Inculpatory Statements Against Penal Interest:  
State v. Parris Goes Too Far  

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I. INTRODUCTION

At common law and until the adoption of the Federal Rules of Evidence in 1975, declarations against interest were viewed with great suspicion. As stated by the Court of Errors and Appeals of Connecticut in 1963, "[t]he dangers inherent in this type of evidence are so great that a trial judge should not admit [a declaration against interest] unless, in the exercise of a sound discretion, he concludes that the particular declaration against interest meets this test." The Indiana Appellate Court observed:

> Where declarations [against interest] . . . are received they are "generally considered a weak class of evidence, by reason of the fact that the party making them may not have clearly expressed his meaning, or may have been misunderstood, or the witness, by unintentionally altering a few words of the expressions really used, may give an effect to a declaration completely at variance with what the party did actually say."

Until 1975 the strong weight of authority in the United States excluded an *exculpatory* declaration by an unavailable

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1. Ferguson v. Smazer, 151 Conn. 226, 232-33, 196 A.2d 432, 436 (1963). The test for admission of declarations against interest is whether the statement is trustworthy under the particular circumstances, "that is, that safeguards reasonably equivalent to the oath and the test of cross-examination exist." *Id.* Ferguson was a bastardy case. The declaration against interest was a declaration of paternity made by George Twenty, the deceased brother-in-law of the plaintiff. The defendant offered the declaration to prove that Twenty, not the defendant, was the father of the plaintiff's illegitimate child. Four witnesses were prepared to swear to the extrajudicial statement, but the evidence was excluded.


3. Exculpatory statements are declarations made by an out-of-court declarant that implicate the declarant and exonerate the defendant. The defendant normally uses the statements at trial to show that someone else confessed to committing the crime. For a
witness even if the witness, rather than the defendant, had committed the crime for which the defendant stood charged. Wigmore called the rule "barbarous," and Mr. Justice Holmes observed that "no other statement is so much against interest as a confession of murder." No one dared propose, however, that the inculpatory declaration of an unavailable witness in a murder trial should be received to convict the defendant when the unavailable witness declared that he and the defendant committed the crime together. Yet this has been the trend since 1975, and it is the rule laid down by the Washington Supreme Court in State v. Parris. Under the Parris rule, a declaration against penal interest by a witness, inculpating both the witness and the defendant, may be received against the defendant in a criminal trial. The Parris rule is unsound for the reasons expounded in Judge William H. Williams' dissent in Parris and developed in this article.

In 1975 the United States Congress adopted Federal Rule of Evidence 804(b)(3). Four years later, Washington adopted verbatim the same rule, allowing into evidence a hearsay statement that is against one's interest as an exception to the general principle of excluding hearsay statements. Although this exception

thorough explanation of exculpatory statements, see Comment, Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest, 66 CALIF. L. REV. 1189, 1190 n.7 (1978). See also Fed. R. Evid. 804(b)(3).
4. 5 J. WIGMORE, EVIDENCE § 1476 (Chadbourn rev. 1974).
5. Id. § 1477.
7. Inculpatory statements implicate both the declarant and the defendant. Usually, the prosecution offers out-of-court statements at trial to convict the defendant. The out-of-court declarant has more often than not—according to the extrajudicial statement—been a coconspirator or codefendant. Example: A says to B: "C and I just killed V." The question of admissibility of this statement at C's trial is the focus of this article. See Comment, supra note 3, at 1190 n.7.
10. Id.
11. Id. at 154-73, 654 P.2d at 84-94.
13. See infra note 87. WASH. R. EVID. 804(b) provides:
(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(3) Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or crimi-
was traditionally limited to statements against the declarant's pecuniary or proprietary interest, the recently adopted version departs from common law and allows into evidence hearsay statements that are against the declarant's "penal" interest.

The new "penal interest" exception specifically authorizes the receipt into evidence of extrajudicial statements that tend to subject the declarant to criminal liability, at least when the declarant is "unavailable." At a criminal trial, such statements may be exculpatory, exonerating the defendant, or inculpatory, implicating the defendant. Rule 804(b)(3) expressly allows exculpatory statements into evidence when "corroborating circumstances clearly indicate the trustworthiness of the statements," but the rule does not mention inculpatory statements. The Parris court, by a 6-3 vote, indicated that statements implicating both declarant and defendant are receivable as against penal interest.

On the other hand, a declarant's statements implicating the defendant but not the declarant would not be receivable under Rule 804(b)(3) or, presumably, under Parris. The fact that the declarant's interest is disserved supplies the supposed psychological badge of authenticity. The damnification of the defendant is justified because the declarant would probably not speak ill of himself unless the entire statement were true.

Hearsay problems and confrontation clause difficulties were among the reasons inculpatory statements were omitted

15. Fed. R. Evid. 804(b)(3); Wash. R. Evid. 804(b)(3). For the definition of "unavailability," see Fed. R. Evid. 804(a).
16. Fed. R. Evid. 804(b)(3); Wash. R. Evid. 804(a).
17. 98 Wash. 2d at 149-54, 654 P.2d at 81-84. The final version of the rule did not mention inculpatory statements. The original draft, however, specifically proposed that inculpatory statements be excluded. The legislative history of this rule continues to be the subject of a variety of interpretations by the courts. Compare, e.g., 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 804(b)(3)[03], at 804-110 (1981) [hereinafter cited as 4 J. Weinstein] with United States v. Alvarez, 584 F.2d 694, 700 (5th Cir. 1978).
18. Parris, 98 Wash. 2d at 149, 654 P.2d at 81.
19. U.S. Const. amend. VI.
from the rule. Confrontation clause problems are not present with exculpatory statements because such statements do not speak "against" the defendant, but only speak in his behalf. An inculpatory statement, however, is directed against the defendant, and the sixth amendment arguably is violated if the defendant cannot confront the declarant. Consequently, inculpatory statements must be scrutinized intensively to see if they conform to sound hearsay doctrine and confrontation clause requirements.

In 1982, in State v. Parris, the Washington Supreme Court allowed inculpatory statements against penal interest into evidence without intense scrutiny of either hearsay or confrontation clause requirements. Parris affirmed a court of appeals decision interpreting ER 804(b)(3) to allow inculpatory statements into evidence. The supreme court concluded that because the penal interest exception adopted the federal rule verbatim, it was a "firmly rooted exception" and therefore reliable. The court allowed inculpatory statements into evidence even though ER 804(b)(3) does not mention inculpatory state-


21. Constitutional principles mandate that exculpatory statements be admitted into evidence in certain circumstances to ensure the defendant due process and to increase the chances of a fair trial. See Chambers v. Mississippi, 410 U.S. 284 (1973) (admission of exculpatory statement against penal interest may be constitutionally required to preserve defendant's fundamental constitutional right to present witnesses and testimony in his own behalf).

22. As in Parris, the declarant may be unavailable because of his own invocation of the self-incrimination clause. 98 Wash. 2d at 144, 654 P.2d at 79.


24. The hearsay evidentiary requirements were outlined in Parris, but not closely scrutinized. These requirements included: (1) the declarant must be unavailable; (2) the statement had to be against the interest of the declarant at the time the statement was made; and (3) there must be corroborating circumstances clearly indicating the trustworthiness of the statement. Id. at 145-48, 654 P.2d at 79-81.


26. At least if "accompanied by corroborating circumstances clearly indicating their trustworthiness." Parris, 98 Wash. 2d at 148, 654 P.2d at 81. The phrase "firmly rooted exception" comes from Ohio v. Roberts, 448 U.S. 56, 66 (1980). In Roberts, the Court focused on the specific sixth amendment confrontation problem involved when inculpatory statements are received under FED. R. EVID. 804(b)(3). The Court stated that the constitutional confrontation clause requirements are met if the statement has adequate "indicia of reliability." Id. Additionally, "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." Id. (emphasis added).
ments, and even though historical precedent excluded all penal interest statements from evidence.\(^{27}\)

The facts of the *Parris* case favored receipt of the evidence, and the result was the conviction of an apparent heroin pusher. It is not just right-wing, law-and-order advocacy that today protests “coddling criminals” and “handcuffing police.” The Federation of New York State Judges recently announced such a policy resolution:

The residences of people of this State have become barri-caded places in which they live behind chained and bolted doors; the streets have become the lawless marches of robbers, rapists and felons of every kind who victimize men, women and children. . . . The moral law, the oath of judicial office and the Canons of Judicial Ethics require every judge to execute the law by sentencing such defendants to prison terms that will effectively punish them for the crimes that they have committed.\(^{28}\)

It is incongruous that in a “liberal” era, evidence that would have been excluded throughout the history of our country should now be received to convict a criminal defendant.

This article first demonstrates that courts historically did not trust penal interest statements in general, and that courts were extremely suspicious of any statements by a third party that implicated the defendant. Since Washington adopted Federal Rule of Evidence 804(b)(3) verbatim, this article then analyzes the legislative history of the rule. The article concludes that the legislative history favored exclusion of inculpatory statements but that Congress failed to codify the exclusion because of unrelated problems. Finally, the article discusses the confrontation clause problems that arise when inculpatory statements are allowed into evidence. This article argues that the *Parris* holding\(^{29}\) should be narrowed, in a case now pending in the court of appeals,\(^{30}\) to exclude inculpatory statements alte-

\(^{27}\) See *supra* notes 1-11 and accompanying text.

\(^{28}\) Quoted in Wall St. J., Apr. 25, 1984, at 26, col. 1. See also N.Y. Times, Apr. 23, 1984, at 1, col. 3.

\(^{29}\) 98 Wash. 2d at 153, 654 P.2d at 83-84. Although not discussed in this article, another case involving inculpatory penal interest statements came before the Washington Supreme Court in 1983. State v. Valladares, 99 Wash. 2d 663, 664 P.2d 508 (1983). The court adopted, without discussion, the *Parris* analysis of inculpatory statements against penal interest. *Id.* at 670, 664 P.2d at 512. Because *Valladares* did not analyze the problem, the earlier *Parris* decision remains the focus of this article.

gether. The authors urge a rule of exclusion notwithstanding the supreme court's rejection of this claim as having little merit.31

II. THE PARRIS CASE

A. Facts

John Parris was charged in Thurston County Superior Court as an accomplice in the unlawful delivery of heroin. He was arrested while participating in a drug deal that an informant had arranged with DeHart at a Taco Time restaurant. DeHart was the charged principal in the conspiracy and the person who made the incriminating statements about Parris. An undercover police officer and the informant were at the scene of the drug purchase. Parris drove up to the restaurant and had a discussion with DeHart inside his car. After Parris drove away, DeHart told the officer and the informant that "the drugs were being gotten." In response to the informant's question, "Do you think he'll return with the drugs, or the money and the quantity and quality will be accurate?", DeHart replied, "Yes, I think so. There won't be any problem."32

Later, at a prearranged time, all parties returned to the restaurant. DeHart walked out from behind the building and delivered the heroin to the undercover police officer. At the same time, the police officer spotted the car that Parris had been driving earlier, leaving the back of the parking lot.

At trial, DeHart claimed his fifth amendment privilege against self-incrimination and was therefore unavailable as a witness.33 The prosecutor examined the police officer and the informant regarding DeHart's out-of-court statements made at the scene of the drug deal. The superior court found the testimony admissible as penal interest statements under ER 804(b)(3). The court of appeals affirmed that decision.34

31. State v. Valladares, 99 Wash. 2d 663, 667-68, 664 P.2d 508, 511 (1983) (argument that inculpatory statements against penal interest implicating an accused are per se inadmissible not well received by the court).
32. Parris, 98 Wash. 2d at 143, 654 P.2d at 78. The dissent argued that the statements made by DeHart at the scene of the crime were inherently untrustworthy because they were made in response to various questions from the informant and the police officer. Id. at 155, 162-63, 654 P.2d at 84, 88-89 (Williams, J., dissenting).
33. A declarant is considered unavailable if the declarant "[i]s exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement." Fed. R. Evid. 804(a)(1); Wash. R. Evid. 804(a)(1).
B. Analysis

In affirming the courts below, the Washington Supreme Court allowed into evidence inculpatory statements made against a criminal defendant without adequately addressing the newly enacted penal interest exception. The court ignored longstanding policies against penal interest statements as a whole and policies against inculpatory statements in particular. These policies should have given the court guidance to fill in a legislative omission. Instead, the court adopted a controversial federal circuit court case, United States v. Alvarez,\(^5\) that had accepted inculpatory statements without a thorough analysis of the inherent differences between inculpatory and exculpatory\(^6\) statements and without adequately addressing the confrontation clause problems.

The Parris court briefly examined\(^7\) the legislative history of Federal Rule of Evidence 804(b)(3), as discussed in Alvarez. The court concluded that the legislative omission of inculpatory statements meant that these statements were to be admitted into evidence.\(^8\) A closer look at legislative history reveals that the drafters of the bill and the House wanted total exclusion of such statements.\(^9\)

The Parris court also failed to scrutinize closely the sixth amendment confrontation problem, even though the holding

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36. Exculpatory statements have been constitutionally mandated in some cases. See supra note 21. Similarly, the confrontation clause mandates exclusion of inculpatory statements in certain situations. But see Justice Williams’ dissent in Parris for a different treatment. 98 Wash. 2d at 157-60, 654 P.2d at 85-87.

37. 98 Wash. 2d at 147-48, 654 P.2d at 81.

38. Id. at 148, 654 P.2d at 81. In his dissent, Justice Williams discussed the original version of Fed. R. Evid. 804(b)(3). 98 Wash. 2d at 158, 654 P.2d at 86.

allowed inculpatory statements into evidence without permitting the defendant to confront the witness who spoke against him.\textsuperscript{40} Washington's constitution, which calls for "face-to-face" confrontation, suggests a special concern for confrontation clause problems in the criminal context.\textsuperscript{41} This concern is underscored further by the codification of the confrontation right in the Revised Code of Washington\textsuperscript{42} and by Washington's history of protecting the defendant when confrontation problems arise in a criminal context.\textsuperscript{43}

Finally, the \textit{Parris} court completely ignored the history and policies of the statement against interest exception and its recent expansion allowing penal interest statements into evidence. That history shows that Washington should have adopted a narrow reading of rule 804(b)(3) because of the inherent unreliability of third party out-of-court statements that implicate a criminal defendant.\textsuperscript{44}

\section*{III. History of the Penal Interest Exception}

The rule against hearsay\textsuperscript{45} has traditionally mandated that any out-of-court statement offered to prove the truth of the matter asserted be excluded from evidence. Hearsay statements were considered inadmissible because they were inherently unreliable.\textsuperscript{46} Certain situations, however, naturally ensured that an

\textsuperscript{40} 98 Wash. 2d at 144, 654 P.2d at 79. The sixth amendment to the United States Constitution guarantees the right of a criminal defendant to confront the witnesses against him. \textit{See generally} Davis v. Alaska, 415 U.S. 308 (1974) (discussing the requirements and purposes of the confrontation clause); California v. Green, 399 U.S. 149 (1970) (minimum requirements under the confrontation clause).

\textsuperscript{41} WASH. CONST. art. I, § 22. The Washington Constitution has a provision parallel to the sixth amendment, but adds that: "the accused shall have the right . . . to meet the witnesses against him face to face." \textit{Id.} (emphasis added). In his dissent Justice Williams recognized that these words mean physical confrontation between the witness and the defendant. \textit{Parris}, 98 Wash. 2d at 154, 654 P.2d at 84. Although the court discussed the sixth amendment confrontation problem and cited several federal cases, the majority did not mention Washington's constitutional protections.

\textsuperscript{42} WASH. REV. CODE § 10.52.060 (1983).


\textsuperscript{44} \textit{See infra} notes 101-36 and accompanying text.

\textsuperscript{45} Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." \textit{Fed. R. Evid.} 801(c).

\textsuperscript{46} The unreliability of hearsay statements stems from the want of an oath, the absence of cross-examination, and the inability of the jury to view the declarant's demeanor. \textit{See, e.g., California v. Green}, 399 U.S. 149, 158 (1970); Donnelly v. United
out-of-court statement was reliable. Thus, well-recognized exceptions to the hearsay rule evolved. 47

One of the exceptions to the hearsay rule was the "statement against interest" exception. 48 The common law allowed into evidence statements against the declarant's pecuniary or proprietary interest when the declarant was unavailable 49 at trial. Only statements against one's property or monetary interests were included at common law. Experience of human nature suggested that a person would not ordinarily make a statement against these interests unless it were true. 50 Additionally, these types of interests were usually evidenced by some sort of writing. 51 The statements were, therefore, considered reliable, and the need to exclude them under the hearsay rule vanished.

Although hearsay statements against one's pecuniary and proprietary interests were allowed into evidence at common law, statements against one's penal interest were excluded. Such statements were treated with great distrust, a distrust stemming from the famous Sussex Peerage case. 52 In Peerage, the Committee for Privileges of the House of Lords refused to admit penal statements at trial because it feared that if these statements were admitted, defendants' rights would suffer. The Comm-

States, 228 U.S. 243, 273 (1913). See also C. McCormick, Handbook of the Law of Evidence § 245 (2d ed. 1972); 4 J. Weinstein, supra note 17, ¶ 801; 5 J. Wigmore, supra note 4, § 1362.

47. Federal Rules of Evidence 803 and 804 enumerate a variety of exceptions to the general exclusion of hearsay statements.

48. A statement against one's criminal interest was not included within this exception at common law. Jefferson, supra note 14, at 39-40.

49. The declarant is still required to be unavailable. Fed. R. Evid. 804; Wash. R. Evid. 804. This is consistent with the need to show a "special necessity" before the statement will be allowed into evidence. C. McCormick, supra note 46, § 253, at 608; Comment, Evidence: The Unavailability Requirement of Declaration Against Interest Hearsay, 55 Iowa L. Rev. 477, 478 (1969).

50. McCormick agreed that the principal rationale for this exception is based upon the experience of human nature. C. McCormick, supra note 46, § 278. See also G. Lilly, An Introduction to the Law of Evidence § 77 (1978) (common observation probably supports the proposition that one is unlikely to make a disavowing statement unless it is true); 11 J. Moore & H. Bendix, Moore's Federal Practice ¶ 804.06(3)[1], at VIII-277 (2d ed. 1948).

51. Some commentators suggest that the only viable reason that the statements against interest exception was limited to pecuniary or proprietary interests was that these interests usually appeared in accounting books or some other type of document, decreasing the likelihood of fabrication. See, e.g., 1 S. Greenleaf, A Treatise on the Law of Evidence § 150, at 234 (16th ed. 1899) (common law reliance on documentary evidence); 5 J. Wigmore, supra note 4, § 1476, at 350 (possibility of fabrication the only plausible reason to exclude penal interest statements).

mittee was confronted with an exculpatory statement against penal interest, but expressed concern that if the rule were expanded beyond these exculpatory statements, prosecutors could unjustly use statements that implicated the defendant.\textsuperscript{53} The Committee was concerned about the trustworthiness of all penal interest statements, but expressly rejected any type of statement implicating a criminal defendant.\textsuperscript{54}

Federal and state courts in the United States followed Sussex Peerage.\textsuperscript{55} In 1913 the United States Supreme Court, though divided 6-3, rejected penal interest statements in Donnelly v. United States.\textsuperscript{56} The Donnelly Court argued that the virtually unanimous weight of state court authority was against penal interest statements.\textsuperscript{57} The Court did not review its own authority because it was deemed well settled that penal interest statements were to be excluded.\textsuperscript{58} The Court also noted that the dangers of hearsay in general are great, and that no court should lightly yield to the "introduction of fresh exceptions."\textsuperscript{59}

Additional considerations justified exclusion of penal interest statements. Declarations of criminal activity are often motivated by selfish considerations and are not as reliable as statements against pecuniary or proprietary interest.\textsuperscript{60} Judicial exclusion of penal interest statements prevailed until 1975, when Congress promulgated the new evidence rules.

Justice Holmes advocated acceptance of exculpatory penal interest statements in his famous dissent in Donnelly, in which he stated: "[N]o other statement is so much against interest as a confession of murder."\textsuperscript{61} Holmes was concerned in Donnelly, however, with exculpatory statements and the defendant's constitutional right to produce a witness. No one has suggested that the renowned dissenter advocated receipt of inculpatory penal

\textsuperscript{53} Id. at 1042.
\textsuperscript{54} Id. at 1045.
\textsuperscript{56} 228 U.S. 243, 276 (1913).
\textsuperscript{57} Id. at 273-74 n.1.
\textsuperscript{58} Id. at 276.
\textsuperscript{59} Id. at 276-77.
\textsuperscript{61} 228 U.S. at 278 (Holmes, J., dissenting).
interest statements.

Although some commentators argued that excluding penal interest statements was illogical,63 such statements were almost universally excluded until the new federal rules were promulgated in 1975. Even subsequent to adoption of the Federal Rules of Evidence, some states declined to adopt the penal interest exception.64

IV. HISTORY OF PENAL INTEREST STATEMENTS IN WASHINGTON

Before 1967 Washington adhered strictly to the Donnelly policy that penal interest statements were inherently unreliable.65 In 1967 the Washington Supreme Court excluded exculpatory statements in State v. Garrison.66 The court concluded that the statement against interest exception included only proprietary or pecuniary interests. The court did not reach the penal interest issue because the statement was held not to be one against the declarant’s “interest” and because the declarant was not, as the rule requires, unavailable.66

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62. Wigmore referred to the exclusion of penal interest statements as a “barbarous doctrine.” 5 J. WIGMORE, supra note 4, § 1477, at 360. He argued that a person would be just as unlikely to make a statement that would subject him to criminal punishment as he would in circumstances involving monetary or property obligations. Additionally, Wigmore said that the Peerage decision represented a step backward in the rule of exceptions for statements against interest. Id. § 1476, at 351.

Weinstein states that the likelihood of perjured confessions to crimes is a policy reason for rejecting the penal interest exception, even though most courts fail to recognize this as a basis for their decisions. 4 J. WEINSTEIN, supra note 17, ¶ 804(b)(3)[01], at 804-91. See also C. MCCORMICK, supra note 46, § 278 (hypothesizing that “the fear of opening a door to a flood of prepared witnesses falsely testifying to confessions that were never made,” was a motivation for exclusion of penal statements). But see Jefferson, supra note 14, at 39-43; Note, supra note 60, at 424.


64. See, e.g., Allen v. Dillard, 15 Wash. 2d 35, 54-60, 129 P.2d 813, 821-24 (1942) (setting out the traditional theory of this exception and outlining the common law requirements).

65. 71 Wash. 2d 312, 427 P.2d 1012 (1967). Garrison was charged with burglary in the second degree. He was stopped in a car that was carrying four cases of beer that had been spotted earlier being carried out the back door of a tavern. Id. at 312-13, 427 P.2d at 1013. The defendant sought to admit statements by his accomplice to a police officer that the stolen beer belonged to the accomplice and that the defendant had had nothing to do with getting the beer. Id. at 313, 427 P.2d at 1013.

66. Id. at 314, 427 P.2d at 1014. No reason was given why the declarant could not be subpoenaed or why he would not testify. The court noted that the statement was not against the declarant’s penal interest because it was not a declaration for which he could be punished. Id. The statements were merely an attempt to absolve both the declarant
Two appellate courts, just prior to adoption of the new federal rules, briefly discussed penal interest statements.\footnote{Id. to Wicker, 10 Wash. App. 905, 520 P.2d 1404 (1974); State v. Grant, 9 Wash. App. 260, 511 P.2d 1013 (1973), cert. denied, 419 U.S. 849 (1974).} In State v. Grant, the court noted that case law in other jurisdictions was split on whether or not penal interest statements should be allowed into evidence.\footnote{Id.} The court, however, did not directly confront the issue because the general requirement of unavailability had again not been met.\footnote{Id.}

In State v. Wicker,\footnote{Id. at 268, 511 P.2d at 1018-19. Although Grant involved exculpatory statements, the court was hesitant, because of the heinous nature of the murders, to allow defendants to bring in unreliable evidence. Two women had been raped, stabbed, and asphyxiated, and two six-year-old boys had been beaten and stabbed to death. Id. at 261-63, 511 P.2d at 1015.}\footnote{Id. at 905, 520 P.2d 1404 (1974).} the appellate court stated that the question of the penal interest exception in Washington was "an open one."\footnote{Id. at 909, 520 P.2d at 1406.} The court noted, however, that the "confession of an 'accomplice' ... is . . . unreliable[,] . . . particularly where it is uncorroborated and not inherently inconsistent with the guilt of the accused."\footnote{Id.} The Wicker court cited the then proposed federal rule for the proposition that even exculpatory statements are unreliable.\footnote{Id.}

Following adoption of the federal rules, Washington courts confronted exculpatory penal interest statements in State v. Gardner.\footnote{Id. at 1019.} The court concluded that declarations against penal interest could be admitted into evidence as exceptions to the hearsay rule only when all constitutional and evidentiary requirements were met.\footnote{Id. at 1018-19. Although Grant involved exculpatory statements, the court was hesitant, because of the heinous nature of the murders, to allow defendants to bring in unreliable evidence. Two women had been raped, stabbed, and asphyxiated, and two six-year-old boys had been beaten and stabbed to death. Id. at 261-63, 511 P.2d at 1015.} The court struggled with the new constitutional mandate to admit certain exculpatory statements into evidence when due process so required.\footnote{Id. at 1018-19. Although Grant involved exculpatory statements, the court was hesitant, because of the heinous nature of the murders, to allow defendants to bring in unreliable evidence. Two women had been raped, stabbed, and asphyxiated, and two six-year-old boys had been beaten and stabbed to death. Id. at 261-63, 511 P.2d at 1015.} The court was forced to address the issue when the defendant argued that an

Exculpatory statement had to be admitted as a matter of constitutional due process.\textsuperscript{77}

The \textit{Gardner} court held that the United States Constitution required certain exculpatory penal interest statements to be admitted on behalf of the defendant.\textsuperscript{78} The court remained suspicious of exculpatory statements, however, and adopted a stringent test for their admissibility:\textsuperscript{79} the admission of such evidence must be necessary to prevent "manifest injustice."\textsuperscript{80} Gardner failed to meet these strict requirements and the exculpating statement was excluded at trial.\textsuperscript{81}

The \textit{Gardner} court adhered to the view that penal interest statements are unreliable.\textsuperscript{82} The court cited decisions in other jurisdictions evincing a reluctance to expand the traditional statement against interest exception because of the unreliability of criminal confessions, which are often motivated by extraneous considerations.\textsuperscript{83}

The Washington Supreme Court adopted the penal interest rule, as formulated by \textit{Gardner}, in \textit{State v. Young}.\textsuperscript{84} Although the court found exculpatory statements constitutionally mandated in some instances, the court remained skeptical of penal interest statements in general and emphasized that the majority of states would not allow any type of penal interest declaration into evidence.\textsuperscript{85}

\textsuperscript{77} The defendant cited \textit{Chambers v. Mississippi}, 410 U.S. 284 (1973), as authority for her claim. When the petitioner in \textit{Chambers} was not allowed to cross-examine a witness or introduce testimony important to his case, the Supreme Court held that he had been denied a fair trial in violation of the due process clause. \textit{Id.} at 302.

\textsuperscript{78} 13 Wash. App. at 196, 534 P.2d at 141.

\textsuperscript{79} The \textit{Gardner} court stated that "[w]hat \textit{Chambers} does is to constitutionally mandate use of the declaration against penal interest exception . . . when the evidence offered under that exception equates with the objective special circumstances found in \textit{Chambers}, and the admission of such evidence is necessary to prevent manifest injustice." \textit{Id.} at 198, 534 P.2d at 142.

\textsuperscript{80} \textit{Id.} at 200, 534 P.2d at 143.

\textsuperscript{81} \textit{Id.} at 199, 534 P.2d at 143.

\textsuperscript{82} \textit{Id.} at 198-99, 534 P.2d at 142-43.

\textsuperscript{83} \textit{Id.} at 199, 534 P.2d at 143. See also \textit{F. INbau & J. R eid, Criminal Interrogation and Confessions} 114-15 (2d ed. 1967) (some confessions are motivated by the promise of leniency or immunity); \textit{T. R ek, The Compulsion to Confess} 261 (3d ed. 1959) (examines courts' reluctance to admit penal interest statements because of a fear of perjury and false confessions).

\textsuperscript{84} 89 Wash. 2d 613, 627, 574 P.2d 1171, 1180, \textit{cert. denied}, 439 U.S. 870 (1978).

\textsuperscript{85} \textit{Id.} at 626, 574 P.2d at 1179. \textit{Young} was typical of a pattern that emerged in other courts of excluding exculpatory statements in murder trials. In \textit{Young}, a bomb had been sent to the chambers of the judge who was going to sit at Young's pre-trial hearing. The bomb exploded, instantly killing the judge. The court refused to admit into evidence
One year after Young, Washington adopted Federal Rule of Evidence 804(b)(3). The new rule and accompanying comments did not address inculpatory statements. The comment to ER 804(b)(3) stated that Washington had no prior authority on statements furnishing the basis for criminal liability and that rule 804 "expands" and "clarifies" the scope of the exception. ER 804(b)(3) expanded the common law exception by embracing exculpatory statements. However, because it omitted any mention of inculpatory statements, the rule did not "clarify" the scope of the exception.

Following codification of the penal interest exception, Washington maintained stringent requirements for the admissibility of exculpatory statements against penal interest. In 1980 the Washington Court of Appeals refused to admit exculpatory statements in State v. Russell because the minimum evidentiary requirements enumerated in Chambers had not been met. Russell sought admission of the written statement of a friend. The statement would have suggested that its author had misrepresented her identity to the defendant and that the defendant had been given permission to use two credit cards that purportedly belonged to the author but that were in fact stolen. The trial court excluded the statement.

Although Russell excluded an exculpatory penal interest statement, a footnote in the opinion intimated that ER 804 may...
have weakened Washington's strict criteria. The court noted that "a relevant statement is admissible even though it may not be inconsistent with the guilt of the accused so long as it is clearly trustworthy." However, since the court was confronted with an exculpatory statement, no inference that the rule should be broadened to include inculpatory statements can be indulged. Additionally, in 1982 the same appellate court specifically listed the "inherently inconsistent with the guilt of the accused" language as a requirement before the penal interest statement could be introduced at trial.

It was against this background of distrust that the Washington Court of Appeals confronted inculpatory statements against penal interest in *State v. Parris*. The court permitted the admission of inculpatory statements even though the state and federal constitutions suggest, and possibly require, exclusion of these statements. The Washington Supreme Court affirmed, thus ignoring Washington's apparent policy and its historical disfavor of hearsay statements in general and inculpatory statements against penal interest in particular.

V. LEGISLATIVE HISTORY OF FEDERAL RULE 804(b)(3)

The court of appeals stated in *State v. Parris* that the failure of Congress to include inculpatory statements in the 804(b)(3) exception was due in part to legislative "oversight."  

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96. Id. at 314 n.1, 617 P.2d at 471 n.1.
97. Id.
98. State v. Castro, 32 Wash. App. 559, 566, 648 P.2d 485, 490 (1982). Even though the defendant argued that due process required admission under Chambers, the court said that the trial court has the discretion to judge corroboration requirements. The Castro court found insufficient corroboration. *Id.* at 565-66, 648 P.2d at 490.
100. 98 Wash. 2d at 154, 654 P.2d at 84.
101. 30 Wash. App. at 276 n.8, 633 P.2d at 919 n.8. The court did not address the legislative history in the text of the opinion. In a footnote, however, the court stated: ER 804(b)(3) makes the corroboration requirement expressly applicable only to *exculpatory* statements. A review of the legislative history of Fed. R. Evid. 804(b)(3) indicates the failure to make the corroboration requirement applicable to inculpatory statements stems partly from a misreading of Supreme Court decisions regarding the confrontation clause and partly from legislative oversight. (Citations omitted.) Recent federal cases construing the new Fed. R. Evid. (804)(b)(3) have generally applied the corroboration requirement to inculpatory statements. See United States v. Sarmiento-Perez, [633 F.2d 1092 (5th Cir. 1981)]; United States v. Oliver, 626 F.2d 254 (2d Cir. 1980); United
The state supreme court explained that the only "sensible explanation" for the omission of inculpatory statements is that the drafters wanted to leave the task of delineating the requirements for admissibility to the courts.\textsuperscript{102} As the following discussion demonstrates, the omission of any reference to inculpatory statements in the rule was not an "oversight." The legislative history of the rule indicates that inculpatory statements were distrusted and were meant to be excluded.

A. Advisory Committee

The first Advisory Committee draft of rule 804 was published in 1969.\textsuperscript{103} This first draft of the rule departed from the common law rule of excluding penal interest statements and explicitly allowed exculpatory statements against penal interest into evidence.\textsuperscript{104} The last sentence of the draft, however, clearly stated that inculpatory statements were to be excluded under the rule.\textsuperscript{105} The committee relied\textsuperscript{106} on the dissent in \textit{Bruton v. States v. Alvarez}, 584 F.2d 694 (5th Cir. 1978). We agree with these cases and believe the corroboration requirement should apply to inculpatory statements. The drafters of the federal rule left to the courts the task of delineating the requirements regarding admissibility of inculpatory statements because of the constitutional questions raised by such statements. \textit{Alvarez}, 584 F.2d at 700.

Applying the corroboration requirement to inculpatory statements is consistent with the "indicia of reliability" language in \textit{Roberts}, 448 U.S. at 66. Further, failure to require corroboration of inculpatory statements would subvert the general scheme of the Rules of Evidence, for without the corroboration requirement the statement against penal interest exception would allow the state to circumvent the traditional safeguards surrounding the coconspirator exception to the hearsay rule, ER 801(d)(2). See \textit{Alvarez}, 584 F.2d at 701.  

\begin{flushleft}
\textit{Id.} at 276 n.8, 633 P.2d at 919 n.8.
\end{flushleft}

102. 98 Wash. 2d at 148, 654 P.2d at 81.

103. In its preliminary form, the rule was originally numbered 804(b)(4). Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 378 (1969). The rule was renumbered during the course of congressional consideration and emerged in its final form as \textit{Fed. R. Evid.} 804(b)(3).


105. The first draft provided:

(4) \textbf{STATEMENT AGAINST INTEREST}. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another or to make him an object of hatred, ridicule, or social disapproval, that a reasonable man in his position would not have made the statement unless he believed it to be true. \textit{This example does not include a statement or confession offered against the accused in a criminal case, made}
United States\textsuperscript{107} arguing that inculpatory statements are inherently unreliable.\textsuperscript{108}

Subsequent to the first proposed draft, the rule passed through two sessions of the Standing Committee and publication for comment by bench and bar with the last sentence excluding inculpatory statements unchanged.\textsuperscript{109} Shortly thereafter, however, the last line of Rule 804(b)(3) was deleted.\textsuperscript{110} This ill-conceived revision, some suggest, was prompted by certain powerful politicians in Congress.\textsuperscript{111} The sentence was dropped in the final version of the rule.\textsuperscript{112}

Although the final draft of the Advisory Committee did not refer to inculpatory statements, the Advisory Committee's concluding note to the Federal Rules of Evidence cautioned against allowing inculpatory statements into evidence.\textsuperscript{113} The note cited

\textit{\textsuperscript{107}} United States\textsuperscript{107} arguing that inculpatory statements are inherently unreliable.

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by a codefendant or other person implicating both himself and the accused.

46 F.R.D. at 378 (emphasis added).


\textit{\textsuperscript{107}} 391 U.S. 123 (1968).

\textit{\textsuperscript{108}} Id. at 138-44.

\textit{\textsuperscript{109}} The sentence was retained in the 1971 Advisory Committee draft. Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 438-39 (1971). After publication of the March 1971 draft, criticisms and suggestions were once more submitted to the committee.


\textit{\textsuperscript{111}} Note, Inculpatory Statements Against Penal Interest and the Confrontation Clause, 83 COLUM. L. REV. 159, 175-76 (1983). The author suggests that Senator John L. McClellan, Chairman of the Senate Subcommittee of Criminal Laws and Procedure of the Senate Committee on the Judiciary, introduced a bill that would strip the courts of some rule-making power in response to the Proposed Draft. The Senator thought that the inclusion of the last sentence would further weaken the federal system of criminal justice. \textit{Id.}. at 175 n.109. "I would omit entirely the last sentence of 804(b)(1) [sic]." 117 CONG. REC. 33,648 (1971) (remarks by Senator McClellan). \textit{See also} Tague, Perils of the Rulemaking Process: The Development, Application and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception, 69 Geo. L.J. 851 (1981). Tague refers to a letter that Senator McClellan sent to the Chairman of the Standing Committee saying that he would expend all efforts to prohibit further erosion of the federal justice system. \textit{Id.} at 873.

\textit{\textsuperscript{112}} See supra note 3. The Comment mentions statements by Charles R. Halpern and George T. Frampton to the House Subcommittee on Criminal Justice referring to political pressures. Both speakers pointed to Senator McClellan as coercing the Advisory Committee into making certain changes by threatening to obstruct the entire project. The Comment suggests that looking to the Advisory Committee's silence on inculpatory statements is suspect and inadequate. \textit{Id.} at 1193-94.

\textit{\textsuperscript{113}} \textit{Fed. R. Evid.} 804(b)(3).

\textit{\textsuperscript{111}} Naval Evid. 804(b)(3) advisory committee note.
Douglas v. Alabama\textsuperscript{114} and Bruton v. United States\textsuperscript{116} as cases that had assumed the inadmissibility of all third-person inculpatory statements.\textsuperscript{116} The note expressly outlined two major cautions that suggest the Committee's true stance favored exclusion of all inculpatory statements.\textsuperscript{117} The first caution was that a suspect's motivation to win the favor of prosecutorial authority renders inculpatory statements inherently suspect.\textsuperscript{118} The motivation to save one's own neck may be present any time a codefendant or coconspirator makes an inculpatory statement, regardless of whether or not the declarant is in police custody. Such inculpating statements tend to exonerate the declarant by redirecting and spreading responsibility. The motivation behind such statements makes them grossly unreliable.

The Advisory Committee also warned that "[t]he rule does not purport to deal with questions of the right of confrontation."\textsuperscript{119} This caution mandates an intense constitutional scrutiny of inculpatory statements and suggests that inculpatory statements should be regarded with special suspicion.

The final advisory draft, which deleted any reference to inculpatory statements, was sent to the congressional committees.\textsuperscript{120} Congress was split on the issue of inculpatory statements. The House of Representatives sided with the Advisory Committee's policies and reinserted, with a slight change in the original wording, the final sentence of 804(b)(3)\textsuperscript{121} excluding

\textsuperscript{114} 380 U.S. 415 (1965).
\textsuperscript{115} 391 U.S. 123 (1968).
\textsuperscript{116} \textit{Fed. R. Evid.} 804(b)(3) advisory committee note.
\textsuperscript{117} \textit{Id.}
\textsuperscript{118} The idea that a declarant who is currying favor with authorities will be unreliable has been used in many jurisdictions to justify the exclusion of inculpatory statements. See, e.g., Bruton v. United States, 391 U.S. 123, 141 (1968) (White, J., dissenting); United States v. Riley, 657 F.2d 1377, 1384 (8th Cir. 1981), \textit{cert. denied}, 103 S. Ct. 742 (1983) ("curry favor" language used); United States v. Palumbo, 639 F.2d 123, 128 (3d Cir. 1981), \textit{cert. denied}, 454 U.S. 819 (1981) ("curry favor" expression used); United States v. Sarmiento-Perez, 633 F.2d 1092, 1102 (5th Cir. 1981); United States v. Oliver, 626 F.2d 254, 261 (2d Cir. 1980); United States v. Bailey, 581 F.2d 341, 345 (3d Cir. 1978).
\textsuperscript{119} \textit{Fed. R. Evid.} 804(b)(3) advisory committee note.
\textsuperscript{120} The Supreme Court, over the procedural dissent of Mr. Justice Douglas, also approved this version before it was submitted to the Congress. Douglas was concerned that such action would lend too much weight to the rule and stated that the Court's function is as a conduit, approval being purely perfunctory. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 185-86 (1973).
inculpatory statements. The House addressed its reasons for excluding inculpatory statements in its final note, which asserted that the sentence was added "to codify the doctrine of Bruton." The House apparently sought to protect the criminal defendant's constitutional rights.

The Senate Judiciary Committee, however, deleted the reference to inculpatory statements. The Senate did not argue that inculpatory statements are reliable and should be received, but chose to attack the House's attempted codification of a constitutional principle. The Senate was also concerned that the House version of the rule would exclude inculpatory statements even if those statements fell under another hearsay exception or exclusion, such as vicarious admissions and "coconspirator's statements."

Because of the difference between the House and Senate versions, the issue had to be resolved by a Joint Conference Committee. The Conference Committee accepted the Senate's version of 804(b)(3) and deleted any reference to inculpatory statements. The Committee aligned itself with the Senate's reasoning that Congress should "avoid attempting to codify constitutional evidentiary principles." The Senate had been concerned that sixth amendment principles could be stifled in the future by such a blanket exclusion of all inculpatory statements. As a result, the final version of rule 804(b)(3) had no express reference to inculpatory statements against penal interest.

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122. The final sentence of rule 804(b)(3) read: "A statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused, is not within this exception." 4 J. Weinstein, supra note 17, at 804-11.
123. House Report, supra note 121.
124. Id.
126. Id.
127. Id.
129. Id.
130. Senate Report, supra note 125.
131. On Dec. 16, 1974, the Senate agreed to the Conference version of the rules. 120 Cong. Rec. 40,069-070 (1974). Two days later, the House also accepted that version. Id. at 40,890-96. The rules became effective on July 1, 1975.
The omission of any reference to inculpatory statements in rule 804(b)(3) may be interpreted in two divergent ways. One interpretation is that the omission of the word "inculpatory" solidifies the drafters' intent to make these statements admissible. This means that the "omission" left to the courts the task of deciding the admissibility of these statements. On the other end of the spectrum, another interpretation concludes that because the original intent was to exclude inculpatory statements, and because the Advisory Committee note gave two express warnings against inculpatory statements, these statements should be banned from evidence. The rationale for this viewpoint is that the last sentence of the rule was dropped because of unjustified Senate fears that actually support the exclusion of inculpatory statements.

Although the legislative history of inculpatory statements in the Senate and the House was inconsistent, the initial intent of the drafting committee and the notes following the proposed evidence rules supported the conclusion that inculpatory statements ought to be excluded. Other traditional hearsay exceptions would still be available to prosecutors and litigants. This conclusion is in accord with the continuing view of many commentators who have considered the matter, and with the practice of pre-1975 courts that inculpatory statements against penal interest are inherently unreliable and should be excluded. The new penal interest exception is being used as a "fall-back" for prosecutors when they cannot justify receipt in evidence of the same statement under a traditional hearsay exception.

VI. FEDERAL CASE ANALYSIS OF FEDERAL RULE OF EVIDENCE
804(b)(3)

After congressional codification of rule 804, federal circuit

132. See Comment, supra note 3, at 1191. The author neglects the two cautionary statements that the same committee made. In addition, no credence is given to the fact that influential political pressures might have motivated the committee to drop its original sentence. See supra text accompanying note 111.

133. See supra text accompanying notes 118-19.

134. See 4 J. Weinstein, supra note 17, ¶ 804(b)(3)[03], at 804-112 to -114. Weinstein's argument focuses on the initial drafting that excluded inculpatory statements and the confrontation clause issue. See also 5 J. Wigmore, supra note 4, § 1477. Wigmore concluded that the general rationale for the exception to hearsay for statements against interest is lacking in the context of inculpatory statements.

courts confronted primarily exculpatory statements against penal interest and problems with admissibility standards for those statements.\textsuperscript{136} Cases involving inculpatory penal interest statements have emerged only recently in federal circuit courts.\textsuperscript{137} The context in which the majority of inculpatory statement cases arise, however, shows remarkable consistency. Typically, the hearsay statement is argued under the coconspirator hearsay exception. When the prosecutor fails to meet the requirements under this exception, the statement is then offered under the new 804(b)(3) penal interest exception.\textsuperscript{138}

\textsuperscript{136} These problems include: (1) How much corroboration is necessary? See P. Rothstein, Rules of Evidence for the United States Courts and Magistrates 423 (2d ed. 1983) (corroboration is a middle ground between the common law exclusion and drafters' view that penal interest statements should be admissible). See also Note, Constitutional Restraints on the Exclusion of Evidence in the Defendant's Favor: The Implications of Davis v. Alaska, 73 Mich. L. Rev. 1465 (1975); Note, Commonwealth v. Nash: Admissibility of Declarations Against Penal Interest, 48 Temp. L.Q. 796 (1975).

The rule requiring corroboration for exculpatory statements has been applied to inculpatory statements by a number of courts. See United States v. MacDonald, 688 F.2d 224, 232-33 (4th Cir. 1982), cert. denied, 103 S. Ct. 726 (1983); United States v. Riley, 657 F.2d 1377, 1382-83 (8th Cir. 1981), cert. denied, 103 S. Ct. 742 (1983); United States v. Alvarez, 584 F.2d 694, 701-02 (5th Cir. 1978).

(2) What does "tended to subject" to criminal liability mean? See State v. Garrison, 71 Wash. 2d 312, 314, 427 P.2d 1012, 1014 (1967) (statement must be an admission of an unlawful act and be a declaration for which a person could be punished).


(5) Can a statement against penal interest be carved out of a larger hearsay statement? See M. Graham, Handbook of Federal Evidence § 804.3, at 923-24 n.3 (1981); 5 J. Wigmore, supra note 4, § 1465 (all parts of speech may be admitted if made while declarant was in the same trustworthy psychological conditions). See also United States v. Thomas, 571 F.2d 285, 289-90 (5th Cir. 1978); United States v. Marquez, 462 F.2d 893, 895 (2d Cir. 1972). McCormick summarizes the three different approaches for severance by the court. C. McCormick, supra note 46, § 279 (admit the entire declaration; compare the strength of self-serving and disserving interests and admit it all if the disserving statement preponderates or exclude it all if the self-serving interest is greater; and admit disserving parts and exclude self-serving parts).

\textsuperscript{137} See, e.g., United States v. Alvarez, 584 F.2d 694 (5th Cir. 1978).

\textsuperscript{138} See Note, Inculpatory Declarations Against Penal Interest and the Cocon-
This pattern surfaced in 1978 in United States v. Alvarez.\textsuperscript{139} The prosecutor in Alvarez was unable to meet the requirements for the coconspirator exception and the statements were held inadmissible. The prosecutor then argued that those same statements should be admissible as inculpatory penal interest statements under the new 804(b)(3) exception. Although the court held that in this case the statements were not admissible, the court outlined its requirements for inculpatory statements in future cases.\textsuperscript{140} The Alvarez court test of admissibility for inculpatory statements was ultimately followed by other circuit courts and by some state courts.\textsuperscript{141}

The Alvarez case itself brought into clear focus the undesirable results of allowing third-person inculpatory statements into evidence. Gilbert Alvarez was convicted of heroin trafficking solely on the word of a dead man. At trial, the prosecution's only witness, Lopez, reported a conversation with the decedent, in which the decedent had stated that Alvarez was the supplier. This was all the evidence that the prosecution produced. There was no corroboration, and Lopez had a strong motivation to implicate Alvarez in order to retain his own probation status.\textsuperscript{142}

The Alvarez court held that inculpatory statements were admissible and "that the admissibility of inculpatory declarations against interest requires corroborating circumstances that 'clearly indicate the trustworthiness of the statement.'"\textsuperscript{143} These are the exact requirements for exculpatory statements.\textsuperscript{144} The Alvarez court reasoned that if the standard for inculpatory statements were the same as the standard for exculpatory statements, a unifying principle for all penal interest statements

\textsuperscript{139} 584 F.2d 694 (5th Cir. 1978).
\textsuperscript{140} Id. at 701.
\textsuperscript{142} Alvarez, 584 F.2d at 701.
\textsuperscript{143} Id.
\textsuperscript{144} See supra note 136 and accompanying text.
would be developed.\textsuperscript{145} This rationale, however, completely ignores the divergent constitutional ramifications of exculpatory and inculpatory statements. Exculpatory statements may be constitutionally mandated to ensure criminal defendants a fair trial.\textsuperscript{146} Inculpatory statements, on the other hand, involve sixth amendment confrontation problems; the Constitution often mandates that they be excluded from evidence.\textsuperscript{147}

The \textit{Alvarez} court required clear corroboration for inculpatory statements.\textsuperscript{148} The court was concerned about the unreliability of inculpatory statements when the declarant was motivated to "curry favor with the authorities."\textsuperscript{149} Although the \textit{Alvarez} opinion contained numerous warnings about the unreliability and unfairness of receiving inculpatory statements, the court adopted the view that certain inculpatory statements could be admissible.\textsuperscript{150} Subsequent cases emerged, however, that modified the court's holding and challenged its reasoning.\textsuperscript{151}

\textit{Alvarez} was modified in the Fifth Circuit three years later in \textit{United States v. Sarmiento-Perez}.\textsuperscript{152} \textit{Sarmiento-Perez} dealt with an inculpatory coconspirator statement as part of a written, custodial confession and developed a heightened test for inculpatory statements in general.\textsuperscript{153} Even though the court held that

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\textsuperscript{145} 584 F.2d at 701.


\textsuperscript{147} Bruton v. United States, 391 U.S. 123 (1968).

\textsuperscript{148} The \textit{Alvarez} court cited United States v. Hoyos, 573 F.2d 1111 (9th Cir. 1978), as requiring clear corroboration. In addition, the court set out the following factors for courts to consider when faced with the reliability problem: any apparent motive to misrepresent the matter, general character of declarant, whether any other person heard the out-of-court statement, the spontaneity of the statement, the timing of the declaration, and the relationship between the speaker and the witness. \textit{Alvarez}, 584 F.2d at 701-02.

\textsuperscript{149} The declarant in \textit{Alvarez}, the prosecutor's principal witness, had pleaded guilty prior to Alvarez's trial and had received probation. Even though the statements were made at the scene before custody, the declarant still had substantial motivation to "curry favor with the authorities." 584 F.2d at 701.

\textsuperscript{150} Id.


\textsuperscript{152} 633 F.2d 1092 (5th Cir. 1981).

\textsuperscript{153} In \textit{Sarmiento-Perez}, as in previous cases dealing with inculpatory statements, the statement was not admissible under the coconspirator exception because it was not made "in furtherance" of the conspiracy, as required by rule 801. The coconspirator rule distrusts any statements made after the crime has been committed, at a time when self-preservation and other motivations may evolve. 4 J. Weinstein, supra note 17, \textupshape § 801(d)(2)(E)[01], at 801-166.

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custodial inculpatory statements are per se inadmissible, the court discussed the appropriate analysis for all inculpatory statements. The court stated that Alvarez had not established maximum limits for confrontation clause requirements, and that more than the threshold of admissibility under Alvarez is needed. The court recognized that exculpatory and inculpatory statements demand different constitutional treatment and that inculpatory statements invoke inherent confrontation clause problems. These problems, the court stated, require close constitutional examination.

A case outside the Fifth Circuit has also questioned the Alvarez court's ill-founded conclusions. The Seventh Circuit rejected the premise that rule 804 requirements are enough for inculpatory penal interest statements. Beyond the hearsay requirements, "it must be clear that the declarant actually made the statement" and "there must be evidence supporting the truth of the statement." The court acknowledged that inculpatory statements were new to the Ninth Circuit, but refused to rule on their admissibility. The extrajudicial statement in Layton, however, was admitted because all the Alvarez tests had been met, and because confrontation problems did not exist.

In 1982 the Eighth Circuit held that the Constitution requires a stronger test than the test proposed in Alvarez. Olson v. Green paralleled Layton in the heinous nature of the crime.

154. 633 F.2d at 1098-99.
155. Id. at 1099. The "close examination" test is consistent with the advisory note to Fed. R. Evid. 804, which states that rule 804 does not deal with confrontation problems. Thus, above and beyond any corroboration tests, there must be a separate examination of confrontation problems.
156. United States v. Blakey, 607 F.2d 779, 786 (7th Cir. 1979).
157. Id.
159. Id. at 561.
160. Id. at 558-59.
161. Id. at 557-58. Layton involved a sensational murder trial. Layton was indicted on four counts, one for killing Congressman Leo Ryan in Guyana. The first trial resulted in a hung jury without the admission of inculpatory statements. At the second trial the prosecutor moved to admit statements of unavailable third persons under the penal interest exception. They were received, and Layton was convicted. Id.
Three persons died in a fire after being bound, gagged, and doused with gasoline.\textsuperscript{163} Although the statement was held to be harmless error, the court specifically stated that custodial statements implicating a third person do not fall within a firmly rooted hearsay exception and need independent reliability.\textsuperscript{164} The court outlined two separate tests for inculpatory statements: one to ensure qualification under the new hearsay exception, and one for a sufficient degree of reliability for confrontation clause purposes.\textsuperscript{165} The Eighth Circuit, along with others, indicated a growing concern for constitutional ramifications when inculpatory statements are offered in evidence.

Although federal courts have analyzed inculpatory statements in divergent ways, a common thread emerged in the circuits regarding one type of these statements.\textsuperscript{166} This trend excluded all inculpatory statements that were made while the declarant was in police custody.\textsuperscript{167} This exclusion was supported by the language in the Advisory Note cautioning against statements made to "curry favor with the authorities."\textsuperscript{168} Following that caution, the Fifth Circuit stated that custodial confessions are to be viewed with "special suspicion."\textsuperscript{169}

The Eighth Circuit held that the "against criminal interest" element is not satisfied when a statement is made in police custody because the statement is not really against the penal interest of the declarant.\textsuperscript{170} The Second Circuit concluded that statements made in custody must be viewed with strict scrutiny,\textsuperscript{171} because they are unreliable and not against the declarant’s penal interest, and that they should be allowed in evidence only in narrow circumstances.

The Third Circuit also found custodial statements to be inadmissible.\textsuperscript{172} The concurring opinion of Judge Adams in

\textsuperscript{163} Id. at 423.
\textsuperscript{164} Id. at 427-28.
\textsuperscript{165} Id.
\textsuperscript{166} Id. at 427 n.11.
\textsuperscript{167} United States v. Palumbo, 639 F.2d 1092 (3d Cir.), cert. denied, 454 U.S. 819 (1981); United States v. Lieberman, 637 F.2d 95 (2d Cir. 1980); United States v. Oliver, 626 F.2d 254 (2d Cir. 1980).
\textsuperscript{168} See supra note 83.
\textsuperscript{169} United States v. Sarmiento-Perez, 633 F.2d 1092, 1102 (5th Cir. 1981) (citing Bruton v. United States, 391 U.S. 123 (1968) (White, J., dissenting)).
\textsuperscript{170} United States v. Riley, 657 F.2d 1377, 1383-84 (8th Cir. 1981), cert. denied, 103 S. Ct. 742 (1983).
\textsuperscript{171} United States v. Oliver, 626 F.2d 254, 261 (2d Cir. 1980).
\textsuperscript{172} United States v. Palumbo, 639 F.2d 123, 127 (3d Cir.), cert. denied, 454 U.S.
United States v. Palumbo suggested that noncustodial inculpatory statements should also be intensely scrutinized.\textsuperscript{173} He stated that "[t]he naming of another as a compatriot will often be accompanied by motivations which undermine the trustworthiness of the assertion."\textsuperscript{174}

The federal courts are now requiring a separate constitutional analysis for inculpatory penal interest statements. These constitutional mandates surfaced in cases subsequent to Alvarez and solidified the caution in the Advisory Note that the requirements of the rule did not purport to deal with confrontation problems. The Parris court should have heeded these cautions.

The Parris court should have looked, in any event, to other states' treatment of inculpatory statements. At least seven states have specifically enacted statutes that exclude all inculpatory statements against penal interest.\textsuperscript{175}

VII. The Confrontation Clause

In Parris, the Washington Supreme Court held that hearsay statements satisfy the confrontation clause if they fall within a firmly rooted hearsay exception or if they have a particularized guarantee of trustworthiness.\textsuperscript{176} The court noted that "inculpatory statements are a 'firmly rooted exception' if we add the proviso that they must be accompanied by corroborating circumstances clearly indicating their trustworthiness."\textsuperscript{177} At the time of the decision, however, ER 804 had been codified only recently, and even if the exception were "firmly rooted," it did not mention inculpatory statements. The court should have

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173. Id. at 131.

174. Id. at 132. See also Davenport, The Confrontation Clause and the Co-conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Harv. L. Rev. 1378 (1972). Davenport states:

The invocation of a name may be gratuitous, may be deliberately false in order to gain advantages for the declarant greater than those that would flow from naming a real participant or no one at all, may be a cover for concealment purposes (another kind of "advantage"), or may represent an effort to gain some personal revenge.

Id. at 1396.


176. 98 Wash. 2d at 148, 654 P.2d at 81.

177. Id.
looked more rigorously at the constitutional principles and policies that surround the confrontation clause of the United States Constitution and the similar clause in the Washington State Constitution.\footnote{178}

**A. Constitution of the United States**

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witness against him. . . ."\footnote{179} The right to confrontation protects the reliability and trustworthiness of evidence introduced against a criminal defendant by requiring that a witness testify under oath,\footnote{180} by placing the declarant before the trier of fact to observe the declarant's demeanor,\footnote{181} and by subjecting the declarant to cross-examination.\footnote{182} Cross-examination has been called "a major reason underlying the confrontation rule"\footnote{183} and the "greatest legal engine ever invented for the discovery of truth."\footnote{184} The United

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178. The court of appeals did attempt to squeeze in some legislative history within footnotes in its opinion. For example, footnote six states:

There can be no real dispute that the statement against penal interest exception to the hearsay rule is a "firmly rooted" exception. Roberts, 448 U.S. at 66. ER 804(b)(3) was adopted verbatim from Fed. R. Evid. 804(b)(3). Comment to ER 804. As noted by Judge Weinstein, the Federal Rules of Evidence are 'a firmly rooted' set of hearsay exceptions. 4 Weinstein & M. Berger, at 6. Thus, while the case law in Washington prior to adoption in 1979 of the Rules of Evidence is unclear as to the extent to which statements against penal interests were admissible, see State v. Russell, 27 Wash. App. 309, 314 n.1, 617 P.2d 467 (1980), we believe the adoption verbatim of the federal rule satisfies the "firmly rooted" requirements of Roberts. Parris, 30 Wash. App. at 275 n.6, 633 P.2d at 919 n.6.

179. U.S. CONST. amend. VI. The sixth amendment was included in the first ten amendments proposed by the First Congress on Sept. 25, 1789. These amendments were ratified on December 15, 1791.

180. See Ohio v. Roberts, 448 U.S. 56, 64 n.6 (1980) (giving a statement under oath increases its reliability because it impresses upon the declarant the seriousness of the matter, and guards against the possibility of perjury); California v. Green, 399 U.S. 149, 158-59 (1970).

181. See Mattox v. United States, 156 U.S. 237, 242-43 (1895) (the heart of this constitutional guarantee is the accused's right to compel the witness "to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."); California v. Green, 399 U.S. 149 (1970). See also 4 J. Weinstein, supra note 17, ¶ 800[01], at 800-10 (the requirement of personal presence in front of the jury makes it more difficult to falsely accuse a person, particularly if that person is an accused and is present at trial).


183. Id. at 406-07.

States Supreme Court has stated: "[W]e have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law."\(^{185}\)

When the penal interest hearsay exception has been involved, however, the Supreme Court has not permitted any significant erosion of the defendant's right to confrontation.\(^{186}\) In \textit{Douglas v. Alabama},\(^{187}\) the Supreme Court reversed a conviction for murder, excluding the inculpatory statement because the defendant had no opportunity to cross-examine the declarant and because the confession was a "crucial link" in the government's case.\(^{188}\)

In 1968 the Supreme Court again excluded an incriminating statement in \textit{Bruton v. United States}.\(^{189}\) The Supreme Court reversed Bruton's conviction and held that limiting instructions were inadequate protection in light of the defendant's right to confront the witness.\(^{190}\) Moreover, when the introduction of a confession adds substantial or critical weight to the government's case in a form not subject to cross-examination, the defendant has been denied the sixth amendment confrontation right.\(^{191}\)

Justice Brennan, writing for the majority, stated:

Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. . . . It was against such threats to a fair trial that the Confrontation Clause was directed.\(^{192}\)

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188. \textit{Id.} at 419.
190. \textit{Id.} at 126. The trial judge cautioned the jury that the admission "if used, can only be used against the defendant Evans. It is hearsay insofar as the defendant . . . Bruton is concerned, and you are not to consider it in any respect to the defendant Bruton, because insofar as he is concerned, it is hearsay." \textit{Id.} at 125 n.2.
191. \textit{Id.} at 128.
192. \textit{Id.} at 136. Justice Stewart, concurring, wrote:
I think it clear that the underlying rationale of the Sixth Amendment's Confrontation Clause precludes reliance upon cautionary instructions when the
The *Bruton* principle does not allow inculpatory statements into evidence if they add substantial weight to the case and there is no opportunity to cross-examine the declarant.\(^{193}\)

In 1970 the Supreme Court, in *California v. Green*,\(^{194}\) reaffirmed the rule that some type of cross-examination is necessary to meet confrontation requirements. The Court held that the exercise of extensive cross-examination at a preliminary hearing by the same attorney representing the defendant at trial was sufficient to meet confrontation clause requirements when those preliminary statements were later admitted at trial. The Court recognized that more than once it had "found a violation of confrontation values even though the statements . . . were admitted under an arguably recognized hearsay exception."\(^{195}\) The *Green* Court recognized as the core value of the confrontation clause the ability to "confront" the witness at trial.\(^{196}\)

Again in 1970 the Supreme Court, in *Dutton v. Evans*, held that a hearsay statement may be admissible when it is in no sense crucial or devastating to the case.\(^{197}\) The Court stressed

highly damaging out-of-court statement of a codefendant, who is not subject to cross-examination, is deliberately placed before the jury at a joint trial. A basic premise of the Confrontation Clause, it seems to me, is that certain kinds of hearsay . . . are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, whatever instructions the trial judge might give. . . . It is for this very reason that an out-of-court accusation is universally conceded to be constitutionally inadmissible against the accused, rather than admissible for the little it may be worth.

*Id.* at 137-38.

Justice White, in his dissenting opinion, argued:

As to the defendant, the confession of the codefendant is wholly inadmissible. It is hearsay, subject to all the dangers of inaccuracy which characterize hearsay generally. . . . More than this, however, the statements of a codefendant have traditionally been viewed with special suspicion. . . . Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence. . . . [T]he codefendant's confession implicating the defendant is intrinsically much less reliable.

*Id.* at 141-42.

193. *Id.* at 137.
195. *Id.* at 155-56.
196. *Id.* at 157. The *Green* Court specifically stated that it did not choose to map out a theory of the confrontation clause that could be used for all hearsay exceptions. The Court reasoned that when the declarant is not absent, but is present to testify and to submit to cross-examination, the cases support the conclusion that the admission of his out-of-court statements does not create a confrontation problem. *Id.* at 158.
197. 400 U.S. 74 (1970). *Dutton* involved the murder of three police officers. One of the witnesses against Evans was a prison mate. He testified that a coconspirator of Evans
that this was, in a sense, a harmless error case because twenty witnesses were called for the prosecution. Under Georgia law the statement was received in evidence under its traditional coconspirator exception. 198

In 1980, in Ohio v. Roberts, 199 the Court addressed the confrontation clause and its interplay with the hearsay rule following the adoption of Federal Rule of Evidence 804. The Court held that testimony from a preliminary hearing was admissible in a subsequent trial. The Court explained that when prior testimony is given under oath and with cross-examination, confrontation requirements are satisfied. 200 The Court held further that confrontation clause problems may not arise when the statement falls within a “firmly rooted” hearsay exception. 201 The Court warned that absent a showing of particularized guarantees of trustworthiness, such evidence must be excluded. 202

The Roberts Court stressed reliability and actual “physical” confrontation as the guiding principle behind the confrontation clause. 203 The Court held that when there is a “meaningful” opportunity to cross-examine the declarant at a prior time, the confrontation clause is not violated if all other evidentiary criteria are met.

The Supreme Court consistently has demanded some form of confrontation under oath in order to satisfy the sixth amendment. To pass muster, a statement that is an exception to the hearsay rule must meet strict evidentiary requirements, including the requirement that some “cross-examination” must have

told him, “If it hadn’t been for that dirty son-of-a-bitch Alex Evans, we wouldn’t be in this now.” Id. at 77. See also Note, supra note 111; Note, Inculpatory Declarations Against Interest and the Confrontation Clause: A Wider Spectrum of Admissible Evidence Against Co-Conspirators, 48 BROOKLYN L. REV. 943 (1982) (concluding that inculpatory statements by coconspirators should be admitted under rule 801(d)(2)(e) to the extent that they are in fact against the declarant’s interest, and alternatively, that the stringent requirements of the rule should be met before an inculpatory coconspirator’s statement is received).

198. Contrary to the majority rule that the coconspirator exception is limited to statements made “during the furtherance of the conspiracy,” Georgia admitted statements of coconspirators that were made during the concealment of a criminal enterprise. GA. CODE ANN. § 38-306 (1981). See Chatterton v. State, 221 Ga. 424, 144 S.E.2d 726, cert. denied, 384 U.S. 1015 (1965).

199. 448 U.S. 56 (1980).

200. Id. at 70.

201. Id. at 66.


203. 448 U.S. at 66.
been possible in the past, or at least that the statement must not be "crucial" or "devastating" to the case. Only when these tests are met can a court be satisfied that the barrier of the sixth amendment has been overcome.

B. Washington State’s Treatment of the Right of Confrontation

Under article I, section 22 of the Washington State Constitution, the accused is given the right "to meet the witnesses against him face to face."204 This "face-to-face" requirement is not found in the United States Constitution and, therefore, suggests a greater protection for a Washington criminal defendant's right to confrontation. Justice Williams has observed that "the face-to-face language of Const. art. 1, § 22 seems to require actual physical confrontation between the accused and any adverse witnesses . . . . [I]t also cannot be disputed that this language at least provides greater protection than is afforded under both hearsay rules and the Sixth Amendment."205

Washington courts have adamantly defended this right. The supreme court has consistently affirmed that the right to cross-examine is basic in a criminal case and should be "zealously guarded" by courts.206 Washington courts have also held that the ability of the jury to assess the credibility of the declarant at trial is a basic purpose of the confrontation clause.207 The right to confront a witness is not absolute,208 but may in an appropriate case bow to other legitimate interests, such as the need to

204. Wash. Const. art. I, § 22 provides:
RIGHTS OF THE ACCUSED. In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases . . . . In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.
discover the truth when hearsay evidence is very reliable. When this happens, however, Washington courts have cautioned that "denial or diminution calls into question the integrity of the fact-finding process and requires the competing interest to be closely examined." In addition, as Justice Williams has stated, this close examination must include a careful balancing of the competing interests of the state and of the accused, with added weight being placed on the accused's side of the scale.

Very few situations have survived Washington's close scrutiny of competing interests and the confrontation clause. Among the few exceptions are testimony at a previous trial and prior testimony at some type of preliminary hearing. In both of these instances, the defendant's confrontation right was thoroughly satisfied at some point during the case.

Washington courts continue to stress that the defendant's right to an actual physical confrontation of an adverse witness is paramount. In In re Pettit v. Rhay, the supreme court demanded a "meaningful" and "real" opportunity to cross-examine the adverse witness. The court held that because cross-examination is essential to the purpose of confrontation, it must not be a mere matter of form. Because Pettit was not represented by counsel at a preliminary hearing, he was unable to "effectively" cross-examine the witness.

The courts have extended the effective cross-examination rationale by holding that even at trial, when extensive cross-examination for credibility was not allowed, fundamental fair-

210. Parris, 98 Wash. 2d at 170-71, 654 P.2d at 92-93.
211. State v. Dault, 25 Wash. App. 568, 608 P.2d 270 (1980) (at retrial declarant claimed loss of memory and thus was unavailable; prosecutor brought in the testimony from the first trial); State v. Ortego, 22 Wash. 2d 552, 157 P.2d 320 (1945). In Ortego, the court established four stringent requirements that must be met for the admissibility of previous testimony: (1) the witness is unavailable; (2) the witness was sworn and testified at the previous trial; (3) the accused was present and given an opportunity to cross-examine; and (4) the person who relates the prior testimony was present, heard the testimony, and can state the substance and nature of the subject matter sought to be established. Id. at 563-64, 157 P.2d at 326.
212. State v. Roebuck, 75 Wash. 2d 67, 448 P.2d 934 (1968) (testimony at preliminary hearing admitted when defense counsel had opportunity to cross-examine at that preliminary hearing).
214. Id. at 521, 383 P.2d at 894.
215. Id. at 521, 383 P.2d at 893.
216. Id. at 521, 383 P.2d at 893-94.
ness demanded confrontation of such testimony. They have also stated that "[i]t is fundamental that a defendant charged with commission of a crime should be given great latitude in the cross-examination of prosecution witnesses to show motive or credibility." 

Washington's constitution and previous case law support the right of a criminal defendant to confront an opposing witness face-to-face. The Parris majority completely ignored these words in the state constitution and failed to balance the interests involved when inculpatory penal interest statements are in issue. Had the court done so, the defendant's right to confrontation and a fair trial would have outweighed the inherently unreliable inculpatory statements against penal interest.

VIII. CONCLUSION

A crucial case is now pending before Division II of the Washington Court of Appeals. State v. Edmondson involves a conviction for aggravated murder based almost exclusively on inculpatory statements against penal interest. The court should take this opportunity to reconsider the Parris case and to realign itself with the historical and continuing view that statements by a witness inculpating the defendant are inherently unreliable if they are merely against the penal interest of the witness. The federal courts should follow suit.

Throughout the history of United States jurisprudence until 1975, with exceptions in only a few jurisdictions, declarations against penal interest were excluded even when offered to exculpate the criminal defendant. The statement against the penal interest of a witness could not be received against the defendant because it inculpated the defendant as well. The extensive legislative history surrounding Federal Rule of Evidence 804(b)(3) clearly evidences opposition to the admissibility of inculpatory third-person penal interest statements. The text of rule 804(b)(3) expressly mentions exculpatory penal interest statements. The rule of construction, expressio unius est exclusio alterius, "expression of one thing is the exclusion of another,"

requires that inculpatory third-person penal interest statements be excluded. In any event, the context of virtually all such statements—the desire to displace or share guilt, or the desire to secure prosecutorial favor—proclaims their unreliability.

Admission of exculpatory declarations against penal interest may be constitutionally required. The authors believe that exclusion of inculpatory declarations against penal interest is constitutionally required by the sixth amendment to the Constitution of the United States and even more clearly by article I, section 22 of the Constitution of the State of Washington.

The State of Washington does have, and should have, a strong policy to convict criminals. An equally strong policy, however, is to ensure a fair trial to persons charged with a crime. The rule of the Parris case effectively abrogates the hearsay rule and often will result in unfair trials. The rule should be discarded.