defense? If not, will the different standards of admissibility applied for evidence offered by the defense and prosecution give rise to constitutional problems? For an article addressing these issues, see Tague, *supra* note 26.

<sup>75</sup> See *supra* notes 62-63 and accompanying text.

also adversely affect the declarant's liability.<sup>76</sup> On the other hand, if a court decides that statements are never against the suspect's interest if made in a context where the suspect has been arrested and formally questioned by police officers, then the court's approach to addressing the other two questions becomes irrelevant.

#### B. *Williamson v. United States*

In *Williamson*, the majority directly addressed the third question, holding that a statement does not become a declaration against interest merely because it is closely connected with another statement that is against interest.<sup>77</sup> In addition, parts of Justice O'Connor's opinion, some of which was for a majority and some for a plurality,<sup>78</sup> shed light on the other two questions relating to the approaches a court should take in evaluating the words

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<sup>76</sup> In *Barrett*, for example, the First Circuit appeared to conclude that the declarant's words, "Bucky wasn't involved," was against his interest "since it strengthened the impression that he had an insider's knowledge of the crimes." *Barrett*, 539 F.2d at 252. Once this conclusion is reached, it is of course unnecessary to determine whether the "wasn't involved" statement should be admitted because it is closely connected to another statement against interest. The statement qualifies because it is itself contrary to the declarant's penal interest.

<sup>77</sup> *Williamson v. United States*, 114 S. Ct. 2431, 2435 (1994).

<sup>78</sup> Justice O'Connor's majority opinion concluded that a "statement" within the meaning of Rule 804(b)(3) includes "a single declaration or remark," *id.* at 2434, an interpretation that led to the holding that a "statement" does not become a declaration against interest merely because it is closely connected to another statement that is against interest, *id.* at 2435. The majority opinion also concluded that whether a particular statement qualifies as a declaration against interest is a fact-sensitive question that "can only be answered in light of all the surrounding circumstances." *Id.* at 2437. Justice O'Connor's plurality opinion, joined by Justice Scalia, concluded that "[s]ome of Harris' confession would clearly have been admissible under Rule 804(b)(3)" but other parts would not. *Id.* On this point, four Justices who joined Justice O'Connor's majority opinion disagreed. On behalf of these justices, Justice Ginsburg wrote a concurring opinion concluding that none of Harris's confession should be admissible as a declaration against interest. *Id.* at 2439 (Ginsburg, J., concurring in part and concurring in judgment, joined by Blackmun, Stevens & Souter, JJ.). Justice Kennedy concurred in the judgment but disagreed with the majority as to the admissibility of statements closely connected to another statement that is against interest. He advocated an approach under which statements connected to a statement against interest would be admissible subject to two limitations. *Id.* at 2445 (Kennedy, J., concurring in judgment). For further discussion of the various Justices' approaches with respect to this issue, see *infra* notes 100-21 and accompanying text. Despite their differences, the Justices unanimously concluded that the case should be remanded to the lower court for further proceedings. *Id.* at 2437-38 (plurality opinion); *id.* at 2440 (Ginsburg, J., concurring in part and concurring in judgment); *id.* at 2445 (Kennedy, J., concurring in judgment).

of an accomplice's statement and in assessing the effect of the context in which an accomplice's statements to the police were made.

In *Williamson*, a deputy sheriff stopped Harris's car for weaving on the highway.<sup>79</sup> Harris consented to a search of the car; the search revealed nineteen kilograms of cocaine in two suitcases in the trunk.<sup>80</sup> Harris was then arrested. A few minutes later, DEA Agent Walton interviewed Harris by telephone.<sup>81</sup> In response to Walton's questions, Harris said he had obtained the cocaine from a Cuban in Fort Lauderdale, that the cocaine belonged to Williamson, and that it was to be delivered to a particular dumpster.<sup>82</sup> After repeating essentially this same story to Walton when Walton questioned him in person, Harris agreed to make a controlled delivery of the cocaine.<sup>83</sup> After Agent Walton began to arrange the controlled delivery, however, Harris admitted he had lied about the Cuban, the note, and the dumpster.<sup>84</sup> In a new statement to Agent Walton, Harris said that when he was stopped by the deputy sheriff, he was transporting the cocaine to Atlanta for Williamson, who had been traveling in front of him in another rental car.<sup>85</sup> He added that Williamson had seen the police searching his car and that, therefore, the controlled delivery would not work.<sup>86</sup> According to Agent Walton, Harris was not promised any reward or other benefit for cooperating with the authorities.<sup>87</sup>

At Williamson's trial, Harris refused to testify and was held in contempt.<sup>88</sup> The government was then allowed to introduce all of Harris's statements to Agent Walton under Rule 804(b)(3). The District Court ruled that "Harris' statements clearly implicated himself, and therefore, [were] against his penal interest."<sup>89</sup> Williamson was convicted. The lower courts affirmed his conviction, holding that Harris's statements incriminating Williamson were properly admitted under Rule 804(b)(3).<sup>90</sup>

The Supreme Court reversed. In an opinion written by Justice O'Connor, a majority of the Court decided that a statement is not admissible as a declaration against interest merely because it is closely connected to another

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<sup>79</sup> *Williamson*, 114 S. Ct. at 2433.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* Harris was also connected to Williamson by other evidence, including Williamson's name on the car's rental agreement. *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 2434.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *United States v. Williamson*, 792 F. Supp. 805, 806 (M.D. Ga.), *aff'd*, 981 F.2d 1262 (11th Cir. 1992), *rev'd*, 114 S. Ct. 2431 (1994).



statement by the declarant that is against his interest.<sup>91</sup> Rejecting the apparently contrary view expressed in the Advisory Committee's Note to Federal Rule 804(b)(3),<sup>92</sup> the majority stated that "Rule 804(b)(3) . . . does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory."<sup>93</sup>

As to the first question concerning the methodology for evaluating a statement's language, Justice O'Connor adopted a middle position, rejecting both an approach that requires the statement to be incriminating on its face and one that focuses exclusively on whether the statement could be used to inculcate the declarant. Her opinion emphasized that "statements that are on their face neutral may actually be against the declarant's interest."<sup>94</sup> As one example, she observed that the statement, "'I hid the gun in Joe's apartment' may not be a confession of a crime; but if it is likely to help the police find the murder weapon, then it is certainly self-inculpatory."<sup>95</sup> Through other examples, however, Justice O'Connor indicated that the fact that a statement is self-inculpatory in the sense that it can be used to incriminate the declarant is not sufficient to make it a declaration against interest. In particular, she stated that "other statements that give the police significant details about the crime may also, depending on the situation, be against the declarant's interest."<sup>96</sup> She ended this part of her opinion by stating that whether a statement is sufficiently against penal interest to qualify under Rule 804(b)(3)'s critical language, which requires that "a reasonable person in the declarant's position would not have made the statement unless believing it to be true,"<sup>97</sup> depends on "all the surrounding circumstances."<sup>98</sup>

Thus, the majority's approach for determining whether the language of an accomplice's statement is against interest seems to require a fact-intensive analysis that focuses especially on whether the accomplice would be likely to perceive that his statement could be used to incriminate himself. Significantly, however, the majority stated that "[e]ven the confessions of arrested accomplices may be admissible if they are truly self-inculpatory,

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<sup>91</sup> *Williamson*, 114 S. Ct. at 2435.

<sup>92</sup> The Advisory Committee Note states that a third party confession "may include statements implicating [the accused], and under the general theory of declarations against interest they would be admissible as related statements." FED. R. EVID. 804(b)(3) advisory committee's note. The Court, however, concluded "that the policy expressed in the statutory text points clearly enough in one direction that it outweighs whatever force the Notes may have." *Williamson*, 114 S. Ct. at 2436.

<sup>93</sup> *Williamson*, 114 S. Ct. at 2435.

<sup>94</sup> *Id.* at 2436-37.

<sup>95</sup> *Id.* at 2437.

<sup>96</sup> *Id.*

<sup>97</sup> FED. R. EVID. 804(b)(3).

<sup>98</sup> *Williamson*, 114 S. Ct. at 2437.

rather than merely attempts to shift blame or curry favor."<sup>99</sup> Although somewhat cryptic, this statement opens up favorable possibilities for prosecutors. The mere fact that an accomplice's confession incriminates another suspect does not preclude a court from admitting part or all of that confession as a declaration against the accomplice's penal interest.

As to the second question, concerning the methodology for determining when the context in which an accomplice's statement is made will transform an otherwise inculpatory statement into a non-inculpatory one, the Court was fractured. The opinions of Justice O'Connor, Justice Ginsburg, and Justice Kennedy all addressed this question, but none of these opinions commanded a majority of the Court. All three opinions agreed that when an accomplice makes a confession to the police, the surrounding circumstances must be considered in evaluating the reliability of statements contained in the accomplice's confession.<sup>100</sup> They all agreed, moreover, that in some instances the accomplice's statements would not be admissible against another criminal suspect as a declaration against interest.<sup>101</sup> They apparently disagreed, however, as to how a court should consider the effect of the accomplice's situation vis-à-vis the police in evaluating the trustworthiness of the accomplice's statements.<sup>102</sup> Furthermore, they disagreed as to the result in *Williamson*: Justice Ginsburg, speaking for four Justices, would have held that none of the statements contained in Harris's confessions could be admitted as a declaration against interest.<sup>103</sup> The majority, on the other hand, remanded to the lower courts for a determination as to whether the "statements in Harris' confession [were] truly self-inculpatory."<sup>104</sup>

In concluding that none of Harris's statements should be admitted, Justice Ginsburg began with the principle that accusations against the accused by accomplices or co-defendants "have traditionally been viewed with special suspicion."<sup>105</sup> In this case, Harris was accusing his accomplice Williamson, and Justice Ginsburg was unwilling to differentiate between

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<sup>99</sup> *Id.* at 2436.

<sup>100</sup> *Id.* at 2437 (plurality opinion); *id.* at 2438 (Ginsburg, J., concurring in part and concurring in judgment, joined by Blackmun, Stevens & Souter, JJ.); *id.* at 2445 (Kennedy, J., concurring in judgment).

<sup>101</sup> *Id.* at 2437 (plurality opinion); *id.* at 2438-39 (Ginsburg, J., concurring in part and concurring in judgment, joined by Blackmun, Stevens & Souter, JJ.); *id.* at 2445 (Kennedy, J., concurring in judgment).

<sup>102</sup> *Id.* at 2437 (plurality opinion); *id.* at 2439 (Ginsburg, J., concurring in part and concurring in judgment, joined by Blackmun, Stevens & Souter, JJ.); *id.* at 2444 (Kennedy, J., concurring in judgment).

<sup>103</sup> *Id.* at 2440 (Ginsburg, J., concurring in part and concurring in judgment, joined by Blackmun, Stevens & Souter, JJ.).

<sup>104</sup> *Id.* at 2437.

<sup>105</sup> *Id.* at 2439 (Ginsburg, J., concurring in part and concurring in judgment) (quoting *Bruton v. United States*, 391 U.S. 123, 141 (1968) (White, J., dissenting)).

Harris's statements incriminating himself and those incriminating Williamson. Because Harris was caught "red-handed," she viewed even his facially incriminatory statements as "project[ing] an image of a person acting not against his penal interest, but striving mightily to shift principal responsibility to someone else."<sup>106</sup>

Justice O'Connor, on the other hand, concluded that "[s]ome of Harris' confession would clearly have been admissible under Rule 804(b)(3)."<sup>107</sup> As one example, she said that Harris's statement in which he admitted to knowing that cocaine was in the suitcase was against his interest because it "essentially forfeited his only possible defense to a charge of cocaine possession."<sup>108</sup> She added that the parts of the confession implicating Williamson would not be against Harris's interest because they did little to subject Harris to criminal liability and a "reasonable person in Harris' position might even think that implicating someone else would decrease his practical exposure to criminal liability."<sup>109</sup>

Justice Kennedy, who disagreed with the majority with respect to the admissibility of statements connected to a statement against interest,<sup>110</sup> advocated an approach under which statements connected to an accomplice's inculpatory admissions<sup>111</sup> would be admissible, subject to two limitations. First, a collateral statement "so self-serving as to render it unreliable" should be excluded.<sup>112</sup> As an example, Justice Kennedy posited a situation in which the declarant "shift[ed] blame to someone else for a crime [he] could have committed."<sup>113</sup> Second, and more importantly, "where the statement was made under circumstances where it [was] likely that the declarant had a significant motivation to obtain favorable treatment,"<sup>114</sup> all of the declarant's statements should be excluded. As an example of the second situation, Justice Kennedy posited a situation in which the declarant's statements were given as a result of the government's "explicit offer of leniency in exchange for the declarant's admission of guilt."<sup>115</sup> Based on these rules, it would appear that Justice Kennedy would be even more willing

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<sup>106</sup> *Id.* at 2439-40 (Ginsburg, J., concurring in part and concurring in judgment).

<sup>107</sup> *Id.* at 2437.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 2445 (Kennedy, J., concurring in judgment).

<sup>111</sup> Under Justice Kennedy's approach, the court "first should determine whether the declarant made a statement that contained a fact against penal interest." *Id.* (Kennedy, J., concurring in judgment). Thus, his methodology for evaluating the statement's language appears to be somewhat stricter than the majority's. *See supra* text accompanying note 94.

<sup>112</sup> *Williamson*, 114 S. Ct. at 2445 (Kennedy, J., concurring in judgment).

<sup>113</sup> *Id.* (Kennedy, J., concurring in judgment).

<sup>114</sup> *Id.* (Kennedy, J., concurring in judgment).

<sup>115</sup> *Id.* (Kennedy, J., concurring in judgment).

than Justice O'Connor to admit statements contained in an accomplice's confession. Even another accomplice's statement that specifically inculcated the accused would not necessarily be excluded unless it constituted an attempt to "shift blame" or was prompted by a promise of leniency from the government.<sup>116</sup>

Justice O'Connor's opinion was thus pivotal. She differed from Justice Ginsburg especially in her willingness to view different parts of the accomplice's confession in isolation, rather than as an integrated narrative prompted by the accomplice's perception of his position vis-à-vis the authorities.<sup>117</sup> In contrast to Justice Ginsburg, Justice O'Connor refused to conclude that the fact that an accomplice was caught "red-handed" should dictate a finding that all of the accomplice's statements should be viewed as attempts to curry favor with the authorities rather than as against his interest.<sup>118</sup> Observing that "Harris was not promised any reward or other benefit for cooperating,"<sup>119</sup> she concluded that even though Harris may have been seeking to obtain benefits from law enforcement when he named Williamson, it does not follow that a similar motive prompted the other parts of his confession.<sup>120</sup> Accordingly, under Justice O'Connor's approach, it appears that the primary focus will be on whether the accomplice's statement is inculpatory. If the accomplice's statement clearly is inculpatory as to himself, it may be admissible as a declaration against interest even if it also directly or indirectly incriminates another party.<sup>121</sup> In deciding whether the accomplice's statement is inculpatory as to himself, Justice O'Connor would apparently take into account all of the surrounding circumstances, but would not give decisive weight to the fact that the accomplice was caught "red-handed" by the police and was making a statement that implicated another party.

The Court declined to address the question whether admission of Harris's statements against Williamson would violate Williamson's right to confrontation.<sup>122</sup> Justice O'Connor's pivotal plurality opinion observed,

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<sup>116</sup> On the other hand, Justice Kennedy would exclude some statements that Justice O'Connor would apparently admit. If, in response to a promise of leniency, the accomplice directly incriminated himself—stating "the cocaine belongs to me," for example—Justice O'Connor would apparently admit the statement because it was incriminatory on its face. Justice Kennedy, however, would exclude it because it was given in exchange for a promise of leniency. *Id.* at 2445 (Kennedy, J., concurring in judgment).

<sup>117</sup> *Id.* at 2435.

<sup>118</sup> *Id.* at 2436.

<sup>119</sup> *Id.* at 2434.

<sup>120</sup> *Id.* at 2437.

<sup>121</sup> Thus, if the declarant said, "Joe and I are conducting an extortion racket," all of the statement would be contrary to the declarant's interest because it would show he was involved in a conspiracy. Compare note 134, *infra*, explaining Justice Scalia's approach to this issue.

<sup>122</sup> *Id.* at 2437. The Court also declined to address the questions that arise as a result

however, that “the very fact that a statement is genuinely self-inculpatory—which our reading of Rule 804(b)(3) requires—is itself one of the ‘particularized guarantees of trustworthiness’ that makes a statement admissible under the Confrontation Clause.”<sup>123</sup> Thus, *Williamson’s* analysis of the questions relevant to determining an accomplice’s statement’s admissibility under Rule 804(b)(3) has critical Confrontation Clause implications. As might be expected, an accomplice’s statement that qualifies as a declaration against penal interest will probably also be admissible under the Confrontation Clause.

### C. *The Court’s Empirical Premises*

The two critical opinions relating to the admissibility of statements contained in an accomplice’s confession to the police seem to be shaped by two different empirical premises. Although both Justice O’Connor’s opinion and Justice Kennedy’s opinion assume that an accomplice’s statement is unreliable if motivated by a desire to obtain favor from the police,<sup>124</sup> Justice Kennedy’s opinion seems to assume that such motivation can only be inferred when there is some affirmative indication of the accomplice’s favor-seeking, such as the accomplice’s statement being given in exchange for “an explicit offer of leniency.” On the other hand, Justice O’Connor’s opinion seems to assume that such motivation cannot be inferred when the accomplice’s statement directly incriminates the accomplice.

In both cases, the words “seems to assume” are used advisedly. In view of *Williamson’s* limited holding, it would be a mistake to draw too much from the various opinions in that case. All the Court really decided was that the case would be remanded so that the lower courts could decide whether particular statements in Harris’s confession would qualify as declarations against interest. Moreover, even if the O’Connor and Kennedy opinions are taken at face value, neither Justice delineated clear guiding principles. Justice Kennedy merely indicated that an accomplice’s inculpatory statements given as a result of a promise of leniency are unreliable.<sup>125</sup> He did not endorse the view that an accomplice’s inculpatory statements given in the absence of such a promise are necessarily reliable. His language seems to

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of Rule 804(b)(3)’s final sentence relating to the admissibility of statements against penal interest offered by a criminal defendant. Justice O’Connor observed that some circuit courts have read that sentence as imposing an additional burden that the prosecutor must meet when seeking to introduce a statement against penal interest inculcating the accused. *Id.* In view of the disposition of the case, she found it unnecessary to address that question. *Id.*

<sup>123</sup> *Id.* (citing *Lee v. Illinois*, 476 U.S. 530, 543-45 (1986)).

<sup>124</sup> *See supra* notes 109 & 114 and accompanying text.

<sup>125</sup> *See supra* note 100 and accompanying text.

indicate that an accomplice's confession to the police will not be unreliable unless there is affirmative evidence of "favor-seeking." In other words, an accomplice's confession not subjected to cross-examination will not be viewed as unreliable merely because it incriminates another suspect and was given in response to police questioning. Moreover, his identification of the "explicit promise of leniency" scenario as an example of the necessary type of affirmative evidence appears to suggest that a particular type of police inducement may be necessary to establish "favor-seeking."<sup>126</sup> Nevertheless, his identification of a single example of "favor-seeking" leaves open the question as to how to identify other situations in which the accomplice would have "a significant motivation to obtain favorable treatment."<sup>127</sup>

Justice O'Connor was even more circumspect. Without clearly defining her definition of an inculpatory statement, she merely indicated that an accomplice's inculpatory statements would be sufficiently reliable to be admissible under Rule 804(b)(3).<sup>128</sup> Although she indicated that some of the statements in Harris's confession were inculpatory and therefore admissible,<sup>129</sup> she did not elaborate on the circumstances in which an accomplice's position vis-à-vis the authorities might render some or all of his statements non-inculpatory. Thus, if an issue relating to the admissibility of statements in an accomplice's confession under the Confrontation Clause were before the Court, *Williamson* could be distinguished and the language contained in the Kennedy and O'Connor opinions reinterpreted.

If accepted, however, the premises reflected in these opinions would lead to a significant limiting of the Court's decision in *Lee v. Illinois*. Justice Kennedy's premise that evidence of police inducement, such as "an explicit offer of leniency," is necessary to establish that the accomplice's confession was motivated by "favor-seeking" is inconsistent with *Lee*. In *Lee*, there was no indication that Thomas's confession was prompted by a promise of leniency or other police inducement beyond interrogation.<sup>130</sup> Furthermore, if Justice Kennedy's opinion were read to mean that a police inducement equivalent to a promise of leniency<sup>131</sup> is necessary to show

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<sup>126</sup> *Williamson*, 114 S. Ct. at 2445 (Kennedy, J., concurring in judgment). His decision to identify the narrow category of cases in which there is an "explicit" promise of leniency as those establishing the declarant's motive to obtain favor at least suggests that he is not inclined to perceive that a confessing accomplice has a motive to obtain favor from the police when there is no indication that his confession was prompted by any promise of leniency.

<sup>127</sup> *Id.* at 2445 (Kennedy, J., concurring in judgment).

<sup>128</sup> *Id.* at 2436.

<sup>129</sup> See *supra* note 107 and accompanying text.

<sup>130</sup> See *Lee v. Illinois*, 476 U.S. 530, 532-33 (1986). Moreover, for the most part, Thomas's statements did not seem designed to shift the blame to Lee. On the contrary, he admitted that he and Lee were both fully involved in the killings. See *id.* at 553 (Blackmun, J., dissenting).

<sup>131</sup> Equivalent inducements might include a promise of leniency or immunity in the

that an accomplice's confession was motivated by "favor-seeking,"<sup>132</sup> the scope of *Lee's* presumption of unreliability would be drastically reduced. In cases where the accomplice was not available as a witness at trial,<sup>133</sup> any statement in the accomplice's confession could be admitted against the accused as a declaration against interest so long as the statement did not amount to an attempt to shift blame and the confession did not result from a police inducement equivalent to a promise of leniency.

If Justice O'Connor's premise were accepted, *Lee* would be limited to the extent that statements contained in an accomplice's confession were viewed as inculpatory. Because inculpatory statements might include those in which an accomplice inculpates himself and another party in a conspiracy or an organized crime group,<sup>134</sup> this would be a significant limitation.

If, as would seem to be the case from the various opinions in *Williamson*, the government will be able to introduce a statement contained in an accomplice's confession as a declaration against interest only if the statement meets the criteria for admissibility articulated by both the Kennedy and O'Connor opinions,<sup>135</sup> it would appear that statements contained in an accomplice's confession may be admitted consistent with the Confrontation Clause so long as (1) the confession was not given as a result of a police inducement such as a promise of leniency, and (2) the statements were inculpatory as to the accomplice.<sup>136</sup>

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event that the accomplice's confession could be verified.

<sup>132</sup> See *supra* note 114 and accompanying text.

<sup>133</sup> In many cases, the accomplice will not be available because, as in *Williamson*, he will refuse to testify on the basis of his Fifth Amendment privilege.

<sup>134</sup> In his concurring opinion, Justice Scalia articulated this position somewhat more explicitly than Justice O'Connor. For example,

if a lieutenant in an organized crime operation described the inner workings of an extortion and protection racket, naming some of the other actors and thereby inculpat[ing] himself on racketeering and/or conspiracy charges, I have no doubt that some of those remarks could be admitted as statements against penal interest.

*Williamson v. United States*, 114 S. Ct. 2431, 2438 (1994) (Scalia, J., concurring).

<sup>135</sup> Because Justice Ginsburg and the three Justices joining her opinion would appear to adhere to the view that statements contained in an accomplice's confession are presumptively unreliable, the government would have to show that the statements satisfied the tests applied by both the O'Connor and Kennedy opinions in order to admit statements contained in an accomplice's confession as a declaration against interest.

<sup>136</sup> Justice Kennedy would also exclude statements in which the accomplice "shift[ed] blame to someone else for a crime [he] could have committed." *Williamson*, 114 S. Ct. at 2445 (Kennedy, J., concurring in judgment). It may be assumed, however, that statements that "shift blame" to another would not be inculpatory in the sense defined by Justice O'Connor.

## III. EXAMINING WILLIAMSON'S EMPIRICAL PREMISES

A. *Justice Kennedy's Premise: Exploring the Significance of a Police Inducement*

Justice Kennedy assumes that an accomplice's confession is too unreliable to be admissible if motivated by a desire to obtain benefits from law enforcement. Nevertheless, he apparently is unwilling to assume that the accomplice's confession is motivated by a desire to gain benefits from law enforcement unless it is precipitated by a police inducement, such as "an explicit offer of leniency."<sup>137</sup> Justice Kennedy's first assumption seems consistent with the rationales that underlie both the declaration against interest exception to the hearsay rule and the Confrontation Clause of the Sixth Amendment. When a declarant makes a statement with the hope that it will lead to benefits from authorities, there is no reason to believe that "a reasonable person in the declarant's position would not have made the statement unless believing it to be true."<sup>138</sup> On the contrary, it appears quite likely that the declarant is making a false statement in order to gain favor from authorities. For this reason, it is proper to conclude that the statement does not have the necessary "indicia of reliability" to satisfy the Confrontation Clause test.<sup>139</sup>

When will an accomplice's confession be motivated by the desire to gain favor from authorities? Will it be only when the confession is prompted by a police inducement such as a promise that the accomplice will be granted leniency if he confesses? Or will an accomplice who confesses to the authorities sometimes be seeking to gain favor from the authorities even though no police inducement has prompted the confession? Examination of police manuals that teach techniques of interrogation may shed light on these questions.

As Professor Roger Park has observed, police manuals advise interrogators to "play[] on the subject's desire to shift blame."<sup>140</sup> Indeed, when it appears that more than one person has been involved in the crime, the manuals instruct the interrogator to emphasize this theme. The latest edition of an interrogation manual by Inbau, Reid, and Buckley,<sup>141</sup> for example, includes a three-page section that instructs the interrogator in the technique of

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<sup>137</sup> *Id.* at 2445 (Kennedy, J., concurring in judgment); see *supra* note 114 and accompanying text.

<sup>138</sup> FED. R. EVID. 804(b)(3).

<sup>139</sup> See *supra* note 37 and accompanying text.

<sup>140</sup> Park, *supra* note 13, at 95.

<sup>141</sup> FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS (3d ed. 1986).



“condemning the accomplice,”<sup>142</sup> as well as another section that explains how the interrogator should proceed when more than one person has been arrested for the same offense.<sup>143</sup> When it is suspected that more than one person is involved in the crime, the manual explains that the interrogator should “suggest that the primary blame, or at least some of the blame, belongs to the other fellow.”<sup>144</sup> Use of this technique will enable the interrogator to play on the offender’s natural inclination “to have someone else share the blame or even be blamed altogether for the commission of the crime in question.”<sup>145</sup> The Inbau manual recounts numerous instances in which this technique was effective in the sense that the suspect was persuaded to make a statement. In some of these cases, however, the authors admit that the suspect’s first statement was not reliable because the portions in which the suspect placed blame on another party were found to be inaccurate.<sup>146</sup>

The technique of condemning the accomplice is based on appealing to the suspect’s belief that pinning the blame on someone else will lessen his punishment.<sup>147</sup> Significantly, however, the manuals assert that the interrogator should not promise or even suggest that the suspect will receive leniency if he names another party or explains that party’s involvement.<sup>148</sup> The Inbau manual, for example, states that the interrogator “must refrain from making any comments to the effect that the blame cast on an accomplice thereby relieves the suspect of legal responsibility for his part in the commission of the offense.”<sup>149</sup> Instead, in “suggesting the application of this technique, the authors merely recommend a moral condemnation in the form of expressions of sympathy for the suspect’s ‘unfortunate’ experience in having been influenced by a ‘criminally minded associate.’”<sup>150</sup>

<sup>142</sup> *Id.* at 111-14.

<sup>143</sup> *Id.* at 132-36.

<sup>144</sup> *Id.* at 111.

<sup>145</sup> *Id.* Similarly, Aubry and Caputo identify the “shifting the blame” technique as “one that many times produces good results.” ARTHUR S. AUBRY, JR. & RUDOLPH R. CAPUTO, *CRIMINAL INTERROGATION* 204 (3d ed. 1980). “When there are two or more participants in the commission of the crime,” the manual explains,

the full blame for the crime may be easily and naturally shifted over to the other participants when each of the individual subjects is being interrogated. The emphasis here is to the effect of placing the blame on the other subject(s), and intimating to the subject being interrogated that he was led into his part in the crime by the other participants.

*Id.*

<sup>146</sup> INBAU ET AL., *supra* note 141, at 112.

<sup>147</sup> See *supra* note 145 and accompanying text.

<sup>148</sup> See AUBRY & CAPUTO, *supra* note 145, at 313; INBAU ET AL., *supra* note 141, at 114.

<sup>149</sup> INBAU ET AL., *supra* note 141, at 114.

<sup>150</sup> *Id.*

Nevertheless, even without making any promises to a suspect, a skillful interrogator can easily "play on" the suspect's belief that placing blame on an accomplice will lessen his own responsibility. Accounts of interrogations contained in reported cases or eye witness accounts<sup>151</sup> indicate that interrogating officers will suggest to or sometimes expressly tell the suspect that failure to explain the part played by another participant in the crime will place more blame on him. In the landmark case of *Bram v. United States*,<sup>152</sup> for example, the interrogator told the defendant, who was suspected of murder,

Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But . . . some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.<sup>153</sup>

Similarly, in the tape-recorded interrogation of John Biron, the defendant in *State v. Biron*,<sup>154</sup> one of the interrogating officers said to the suspect: "The thing you want to remember is that there's two of you involved and you're both to blame. But if you don't tell the truth, and the other one does, it puts more blame on your part."<sup>155</sup> Although statements about placing or removing blame do not ordinarily constitute promises of leniency,<sup>156</sup> such statements are likely to reinforce the suspect's natural belief that he will be in a better position if he can show that at least one other person was involved in the crime that is the subject of investigation.

Moreover, the references to placing the "blame" on another party are not even necessary. Interrogating officers can convey to a suspect the message that inculcating another suspect will be in his interest without saying anything that would be characterized by courts as an inducement.<sup>157</sup> The inter-

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<sup>151</sup> See, e.g., DAVID SIMON, *HOMICIDE 215* (1991).

<sup>152</sup> 168 U.S. 532 (1897) (refusing to admit a confession induced by the implication that punishment would be mitigated).

<sup>153</sup> *Id.* at 539 (internal quotations omitted).

<sup>154</sup> 123 N.W.2d 392 (Minn. 1963) (finding a confession induced by the possibility of lenient treatment to be inadmissible).

<sup>155</sup> Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 619 (1979) (quoting six-hour tape recording of the interrogation conducted in *Biron* (tape on file in the University of Michigan and University of Minnesota Schools of Law)).

<sup>156</sup> See *United States v. Garot*, 801 F.2d 1241, 1245 (10th Cir. 1986). *But see Bram*, 168 U.S. at 565.

<sup>157</sup> In *Bram*, the Supreme Court viewed the officer's reference to "removing blame" as an improper inducement to confess because it constituted an implied promise of

rogating officer can simply tell the suspect that he knows that other people were involved in the crime and doesn't believe the suspect was the ringleader or doesn't believe that the suspect was the roughest or wildest of those involved. Alternatively, the interrogator could simply say, "I know you were involved; but I don't know what part you played." Through statements of this type, the interrogator can exploit the suspect's natural belief that explaining the part played by another party will to some degree lessen his guilt.<sup>158</sup>

Indeed, even if the interrogator does nothing at all to exploit this belief, the suspect will probably at least hope that placing the blame on another party will lessen the blame to be placed on him. People accused of wrongdoing have a natural belief, dating from childhood, that they will receive less punishment if they can show that someone else was involved in the wrongdoing. In order to exploit this belief so as to obtain a statement incriminating another party, interrogators do not need to suggest that such a statement will lead to leniency or other favorable treatment. In the absence of information to the contrary, the suspect will be likely to believe that statements incriminating another will be to his advantage. Thus, contrary to Justice Kennedy's apparent assumption, there is no reason to believe that suspects' statements condemning accomplices will be unreliable only when the statements are given in exchange for a police inducement such as a promise of leniency. If criminal suspects are likely to speak falsely when they have a "significant motivation to obtain favorable treatment,"<sup>159</sup> suspects' statements obtained as a result of police interrogation that condemn accomplices will be suspect, regardless of whether the police can be shown to have made any special effort to induce the suspect to condemn the accomplice.<sup>160</sup>

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leniency. *Bram*, 168 U.S. at 564-65. Modern authorities would not generally view a statement about placing or removing "blame" as either an improper inducement or an implied promise of leniency, however. See generally George E. Dix, *Promises, Confessions, and Wayne LaFave's Bright Line Rule Analysis*, 1993 U. ILL. L. REV. 207, 219-20 (noting that "this approach would have barred officers from using numerous useful methods of persuasion").

<sup>158</sup> Because most interrogations are not taped, determining the precise statements made by the police is extremely difficult. Thus, if there is a fine line between improper police inducement and proper statements of sympathy or encouragement, determining whether a particular interrogator's statements are on the wrong side of the line will be difficult in practice. See generally Yale Kamisar, *Foreword: Brewer v. Williams—A Hard Look at a Discomforting Record*, 66 GEO. L.J. 209, 233 (1977) (noting that the "various opinions in *Williams* totter on an incomplete, contradictory and recalcitrant record").

<sup>159</sup> *Williamson v. United States*, 114 S. Ct. 2431, 2445 (1994) (Kennedy, J., concurring in judgment); see *supra* note 114 and accompanying text.

<sup>160</sup> For discussion of when an accomplice's statements should be viewed as stemming from a police interrogation, see *infra* notes 180-82 and accompanying text.

B. *Justice O'Connor's Premise: Exploring the Significance of an Accomplice's Incriminatory Statements*

Justice O'Connor's position in *Williamson* seems predicated on the assumption that the portions of an accomplice's confession that are incriminatory as to the accomplice will be reliable even though the parts of the confession that condemn the accused may not be.<sup>161</sup> Intuitively, this assumption seems plausible. Even if the accomplice has reason to lie about others, his statements that incriminate himself should be reliable for the same reason that statements against interest are generally reliable. Because people generally try to protect themselves, they are not likely to make statements that they know or should know will subject them to penal liability unless they believe the statements to be true.

The problem with this assumption is that once an accomplice has been arrested, his perception as to whether a statement will be against his penal interest—in the sense that it worsens his position vis-à-vis the government—is likely to become wildly skewed. Two factors precipitate the skewing: first, the accomplice's perception as to what the police already know about him; and, second, the accomplice's perception as to the extent to which providing the authorities with facts that may incriminate another suspect will benefit him.

An accomplice's belief that the police already have significant evidence against him will alter his perception as to whether admission of facts will truly incriminate him. As Justice Ginsburg observed in *Williamson*, if the accomplice has been caught "red-handed," he is not likely to believe that admitting facts that the police already know is going to make his situation any worse.<sup>162</sup> Harris's admission that the cocaine in the trunk of his car belonged to him was clearly incriminatory; but, because Harris knew that the police had found the cocaine, he would be likely to believe that he was not telling the police anything that they didn't already know.<sup>163</sup> Moreover, even if the accomplice is not caught "red-handed," whenever a suspect is arrested, he will be likely to believe that the police already have significant evidence against him. Indeed, the interrogation manuals stress that when an officer is interrogating an arrested suspect, it is generally advisable for the interrogator to "convince the suspect . . . not only [that] . . . guilt [has] been detected, but also that it can be established by the evidence currently avail-

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<sup>161</sup> See *supra* note 121 and accompanying text.

<sup>162</sup> *Williamson*, 114 S. Ct. at 2439 (Ginsburg, J., concurring).

<sup>163</sup> Harris's admission might in fact ease the burden of the prosecutor if he was brought to trial because, as Justice O'Connor stated, this admission essentially forfeited Harris's defense of "lack of knowledge." *Id.* at 2437. Accordingly, Harris would not be likely to perceive the admission as truly against his interest.

able or that will be developed before the investigation is completed.”<sup>164</sup> Thus, the interrogator tries to make the arrested suspect believe that his failure to confess will be at best futile, and in situations where there would be a possibility of establishing “mitigating circumstances,” such as would be the case when there is a possibility of shifting blame to other parties, actually disadvantageous.<sup>165</sup> Accordingly, in situations where accomplices are arrested and interrogated by the police, it will be extremely difficult to determine whether the accomplice is likely to believe that admitting incriminating facts will actually be against his interest. In many situations, the accomplice may believe that his admissions will benefit him because he is giving law enforcement desired information or, at the very least, that his admissions will not harm him because he is not telling the police anything they do not already know.<sup>166</sup>

Justice O’Connor seems to assume that a distinction can be drawn between an accomplice’s statements that are self-incriminatory and those that are incriminatory as to another suspect.<sup>167</sup> But this distinction is tenuous at best. As both Justice O’Connor and Justice Scalia recognize, statements in an accomplice’s confession that directly incriminate another suspect may also incriminate the accomplice.<sup>168</sup> To use Justice Scalia’s example, if a suspect “described the inner workings of an extortion and protection racket, naming some of the other actors and thereby inculcating himself on racketeering and/or conspiracy charges,”<sup>169</sup> there is no doubt that the statement is incriminatory as to the suspect; its primary thrust, however, is to incriminate others. If an accomplice’s accusation of an accused is of doubtful reliability because of the accomplice’s motive to fabricate, there is no reason to view differently those portions of the accomplice’s accusation that incriminate himself.

Moreover, even if a particular statement in the accomplice’s confession seems on its face to incriminate only himself and not the accused, viewing the statement apart from its context is problematic. A suspect who is motivated to condemn an accomplice would generally be aware that he must supply the police with facts that will incriminate the accomplice. In *William-*

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<sup>164</sup> INBAU ET AL., *supra* note 141, at 131.

<sup>165</sup> *Id.*

<sup>166</sup> In addition, a skilled interrogator may suggest that the suspect’s admissions will benefit him in other ways. In cases in which it is suspected that two or more perpetrators were involved, the Inbau manual suggests that the interrogator should tell the suspect that he should tell his story before the other suspect does because “[w]hat you say now, before [the other suspect tells his story], we can believe. But later on, no one is likely to believe what you say, even though at that time you may be telling the absolute truth.” *Id.* at 131 (emphasis omitted).

<sup>167</sup> *Williamson*, 114 S. Ct. at 2435-37.

<sup>168</sup> See *supra* note 99 and accompanying text.

<sup>169</sup> *Williamson*, 114 S. Ct. at 2438 (Scalia, J., concurring).

son, for example, Harris would be very likely to believe that, if he wanted to falsely condemn another party, he would need to relate a story that would include details that would incriminate that party. Accordingly, in explaining where he obtained the drugs, it would be more convincing if Harris could name a place to which the other party had access. Thus, statements seemingly incriminatory only as to himself might still be made with a view towards incriminating another party.

In short, when an accomplice confesses to the police, the parts of the accomplice's confession cannot be meaningfully separated. If the confession is likely to be unreliable because of the accomplice's motive to fabricate, the parts of the confession that are incriminatory as to the accomplice are also likely to be unreliable. Thus, if we start with the assumption that an accomplice's accusation of another party is of dubious reliability, Justice O'Connor's assumption concerning the reliability of the accomplice's self-incriminatory statements should be rejected.

### C. *Justice Harlan's Constitutional Rule*

What approach should a court take in determining whether a statement contained in an accomplice's confession has sufficient "indicia of reliability" to be admissible under the Confrontation Clause? If the premises that apparently underlie the O'Connor and Kennedy opinions in *Williamson* are rejected, then such statements cannot be presumed to be reliable simply because they were not prompted by police inducements, such as a promise of leniency, or because they directly incriminated the accomplice. If these two approaches are rejected, what approach for evaluating the reliability of an accomplice's statements should replace them?

One approach would be to evaluate the reliability of statements in an accomplice's confession on a case-by-case basis, considering any facts that might bear on the reliability of the particular statements. Although *Lee v. Illinois* adopted the presumption that an accomplice's confession to the police is unreliable,<sup>170</sup> it allows such a case-by-case approach. By stating that the "presumption of unreliability" could be rebutted,<sup>171</sup> the Court seemed to recognize that whether statements contained in an accomplice's confession are sufficiently reliable to be constitutionally admissible would have to be determined on the basis of the particular facts in each case.

Justice Ginsburg's concurring opinion in *Williamson* appeared to endorse this approach. In finding that all of Harris's statements in his confession to DEA Agent Walton were unreliable, she emphasized that Harris had been caught "red-handed" and that Harris's incriminatory statements did not tell

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<sup>170</sup> See *supra* text accompanying note 51.

<sup>171</sup> See *supra* text accompanying note 52.

the DEA Agent anything that was not readily apparent.<sup>172</sup> Her analysis suggests that in a different setting—in a situation where the accomplice was not caught “red-handed,” for example, or one in which the accomplice’s confession included statements relating to crimes as to which he had not yet been arrested—statements contained in the accomplice’s confession might be sufficiently reliable to qualify as a declaration against interest or to be admissible under the Confrontation Clause.<sup>173</sup> In deciding whether a particular statement met the requisite standard of reliability, the court would have to assess myriad circumstances bearing on the accomplice’s perception of whether particular statements in his confession would be likely to be against his interest.

The problem with this approach is that, given the realities of police interrogation, it is very difficult for a court to evaluate the accomplice’s perception of the critical circumstances. For example, when will an accomplice believe he was caught “red-handed”? In many situations, this may depend more on the attitude of the interrogators than it does on the evidence obtained by the police. If the interrogators convincingly suggest that the suspect’s “guilt [has] been detected [and that] it can be established by the evidence currently available or that will be developed before the investigation is completed,”<sup>174</sup> the suspect may believe that the “jig is up” even if the police in fact have only a tenuous case against him. Similarly, if the police effectively exploit the suspect’s belief that shifting the blame to another person will be to his advantage,<sup>175</sup> the suspect may overestimate the benefits of admitting criminal activity that inculpates others.

Assessing the circumstances that bear on an accomplice’s statements’ reliability is thus extremely problematic. When the difficulties in recreating the atmosphere of a police interrogation are taken into account,<sup>176</sup> it becomes obvious that assessing the reliability of an accomplice’s confession on a case-by-case basis is not a viable approach. Instead, courts should seek to differentiate categories of cases involving accomplices’ confessions. Starting with *Lee*’s presumption that accomplices’ confessions to the police are unreliable, courts should seek to determine whether there are nevertheless

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<sup>172</sup> *Williamson*, 114 S. Ct. at 2439-40 (Ginsburg, J., concurring in judgment).

<sup>173</sup> In *Williamson*, Justice O’Connor’s plurality opinion intimated that statements admissible under Rule 804(b)(3) as a declaration against interest would also be admissible under the Confrontation Clause. See *supra* note 123 and accompanying text. The Court could hold, however, that statements that do not qualify under Rule 804(b)(3) nevertheless have sufficient indicia of reliability to be admissible under the Confrontation Clause.

<sup>174</sup> *INBAU ET AL.*, *supra* note 141, at 131.

<sup>175</sup> See *supra* notes 140-58 and accompanying text.

<sup>176</sup> In most cases, the traditional litigation process is not adequate to determine either the extent or the quality of police pressure applied to individual criminal suspects. See *Kamisar*, *supra* note 158, at 234-35.

*categories* of cases in which accomplices' statements have sufficient "indicia of reliability" to be constitutionally admissible.

Seemingly, two types of cases should be differentiated from the ordinary situation in which a statement contained in an accomplice's confession is offered against a criminal defendant. First, if the accomplice's statement has been adopted by the defendant,<sup>177</sup> then concerns about the accomplice's trustworthiness are no longer relevant. The statement is being admitted as an admission—one that was made or adopted by the defendant in the case<sup>178</sup>—not because the accomplice's statement is viewed as reliable.<sup>179</sup>

Second, when an accomplice confesses to someone whom he does not believe to be a police officer—an undercover officer, for example—the usual reason to distrust statements contained in an accomplice's confession is not present.<sup>180</sup> If the accomplice does not realize that the person to whom he is speaking is employed by the government, he will have no reason to believe that making statements that incriminate another individual will gain him favor with law enforcement authorities. The accomplice's statements may thus be viewed as likely to be reliable on the basis of the traditional declaration against interest rationale.<sup>181</sup> A reasonable person would not be likely to make statements contrary to his penal interest unless he believed them to be true.

Formulating additional exceptions to the general principle is problematic. At least in situations where an arrested accomplice gives a confession in response to questioning by a known government agent,<sup>182</sup> statements in the accomplice's confession that tend to incriminate other suspects will necessarily be suspect. Thus, the appropriate bright line rule is the constitutional principle originally formulated by Justice Harlan: "a confession of an ac-

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<sup>177</sup> Justice Harlan identified this situation as one in which the constitutional rule he advocated would not apply. See *Dutton v. Evans*, 400 U.S. 74, 98 (1970) (Harlan, J., concurring).

<sup>178</sup> See FED. R. EVID. 801(d)(1)(2).

<sup>179</sup> In rare situations, the accomplice's statement might be admissible as a co-conspirator's statement under Rule 801(d)(1)(E). In this situation, the statement is not being admitted because the accomplice's statement is viewed as reliable, but rather because that statement was in some sense authorized by the defendant. See FED. R. EVID. 801(d)(1)(E) advisory committee's note.

<sup>180</sup> For a case in which a suspect confesses to an undercover police officer, see *Illinois v. Perkins*, 496 U.S. 292 (1990).

<sup>181</sup> See *supra* note 64 and accompanying text.

<sup>182</sup> If the accomplice confesses before the government agent asks him any questions, the confession may appear to be reliable either because of its spontaneity or because it was not shaped by an official interrogation. Even in this kind of case, however, there may be reason to believe that the accomplice's confession may have been affected by his perception that providing authorities with information relating to other individuals would reduce his culpability.



complice resulting from formal police interrogation cannot be introduced as evidence of the guilt of an accused.<sup>183</sup>

### CONCLUSION

*Lee* established that when the government seeks to introduce an accomplice's confession against a criminal defendant, the accomplice's confession is presumed to be unreliable. Unless the government can rebut the presumption of unreliability, admission of the accomplice's confession will violate the defendant's right to confrontation. Although *Williamson* involved a case in which an accomplice's confession was introduced against a criminal defendant, the Court did not address the Confrontation Clause issue presented in that case. Nevertheless, *Williamson's* pivotal opinions raise the question as to whether *Lee's* presumption of unreliability will be rebutted in particular circumstances. Specifically, Justice Kennedy's opinion seems to assume that an accomplice's confession not prompted by a police inducement such as a promise of leniency generally will be reliable, while Justice O'Connor's opinion seems to assume that, within the accomplice's confession, statements that incriminate the accomplice will be reliable.

In this Article, I have explored these dubious empirical premises. As police interrogation manuals recognize, even if the police scrupulously avoid making promises to the criminal suspect, the suspect will inevitably believe—and may be subtly encouraged by the police to believe—that statements asserting the involvement of another party or parties will redound to his benefit. Thus, an accomplice's confession made in the absence of a police inducement may be just as untrustworthy as one given in response to such an inducement. Whether or not an inducement is involved, the accomplice's confession is untrustworthy because of the likelihood that the accomplice made the confession with the expectation of gaining favor from law enforcement authorities. Moreover, given the realities of police interrogation, there is no reason to assume that statements within the confession that incriminate the accomplice are any more reliable than those that incriminate only the criminal defendant. If the accomplice believes he can gain favor with the authorities by providing incriminating information against another party, he will be motivated to shape his statements incriminating himself so that they will also incriminate that party.

This analysis, if accepted, could have significant practical effect. Because *Williamson* did not decide whether any statements contained in the accomplice's confession in that case would be admissible, a court addressing whether statements contained in an accomplice's confession are admissible as a matter of evidentiary or constitutional law need not adopt the premises suggested in the opinions of Justice Kennedy and Justice O'Connor. Thus, a

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<sup>183</sup> *Dutton v. Evans*, 400 U.S. 74, 98 (1970) (Harlan, J., concurring).

court determining whether a statement contained in an accomplice's confession falls within the declaration against interest exception to the hearsay rule properly could find that, even though the statement incriminates the accomplice, the statement must be excluded because, given the significant probability that the statement was made with the motive of obtaining favor from law enforcement authorities, a reasonable person in the accomplice's position would be likely to have made the statement even though he did not believe it was true. Based on the same rationale, a court properly could find that the accomplice's statement would not have sufficient "indicia of reliability" to be admissible under the Confrontation Clause.

A court that applied this approach would perhaps be drawn towards adopting a categorical rule that would allow it to avoid the difficult task of determining on a case-by-case basis whether statements contained in an accomplice's confession have sufficient "indicia of reliability" to rebut *Lee's* presumption that such statements are unreliable. As Justice Harlan indicated more than two decades ago, the appropriate categorical rule is readily available: "a confession of an accomplice resulting from formal police interrogation cannot be introduced as evidence of the guilt of an accused."<sup>184</sup>

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<sup>184</sup> *Id.* (Harlan, J., concurring).