The Status of the Third Party Confession in Virginia: In Search of a Trustworthiness Standard

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THE STATUS OF THE THIRD PARTY CONFESSION IN VIRGINIA: IN SEARCH OF A TRUSTWORTHINESS STANDARD

I. INTRODUCTION

The issue of third party confessions generates great controversy. The basic inquiry is, should confessions allegedly uttered by persons other than the defendant be admitted into evidence in a criminal trial? If so, under what conditions? How much discretion should a trial judge be afforded in determining whether this evidence should be admitted to exculpate a person charged with murder, armed robbery, or rape? Should the trial judge or the jury determine the reliability of the witness, the declarant, or the content of the confession itself? These considerations, in addition to due process arguments, have troubled criminal courts, legislators, and recently the Supreme Court of Virginia in Ellison v. Commonwealth.¹

The problems arise because third party confessions, distinguishable from party admissions and confessions by the defendant,² are generally held suspect and inadmissible as hearsay.³ Because the third party declarant is usually not a party to the action, his confession is given without the procedural protections of the oath and cross-examination. Additionally, the risk of perjured testimony is considered high because “people may prevaricate, despite the consequences to themselves, to exculpate those

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² Personal or party admissions are extrajudicial statements made by any party to a lawsuit. Any relevant admission may be introduced against the party at trial. First-hand knowledge of the matter declared is not required nor does the statement need to be against the declarant’s interest at the time it is made. See G. Lilly, An Introduction to the Law of Evidence § 77 (1978); C. McCormick, Handbook of the Law of Evidence § 276 (2d ed. 1972); Jefferson, Declarations against Interest: An Exception to the Hearsay Rule, 58 Harv. L. Rev. 1, 63 (1944). Confessions are out-of-court statements made by an accused and offered against him at trial. They will be admissible as evidence against the accused as long as they were voluntarily made. See Rogers v. Richmond, 365 U.S. 534 (1961); Noe v. Commonwealth, 207 Va. 849, 153 S.E.2d 248 (1967) (held that it is court’s duty to ascertain whether a confession was freely and voluntarily made prior to admitting it into evidence).
³ 3. The hearsay rule precludes the admission of out-of-court statements being offered at trial to show the truth of matters asserted therein. C. McCormick, supra note 2, § 246. Confessions of defendants and admissions are exceptions to the hearsay rule because of the nature of the adversary system. Id. § 262. The hearsay rule has been criticized as being an inherently weak rule “which admits more under its exceptions than it excludes under its general provisions . . . .” Note, Erosion of the Hearsay Rule, 3 U. Rich. L. Rev. 89, 95 (1968).
they love or fear, to inculpate those they hate or because they are inveterate or pathological liars."

Notwithstanding these general arguments against the admissibility of third party confessions, certain states, including Virginia, have sidestepped the hearsay rule and have allowed these extrajudicial confessions into evidence under the "declaration against penal interest" exception. Generally, to qualify as admissible evidence, the declaration must have been adverse to the nonparty declarant's interest when the statement was made. The unavailability of the declarant must also be established when testimony concerning the third party confession is proffered. This latter requirement provokes the "necessity" aspect of the exception, for without the testimony, often the most probative evidence would be altogether omitted and an innocent person found guilty. The trustworthiness of the statement is derived from its disserving quality and the belief that a person would not make such a statement unless it were true. Nevertheless, since a third party confession, by its very nature, usually tends to exculpate the accused, most courts require further indicia of trustworthiness in determining admissibility. The imposition of somewhat nebulous and broad standards of trustworthiness presents problems in interpretation and application. This comment traces the historical background of the third party confession in Virginia and seeks to define its current status by placing Virginia's recently articulated standard of trustworthiness into perspective with the United States Supreme Court standard, Federal Rule of Evidence 804(b)(3), and other state trends.

II. HISTORICAL BACKGROUND OF THE DECLARATION AGAINST penal interest

The declaration against interest exception to the hearsay rule had its beginning in English courts in the early eighteenth century. However, this exception was not without limitations. In the famous Sussex Peerage

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5. "The majority of states still do not admit such statements if they are solely against penal interest, i.e., would expose the declarant to a criminal prosecution but would not otherwise affect financial or property interests." C. FRIEND, THE LAW OF EVIDENCE IN VIRGINIA § 234 (1977).
6. Id.
7. "It is the best evidence available in many instances, and should be presented to the trier of fact for what it is worth." Note, Erosion of the Hearsay Rule, supra note 3, at 102.
8. Jefferson, supra note 2, at 63; C. FRIEND, supra note 5. Fed. R. Evid. 804(b)(3) uses the "reasonable man" test. See note 56 infra for a statement of that rule.
Case, the court confined the admissibility of declarations against interest to statements of fact against either proprietary or pecuniary interests. This rule was followed in American courts until questioned in 1913 by the United States Supreme Court in Donnelly v. United States. Although the Court refused to allow the exculpatory third party confession into evidence and upheld the defendant's conviction, the dissenting opinion by Justice Holmes provided a sound argument for disregarding the old distinctions and the exclusion of penal interests. It stated, in part:

There is no decision by this court against the admissibility of such a confession; the English cases since the separation of the two countries do not bind us; the exception to the hearsay rule in the case of declarations against interest is well known; no other statement is so much against interest as a confession of murder. . . .

The limitation was also criticized by scholars such as Wigmore, who felt excluding declarations against penal interest was a "novelty of judicial invention."

In 1923, in Hines v. Commonwealth, the Virginia Supreme Court, following the lead provided in an earlier decision, Karnes v. Commonwealth, adopted the minority view and stated that it would follow the rule of "right and reason" by allowing an exculpatory third party confession into evidence. In Hines, the accused and the third party declarant were connected to the murder by similar motive and circumstantial evidence. The third party declarant had confessed to several persons

10. 8 Eng. Rep. 1034 (1844) (held to exclude the statement of a fact allegedly subjecting the declarant, since deceased, to criminal liability).
11. 228 U.S. 243 (1913).
12. Id. at 278 (Holmes, Lurton, and Hughes, JJ., dissenting).
13. 5 J. Wigmore, supra note 9, § 1477. Wigmore believed the practical result of such a limitation would be "shocking to the sense of justice" since it required rejecting a confession "however well authenticated, of a person deceased or insane or fled from the jurisdiction (and therefore quite unavailable) who has avowed himself to be the true culprit." Id.
15. 125 Va. 758, 99 S.E. 562 (1919), in which the court held it was error to exclude declarations of the deceased made to the defendant and others, concerning a third party who had threatened the deceased. The court seemed to impose a "double standard" approach in its rationale: "The testimony to which we have referred would have been clearly admissible on behalf of the Commonwealth in the prosecution of [the third party] for the crime, and in our judgment it is equally admissible in favor of the accused as tending to show that he was not guilty." Id. at 766, 99 S.E. at 565.
16. 136 Va. at 743, 117 S.E. at 847.
17. Both Hines and the declarant possessed guns similar to the murder weapon which killed the police officer; both wore hats similar to the cap found by the victim's body; and both had threatened police officers several times before. Id. at 734-36, 117 S.E. at 844-45.
before his death that he was responsible for the murder. Were it not for the admission of the proffered testimony of the deceased declarant’s confession to the crime, the supreme court would have sustained the defendant’s conviction. The court reasoned that the after-acquired affidavits, including the confessions which were “clearly admissible under the circumstances,” were material. However, the court did not specify any standard of trustworthiness and merely held that whether the new evidence was worthy of belief was a question for the jury, not the court. Although the declarant’s confession in Hines was corroborated by other facts linking him to the crime, the court appeared ready, at one point, to state a broad rule of admissibility of even “bare confessions” made by unavailable or deceased third party declarants. However, because the decision was “out of line with the current of authority,” the court limited the effect of its decision to the particular facts of the case at bar.

Other courts, in a minority of states, similarly discarded the “barba-

18. Id. at 750-51, 117 S.E. at 849-50. The court stated the following test:
   If a charge involving the life or liberty of a citizen, and depending solely upon circumstantial evidence, cannot stand the test of allowing the jury to determine from the testimony whether a third party has in fact confessed guilt, and if so whether such confession was true, a conviction ought not to follow.
   Id. at 741, 117 S.E. at 846. Cf. Zimmerman v. Commonwealth, 167 Va. 578, 189 S.E. 144 (1937). The supreme court in Zimmerman recognized that under the rule in Hines, the after-acquired evidence (consisting of two affidavits in which a principal witness had confessed) would have been admissible as material and would have gone to the jury. However, due to several counter-affidavits which denied the truth of every material statement alleged by the accused to have been after-acquired testimony, the trial judge was given discretion to weigh the evidence. The court held that the alleged confession, absent corroboration, was “not in accord with the usual experience of mankind” and affirmed the lower court conviction. Id. at 586-88, 189 S.E. at 148-49.

19. The Hines opinion states:
   Although the great majority of decisions are apparently in conflict with our view, very few of them involve the unusual combination of circumstances appearing in this case. In most of the decided cases the declarant was not shown to be unavailable as a witness; and in many of them there was nothing but the bare confession of the declarant to connect him with the crime. . . . [W]e are disposed to think that the evidence of even a bare confession by a deceased or unavailable witness ought to go to the jury for what they may consider it worth; but as our decision here must be regarded as out of line with the current of authority, we will expressly limit its effect as a precedent in this court to the particular facts of the case in hand.

136 Va. at 747, 117 S.E. at 848.

20. See, e.g., People v. Spriggs, 60 Cal.2d 868, 389 P.2d 377, 36 Cal. Rptr. 841 (1964) (held it was prejudicial to defendant to be denied the opportunity to establish that another party admitted to possession of heroin); State v. Leong, 51 Hawaii 581, 465 P.2d 560 (1970) (held trial court erred in refusing testimony that party with the defendant at time of arrest for drug possession had thrown narcotics out the car window); People v. Lettrich, 413 Ill. 172, 108 N.E.2d 488 (1952) (held it would shock sense of justice not to allow a third party confes-
rous doctrine," which allowed only declarations against pecuniary or property interests. In Newberry v. Commonwealth, the Virginia Supreme Court reaffirmed Hines. The defendant in Newberry, a brutal murder case, was convicted, along with his brother, of murdering the former's wife. The defendant had voluntarily signed a written statement explaining the circumstances of the killing, and was apprised that it would be used against him. However, the lower court refused to admit into evidence the written and corroborated confession of the defendant's brother which stated that he alone had murdered the deceased. Since Newberry's brother was available, but refused to testify, the trial court held that the hearsay rule barred the testimony. The supreme court, however, citing Hines and Karnes, reversed and remanded, holding that a refusal to testify is sufficient to qualify a witness as unavailable and stated "[i]f he is unavailable as a witness his confession may be used." As in Hines, the Newberry court left the credibility and weight of the proffered testimony to the jury, reasoning that "[i]f the jury believed this evidence it might have produced a different result."

Thus until 1978, the standard of admissibility for third party confessions in Virginia was a broad rule which only required that the declarant be unavailable and that there be something more than a bare confession

sion where not a scintilla of evidence connected the defendant with the crime except a repudiated confession); Thomas v. State, 186 Md. 446, 47 A.2d 43 (1946) (held where police officer obtained two contradictory confessions, defendant should be allowed to question the officer about them); Sutter v. Easterly, 354 Mo. 282, 189 S.W.2d 284 (1945) (held where an affidavit consisted of an admission that the declarant was engaged in criminal conspiracy resulting in perjury, it is unlikely to be deliberately false and is admissible as evidence); People v. Brown, 26 N.Y.2d 88, 257 N.E.2d 16, 308 N.Y.S.2d 825 (1970) (held that a more "rational view of admissibility" be adopted where the third party confession had significant bearing on defendant's claim of self-defense); Blocker v. State, 55 Tex. Crim. 30, 114 S.W. 814 (1908) (held where evidence against accused was wholly circumstantial and declarant's motive was strong, the third party confession was admissible). See Annot., 92 A.L.R.3d 1164, § 4 (1979).

21. 5 J. Wigmore, supra note 9, § 1477. One article commenting on the minority view of People v. Spriggs, 60 Cal.2d 868, 389 P.2d 377, 38 Cal. Rptr. 841 (1964), suggests that "[i]n the absence of any logical, clearly defined reason for distinguishing between penal interest and pecuniary or proprietary interest, . . . it is difficult to understand the strict, almost blind, adherence to the exclusionary rule by most American courts." 26 U. Prrr. L. Rev. 129, 133 (1964).


23. Id. at 457, 61 S.E.2d at 324.

24. Newberry's brother signed a written confession and orally confessed to a woman in the presence of another. Id. at 460, 61 S.E.2d at 325.

25. Id.

26. Id. at 461-62, 61 S.E.2d at 326 (citation omitted).

27. Id.
connecting the declarant with the crime. The truthfulness of the testimony was a question for the jury.

III. THE STATUS OF THE THIRD PARTY CONFESSION TODAY:

Ellison v. Commonwealth

A. Facts

In 1978, the Supreme Court of Virginia "emasculated" its prior holdings on declarations against penal interest by imposing a strict standard of reliability which the defendant could not meet when proffering testimony of a third party confession. Applying this strict standard, the court upheld Ellison's conviction for robbery and murder.

The defendant was allegedly among three assailants who shot and killed a restaurant manager in the course of robbing him of his credit cards, a hundred dollars in cash, and a radio. Ellison repudiated a confession he made to an undercover agent, alleging it was a falsification of information "heard on the street." He proffered the exculpatory testimony of a witness, Karen Hampton. Hampton's testimony indicated that she had been approached by a third party, Joseph Brown, who admitted that he was in trouble with the police because he was "supposed to have splattered some [man]" at the restaurant where the victim was killed. Hampton further testified that Brown complained that he had only gotten "a lousy hundred dollars and this radio," which he tried to sell to her. He also expressed concern over what Betty, who worked at the restaurant, "was going to do." Even though the unavailability of Brown was established at the trial, the supreme court found no error in excluding

28. The dissenting opinion stated that the Hines and Newberry rules were emasculated and that Hines in particular, was "diluted" as an effective truth-searching device by the Ellison decision. 219 Va. at 412, 247 S.E.2d at 690 (Compton, J., dissenting).

29. Id. at 405, 247 S.E.2d at 686.

30. Ellison alleged that he confessed to the robbery and murder to induce the purported underworld figures to take him out of town. Id. at 406, 247 S.E.2d at 686.

31. Id. at 406, 247 S.E.2d at 686-87. Another witness testified that she had observed Hampton and Brown talking, but did not overhear them. Id.

32. Id. at 407, 247 S.E.2d at 687. Unavailability of the third party was not a determinative issue in the Ellison decision. Since it generally necessitates the declaration against penal interest exception, the defendant's attorney asserted that Brown was unavailable because he had been subpoenaed, but his whereabouts were unknown by both his mother and his attorney. In any event, the latter had stated that he would advise Brown to exercise his right against self-incrimination. Brief for Appellant at 9, Ellison v. Commonwealth, 219 Va. 404, 247 S.E.2d 685 (1978). The Attorney General rebutted this contention by stating that "temporary absence should not be equated to unavailability" and that an attorney's advice not to testify is not binding on an individual in the exercise of his constitutional rights. Brief for Appellee at 9. The court did not rule on this issue.
Hampton's testimony because the defendant had failed to establish the trustworthiness of the content of Brown's confession.33

B. Analysis: In Search of a Trustworthiness Standard

Notwithstanding the defendant's assertions that in Virginia, according to Hines and Newberry, a declaration against penal interest by an unavailable witness is admissible without proof of reliability,34 the court stated that "neither case stands for the proposition, . . . that a 'bare confession' is admissible without supporting proof of its reliability. Indeed we believe both cases stand for the contrary proposition."35 The court further distinguished the earlier decisions as being limited to their facts and as having confessions which were corroborated by several witnesses and other extrinsic evidence.36

The defendant further argued that even if reliability was required, the testimony of Brown's confession was sufficiently reliable since it had caused the initial indictment of Brown for the crime in question.37 The

33. 219 Va. at 409, 247 S.E.2d at 688.
34. The counsel for the defense referred to the requirement for trustworthiness as the "court's unknown standard of reliability." Brief for Appellant at 2. The brief also mentioned that when the defendant's attorney asked the trial court to specify what quantum of evidence was necessary to prove reliability, the trial court refused and stated only that the evidence adduced was insufficient. Brief for Appellant at 15.
35. 219 Va. at 407, 247 S.E.2d at 687.
36. Id. at 408, 247 S.E.2d at 687-88. In distinguishing the cases it is interesting to note that in Hines and Newberry the Commonwealth had a much stronger case against the defendants than it did in Ellison. In Hines, the evidence, though purely circumstantial, would have been sufficient to sustain a conviction. Nevertheless, the court allowed the after-acquired evidence and the testimony of the third party confession because they showed that the third party was as closely connected with the crime as the accused. 136 Va. at 738-39, 117 S.E. at 846. Similarly in Newberry, but for the admission of the exculpatory declaration against penal interest, the defendant's original conviction would have been upheld. In Ellison, the defendant was connected to the crime solely by his repudiated confession. Therefore, it would seem that the weaker the case against the defendant, the more likely the Commonwealth would be to admit testimony equally incriminatory of a third party. For example, in People v. Lettrich, where there was nothing to connect the defendant with the murder except a repudiated confession made to the police under circumstances indicating some duress, the Illinois Supreme Court held it was error to refuse into evidence the testimony of the director of a behavior clinic to show that another person had confessed to the same murder to him. 413 Ill. 172, 108 N.E.2d 488 (1952). But cf. People v. Settles, 46 N.Y.2d 154, 385 N.E.2d 612, 412 N.Y.S.2d 874 (1978) (holding whether court believes a declaration against penal interest is true is irrelevant, and the question of admissibility is to be resolved without regard to the seeming strength or weakness of the prosecutor's case).
37. 219 Va. at 409, 247 S.E.2d at 688. Based upon Hampton's testimony, Brown was arrested and subsequently indicted by the grand jury. However, when the Commonwealth's Attorney learned of Ellison's confession, the charges against Brown were nolle prossed. Id.
court held that it was irrelevant that Brown had been indicted or that Hampton was under oath and subject to cross-examination at Brown's hearing, because the issue was not whether Brown actually confessed or whether Hampton was a reliable witness. Rather, the court stated the relevant issue was whether the content of Brown's confession was reliable.\textsuperscript{38} The opinion provided that in resolving this issue, the record must be searched for "indicia of trustworthiness" which may take the form of (1) evidence from other witnesses to whom the declarant confessed; (2) extrinsic evidence connecting the declarant with the crime; (3) "or a satisfactory combination of both."\textsuperscript{39} However, because Hampton was the only witness to corroborate the confession, the court struck down all evidence tending to connect Brown with the crime, including the facts that he said he had supposedly "splattered" some man and had in his possession the same type radio-tape player as the one stolen from the victim.\textsuperscript{40} While the above "indicia of trustworthiness" appear consistent with the earlier decisions, the rigidity in which the court applied the requirements demonstrates that, in reality, it demanded a satisfactory combination of both indicia.

The trustworthiness of the confession was not left to the determination of the jury as in \textit{Hines} and \textit{Newberry}.\textsuperscript{41} The \textit{Ellison} court dispelled the truth of the confession on the same theory that the defendant had used to repudiate his own confession: that it was merely repetition of information heard "on the street" and therefore, the facts in the confession "were not of such a \textit{unique} nature that they would have been known only by an actual perpetrator of the . . . crimes."\textsuperscript{42} The court hypothesized that if Brown had wanted to "impress Hampton," he could have easily gathered these facts on the street.\textsuperscript{43} The dissenting opinion points out that "[i]n its effort to justify the conclusion that the \textit{content} of the confession was untrustworthy," the majority used this street knowledge argument and thereby disregarded "[a]nother equally compelling deduction," that the confession was true.\textsuperscript{44} The question of choosing between such inferences

\textsuperscript{38} Id. at 409, 247 S.E.2d at 688.
\textsuperscript{39} Id. (emphasis added).
\textsuperscript{40} Id. at 410, 247 S.E.2d at 689.
\textsuperscript{41} See notes 18 & 27 supra.
\textsuperscript{42} 219 Va. at 410, 247 S.E.2d at 689 (emphasis added).
\textsuperscript{43} Id.
\textsuperscript{44} Id. at 415, 247 S.E.2d at 691 (Compton, J., dissenting) (emphasis in original). One year prior to \textit{Ellison}, the Supreme Court of Virginia in \textit{Hyde v. Commonwealth}, ruled that the third party confession "be accepted in full or rejected in full," and reversed and remanded. 217 Va. 950, 956-57, 234 S.E.2d 74, 79 (1977). In that case, the defendant's involvement in a rape and murder was contradicted by his statements and by a third party confes-
should be for the jury.\textsuperscript{45}

Ellison's last argument was based on the constitutional claim that to apply the hearsay rule and refuse him the right to present testimony before the jury, was violative of due process. The defendant based his assertion on the 1973 Supreme Court decision in \textit{Chambers v. Mississippi}.\textsuperscript{46} There the Court, in reversing a murder conviction, held that to deny the accused the opportunity to cross-examine the declarant or present evidence corroborating the confession constituted a denial of the fair opportunity to defend.\textsuperscript{47} In \textit{Ellison}, the court summarily distinguished \textit{Chambers}, then rejected the defendant's argument on the technical ground that the defendant had failed to "complain" that he had been denied the right to cross-examine Brown.\textsuperscript{48} The court also added that the defendant had not been refused the opportunity to introduce testimony concerning a third party confession supported by considerable assurance of reliability, but that "the defendant simply was unable to establish the reliability of Brown's confession."\textsuperscript{49}

The \textit{Ellison} court did not rely on the Supreme Court standard enunciated in \textit{Chambers}, nor did it find the due process argument applicable to the facts and circumstances of the case. Several state courts which now recognize the declaration against penal interest exception have been more reluctant to disregard the \textit{Chambers} ruling.\textsuperscript{50}

C. The Supreme Court Standard

The \textit{Chambers} court reasoned that the hearsay statements involved in

\begin{footnotesize}
\begin{enumerate}
\item Ellison v. Commonwealth, 219 Va. at 415, 247 S.E.2d at 691 (Compton, J., dissenting).
\item 47. 410 U.S. at 302-303.
\item 48. 219 Va. at 411, 247 S.E.2d at 689. It is interesting to note that in \textit{Chambers}, Justice Rehnquist, in his dissent, felt that the defendant in that case did not properly raise the constitutional issue of which he complained. Rehnquist stated that "the litigant . . . must not only object or otherwise advise the lower court of his claim that a ruling is error, but he must make it clear that his claim of error is constitutionally grounded." 410 U.S. at 308 (Rehnquist, J., dissenting) (emphasis in original).
\item 49. 219 Va. at 411, 247 S.E.2d at 689.
\item 50. See note 51 infra. See also Commonwealth v. Nash, 324 A.2d 344 (Pa. 1974) (remanded for new trial even though testimony of third party confession was not supported by reliable, corroborative evidence, since the case was tried prior to the holding in \textit{Chambers}).
\end{enumerate}
\end{footnotesize}
that case provided "considerable assurance of their reliability" because of the circumstances under which they were made. These indicia of reliability included: (1) each confession was made spontaneously to a close acquaintance shortly after the murder had occurred; (2) each one was corroborated by some other evidence, e.g., a sworn confession or testimony of an eyewitness; (3) each confession was self-incriminatory and unquestionably against interest; and (4) the declarant was available and under oath. This latter indicium abrogates the common law requirement that the declarant be unavailable to necessitate the hearsay exception. Modern courts which adopt the declaration against penal interest exception and follow the four-pronged test of Chambers, similarly require availability.

In comparing the Virginia standard of trustworthiness with the Chambers test, the disposition of the Ellison case would have been the same. The key indicia of reliability in both standards require that there be more than one witness and substantial corroborating evidence. However, the other indicia are distinguishable because the Chambers court felt confes-

51. 410 U.S. at 300-01. The declarant was available in Chambers because the defense put him on the stand. However, under the Mississippi voucher rule, the trial court refused to allow the declarant to be used as an adverse witness, thus excluding cross-examination as to his confession to the murder. Justice Powell, in his opinion for the Court, found this voucher rule precluded defendant's constitutional right of confrontation. Id. at 295-98. An article discussing three Supreme Court cases dealing with the right of confrontation questions the applicability of the Chambers standard:

[I]t is unclear whether a refusal to admit a corroborated declaration against penal interest per se would occasion a reversal. Since this exception generally operates to exculpate a defendant, is it reasonable to assume that a less stringent standard of trustworthiness would apply when defendant offers hearsay? Or is the demand for corroboration simply a substitute device to guarantee trustworthiness? . . . These questions are left unanswered by Chambers, . . . leaving the lower courts with insurmountable conceptual and analytical problems.


52. See, e.g., U.S. v. Guillette, 547 F.2d 743 (2d Cir. 1976), cert. denied, 434 U.S. 839 (1977) (held court's application of Rule 804(b)(3) is guided by four factor test in Chambers and excluded testimony by a government informant who could not be located and who had confessed to a stranger, the informant, some four months after the murder); People v. Foster, 66 Ill. App. 3d 292, 383 N.E.2d 788 (1978) (court strictly adhered to Chambers test and refused a third party confession where statement was made to a virtual stranger, there was no corroborating evidence, and the declarant was not available). Accord, People v. Woodruff, 63 Ill. App. 3d 949, 379 N.E.2d 907 (1978); People v. Craven, 54 Ill.2d 419, 299 N.E.2d 1 (1973); Thompson v. State, 309 S.2d 533 (Miss. 1975); State v. Brown, 85 Wis.2d 341, 270 N.W.2d 87 (Wis. App. 1978). But cf. United States v. Goodlow, 500 F.2d 954 (8th Cir. 1974) (held, as in Chambers, that there were corroborative circumstances giving an aura of trustworthiness to the third party confession but did not require that the declarant be available for cross-examination).
sion to a close acquaintance was more reliable; the Virginia court made no such distinction. Additionally, the Virginia Supreme Court did not require availability of the declarant as did the Chambers court. Thus, on application, the Chambers standard could produce a harsher result than the Virginia test. However, by adding the requirement that the content of the confession be considered trustworthy at the trial court’s discretion, the Virginia standard presents an equally difficult challenge to a defense attorney seeking to introduce evidence of a third party confession.

The application of the Chambers standard is clearly not mandatory on the lower state courts. In the opinion, the Court expressly limited its ruling to the facts of the case where constitutional rights were directly involved. Similarly, the Court stated it did not intend to diminish state criminal trial rules and procedures.53

IV. VIRGINIA’S STANDARD IN LIGHT OF RECENT FEDERAL AND STATE TRENDS

Federal Rule of Evidence 804(b)(3),54 which allows the penal interest exception where the declarant is unavailable,55 has provided an appropriate guideline for many states. In its proposed form, the rule contained no provision for trustworthiness and used the reasonable man test to ascertain the reliability of the declaration. An exculpatory statement needed corroboration to be admissible.56

In 1975, the codification of Federal Rule 804(b)(3) raised the standard of admissibility of exculpatory declarations against penal interest by requiring corroborating circumstances which “clearly indicate the trustworthiness of the statement.”57 The Judiciary Committee did not elabo-

53. 410 U.S. at 302-03.
55. For the definition of unavailability, see Fed. R. Evid. 804(a).
56. In its proposed form as submitted by the Court, Rule 804(b)(4) (now 804(b)(3)), provided:

(4) 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 disgrace, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to exculpate the accused is not admissible unless corroborated.

57. The Rule now reads:

(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
rate on what degree of corroboration was required but felt the adopted language afforded "a proper standard and degree of discretion." A sampling of recent cases applying Federal Rule 804(b)(3) demonstrates the varied interpretations this open-ended rule allows.

Although the opinion in Ellison did not allude to Federal Rule of Evidence 804(b)(3), the Attorney General did in his brief. He argued that if the statement against penal interest lacks inherent trustworthiness, its rejection is mandated, and, as with all evidence, its admissibility remains within the discretion of the trial judge. The court's opinion adopted that view.

Some states have provided legislation in order to fix a standard of admissibility for declarations against penal interest; Virginia is not yet among them. Several state provisions are modeled after Federal Rule

subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

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

59. See, e.g., United States v. Lang, 589 F.2d 92 (2d Cir. 1978) (decision mollifies the language of 804(b)(3) by stating that the declarant need not be aware of immediate criminal prosecution when making the declaration; however, the declaration by the third party was held inadmissible because it lacked indicia of reliability and evidence of first-hand knowledge); United States v. Alvarez, 584 F.2d 694 (5th Cir. 1978) (the court devised a "unitary" system as a standard for determining the application of Federal Rule 804(b)(3) to inculpatory statements and stated it would analyze the veracity of the in-court witness and the out-of-court declarant); United States v. Satterfield, 572 F.2d 687 (9th Cir. 1978) (absence of required corroboration, e.g., length of time between robberies and declarations and accusation not "sufficiently integral" to entire statement, indicated that declarations against interest were clearly untrustworthy); United States v. Atkins, 558 F.2d 133 (3d Cir. 1977), cert. denied, 434 U.S. 1071 (1978) (held Rule 804(b)(3) directs the court to the trustworthiness of the declarant, not the witness); United States v. Bagley, 537 F.2d 162 (5th Cir. 1976), cert. denied, 429 U.S. 1075 (1977) (held the two distinct elements of trustworthiness require that the statement be actually made by the declarant and that it afford a basis for the truth of the matter asserted). But see People v. Edwards, 396 Mich. 551, 242 N.W.2d 739 (1976) (held statement of a witness that a third party declarant, since deceased, had confessed to a murder for which defendant was charged, was admissible without a preliminary showing of trustworthiness). The Michigan court rejected the "double standard" that Rule 804(b)(3) imposes by requiring trustworthiness for an exculpatory confession. The court noted: "Such a rule is based on an assumption that criminal defendants are more likely to use perjured testimony. We refuse to predicate a rule of law upon such an assumption." 396 Mich. at 554, 242 N.W.2d at 746. For a thorough discussion of this case, see Comment, 1977 WASH. U.L.Q. 349.
60. Brief for Appellee at 4.
804(b)(3). However, the application of these rules is subject to the discretion of the trial judge, so the problem of how much corroboration is needed still exists, and the requirements vary from case to case. The remaining jurisdictions, like Virginia, who recognize the hearsay exception, have fashioned their own standards of trustworthiness. Maryland has recently articulated its very liberal view that a declaration against penal interest is inherently trustworthy even standing alone, and will not be excluded unless there is evidence that it is "untrustworthy, frivolous or

61. State statutes which have adopted Rule 804(b)(3) are: ARIZ. R. EVID. 804(b)(3); ARK. R. EVID. 804(b)(3); FLA. STAT. ANN. § 90.804(2)(c)(West); ME. R. EVID. 804(b)(3); MICH. R. EVID. 804(b)(3); MINN. R. EVID. 804(b)(3)(West); MONT. R. EVID. 804(b)(3); NEB. R. EVID. 804(2)(c); NEV. REV. STAT. § 11.345(d); N.M.R. EVID. 804(b)(4); N.D.R. EVID. 804(b)(3); OKLA. STAT. ANN. § 2804(B)(3)(West); S.D.R. EVID. 19-16-32; WYO. R. EVID. 804(b)(3). State statutes which have adopted part of Rule 804(b)(3) but have omitted the trustworthiness requirement are: CAL. EVID. CODE § 1230 (West); KAN. STAT. ANN. § 60-460(j); N.J.R. EVID. 63(10); and WIS. R. EVID. 908.045(4)(West). Prior to the adoption of Rule 804(b)(3), Professor Morgan expressed his concern over the need for legislation in the area of the declaration against interest exception. He wrote:

[R]arely in the application of a rule of law can be found such a conglomeration of inconsistencies, such flat contradictions in the facts of the very basis of the rule declared to be applied. It is utterly useless to attempt to harmonize the decisions or even to understand the intellectual processes of the writers of many of the opinions. The need for intelligent legislation is clearly indicated.


62. A New Jersey opinion, liberally applying its statutory provision, stated its standard of admissibility as being "whether, in the context of the whole statement, the particular remark was plausibly against the declarant's penal interest, even though it might be neutral or even self-serving if considered alone." State v. Abrams, 140 N.J. Super. 232, 356 A.2d 26, 28 (1976) (emphasis added) (applying N.J.R. Evid. 63(10)).

For an example of the California statute in application, see People v. Chapman, 50 Cal. App. 3d 872, 123 Cal. Rptr. 862 (1975). The California court provided that in determining trustworthiness, a judge may consider the words uttered, whether a reasonable man in a declarant's position would have made the statement unless it were true, and the circumstances under which the statement was made. Additionally, the trial judge may analyze the possible motivation of the declarant and the latter's relationship to the defendant. 50 Cal. App. 3d at 866-67. The court has clearly given much discretion to the trial judge, similar to the court's position in the Ellison opinion, See also State v. Macumber, 119 Ariz. 516, 582 P.2d 162 (1978) (ARIZ. R. EVID. 804(b)(3)); People v. Dortch, 84 Mich. App. 184, 269 N.W.2d 541 (Mich. App. 1978) (Mich. R. Evid. 804(b)(3)).

63. For a survey of various state and federal standards of trustworthiness prior to 1977, see Note, Declarations Against Penal Interest: Standards of Admissibility Under an Emerging Majority Rule, 56 B.U.L. REV. 148 (1976). The author proposes that courts and legislatures need only apply "six foundation factors" to establish the trustworthiness of declarations against penal interest. Id. at 155. He criticizes the imposition of additional indicia of reliability under the rationale that the trial judge's role should be limited to the "threshold determination of the probability of trustworthiness." Id. The author does concede, however, that if the foundation factors have been established imperfectly, then corroboration as an indication of reliability may be valuable. Id. at 177.
collusive." Washington's stricter standard requires that its minimal criteria include corroboration which clearly indicates the high probability of trustworthiness. West Virginia recently relaxed its previous view which excluded declarations against penal interest, and decided that when a trial court is faced with losing the benefits of the out-of-court testimony altogether, it must examine the facts and determine if the testimony is so unreliable as to compel exclusion. Indiana and North Carolina are among the jurisdictions that still explicitly reject the declaration against penal interest exception.

The New York standard in People v. Settles appears, on its face, to be analogous to the Virginia standard of trustworthiness. The Settles opinion requires that the declarant have competent knowledge of the facts underlying the statement. Brown's incompetent knowledge of the facts, which the Ellison court found was probably gathered from street information, was one reason the court did not reverse the trial court decision which excluded the extrajudicial confession. Similarly, the New York court, felt that the crucial issue was ascertaining the intrinsic trustworthiness of the statement itself. However, the analogy ends there. In the application of its standard, the Settles court held that supportive evi-

64. Harris v. State, 387 A.2d 1152, 1156 (Md. App. 1978). That case held admissible a codefendant's jailhouse confession which exculpated the defendant and substantiated his statements made to the police upon arrest. The only argument the state made regarding the confession's untrustworthiness was that the declarant was merely bragging to his fellow inmates. The court rejected that argument as speculative and reversed the conviction. Id. at 1155-56. Under the Maryland standard, Brown's confession in the Ellison case probably would have been admissible as the court would not have been allowed to speculate why Brown confessed to Hampton.

65. State v. Bjelland, 22 Wash. App. 696, 591 P.2d 865 (1979) (affidavit, later repudiated as being made under pressure, was held inadmissible as exculpatory declaration against penal interest since the circumstances under which it was made negated any degree of trustworthiness).

66. State v. Williams, ___ W. Va. ___, 249 S.E.2d 752 (1978) (reversed and remanded conviction for armed robbery so that trial court could determine if the evidence was sufficiently reliable for admissibility). Factors the trial judge should consider are the self-in erest of the declarant, the trustworthiness of the witness, and the presence of any other corroborating evidence to show reliability. Id. at ___, 249 S.E.2d at 757.


69. Id. at ___, 385 N.E.2d at 619, 412 N.Y.S.2d at 882.

70. Id. at ___, 385 N.E.2d at 620, 412 N.Y.S.2d at 883.
idence is admissible if it establishes "a reasonable possibility that the statement might be true."71 Examples the court gave of supportive evidence included eyewitness testimony placing the declarant at the scene of the crime, "or proof of his possession of the fruits or instrumentalities used to commit the crime . . . ."72 Thus evidence of Brown's possession of the stolen radio plus his statement against interest might have established a reasonable possibility of reliability if the Ellison case had been tried under the New York standard. Once the possibility of trustworthiness was established, the rest would be left to the jury.73

V. Conclusion

What then is the status of the third party confession in Virginia today? To the extent that Virginia was a forerunner in admitting the declaration against penal interest exception, it has recanted its position by imposing a new standard of trustworthiness which will make it more difficult for defendants to proffer exculpatory third party confessions. The Ellison decision limits the applicability of the Chambers standard to cases where the defendant has expressly complained of due process violation. While it may have considered Federal Rule 804(b)(3) as an appropriate standard, it has raised the requirements of that rule to include testimony of more than one witness in addition to substantial corroboration. Although the court in Ellison purported not to delineate the quantity or quality of evidence necessary to establish reliability,74 it impliedly has done so. This is evidenced by the requirement of a satisfactory combination of indicia of trustworthiness, and by the court's refusal to admit facts that are not unique, or at the least, within the scope of street knowledge. Of ultimate significance however, is that the court has further obfuscated the status of the third party confession by requiring that the content of the confession be trustworthy. The difficulties in this requirement are apparent; it would seem that the better standard would be that once the evidence is proven admissible, the trustworthiness of the content should be settled by the jury. Whether this new standard will be strictly adhered to in future criminal cases remains in the sole discretion of the trial judge. Unless the General Assembly provides clearly defined guidelines for the court, the

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71. Id. at __, 385 N.E.2d at 621, 412 N.Y.S.2d at 883 (emphasis added).
72. Id. at __, 385 N.E.2d at 620-21, 412 N.Y.S.2d at 883.
73. "If the proponent of the statement is able to establish this possibility of trustworthiness, it is the function of the jury alone to determine whether the declaration is sufficient to create reasonable doubt of guilt." Id. at __, 385 N.E.2d at 621, 412 N.Y.S.2d at 884.
74. 219 Va. at 408, 247 S.E.2d at 688.
application of the trustworthiness standard for third party confessions will result in continuing controversy.

Donna J. Katos