

2 FEDERAL RULES OF EVIDENCE

16 admissible ~~unless~~ under this subdivision in the following
17 circumstances only:

18 (A) if offered to exculpate an accused, it is supported
19 by corroborating circumstances ~~that~~ clearly indicate
20 the ~~its~~ trustworthiness, ~~or of the statement~~

21 (B) if offered to inculcate an accused, it is supported
22 by particularized guarantees of trustworthiness.

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COMMITTEE NOTE

The Rule has been amended to confirm the requirement that the prosecution must provide a showing of “particularized guarantees of trustworthiness” when a declaration against penal interest is offered against an accused in a criminal case. This standard is intended to assure that the exception meets constitutional requirements, and to guard against the inadvertent waiver of constitutional protections. *See Lilly v. Virginia*, 527 U.S. 116, 134-138 (1999) (holding that the hearsay exception for declarations against penal interest is not “firmly-rooted” and requiring a finding that hearsay admitted under a non-firmly-rooted exception must bear “particularized guarantees of trustworthiness” to be admissible under the Confrontation Clause).

The amendment distinguishes “corroborating circumstances that clearly indicate” trustworthiness (the standard applicable to statements offered by the accused) from “particularized guarantees of

trustworthiness” (the standard applicable to statements offered by the government). The reason for this differentiation lies in the guarantees of the Confrontation Clause that are applicable to statements against penal interest offered against the accused. The “particularized guarantees” requirement cannot be met by a showing that independent corroborating evidence indicates that the declarant’s statement might be true. This is because under current Supreme Court Confrontation Clause jurisprudence, the hearsay exception for declarations against penal interest is not considered a “firmly rooted” exception (*see Lilly v. Virginia, supra*) and a hearsay statement admitted under an exception that is not “firmly rooted” must “possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.” *Idaho v. Wright*, 497 U.S. 805, 822 (1990). In contrast, “corroborating circumstances” can be found, at least in part, by a reference to independent corroborating evidence that indicates the statement is true.

The “particularized guarantees” requirement assumes that the court has already found that the hearsay statement is genuinely disserving of the declarant’s penal interest. *See Williamson v. United States*, 512 U.S. 594, 603 (1994) (statement must be “squarely self-inculpatory” to be admissible under Rule 804(b)(3)). “Particularized guarantees” therefore must be independent from the fact that the statement tends to subject the declarant to criminal liability. The “against penal interest” factor should not be double-counted as a particularized guarantee. *See Lilly v. Virginia, supra*, 527 U.S. at 138 (the fact that the hearsay statement may have been disserving to the declarant’s interest does not establish particularized guarantees of trustworthiness because it “merely restates the fact that portions of his statements were technically against penal interest”).

The amendment does not affect the existing requirement that the accused provide corroborating circumstances for exculpatory

statements. The case law identifies some factors that may be useful to consider in determining whether corroborating circumstances clearly indicate the trustworthiness of the statement. Those factors include (*see, e.g., United States v. Hall*, 165 F.3d 1095 (7th Cir. 1999)):

- (1) the timing and circumstances under which the statement was made;
- (2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie;
- (3) whether the declarant repeated the statement and did so consistently, even under different circumstances;
- (4) the party or parties to whom the statement was made;
- (5) the relationship between the declarant and the opponent of the evidence; and
- (6) the nature and strength of independent evidence relevant to the conduct in question.

Other factors may be pertinent under the circumstances. The credibility of the witness who relates the statement in court is not, however, a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the credibility of the witness would usurp the jury's role in assessing the credibility of testifying witnesses.
