

A defendant is on trial for robbing a particular bank with his best friend. The friend has left the country and cannot be found. The prosecutor has called the friend's mother to testify to a conversation she had with her son the day before he left the country. She implored him not to go, but he said, "Mom, I have to go. I was involved in a robbery at the bank, and I don't want them to catch me." The prosecutor has other evidence indicating that the defendant and the friend were together on the morning of the robbery.

Is the statement by the friend to his mother admissible?

- A. No, because inculpatory statements against penal interest do not satisfy the confrontation clause.
- B. No, because the friend's statement to his mother was not corroborated.
- C. Yes, as a statement against penal interest that is not testimonial under the confrontation clause.
- D. Yes, as a statement of the friend's state of mind that is not testimonial under the confrontation clause.

## Explanation:

A **statement against interest** is one that:

is contrary to the declarant's proprietary (ie, ownership) or pecuniary (ie, monetary) interest

tends to invalidate the declarant's claim against someone else *or*

**exposes** the declarant to civil or **criminal liability**.

These statements are **excluded** from the **rule against hearsay** if they were made by an **unavailable declarant**. But if the statement is offered in a **criminal case** and exposes the declarant to criminal liability, then the statement must also be supported by **corroborating circumstances** that clearly indicate its trustworthiness.

Here, the friend has left the country and cannot be located (unavailable), and his stated involvement in a robbery (criminal liability) is corroborated by evidence that he was with the defendant on the morning of the robbery (**Choice B**). Therefore, his statement falls within this hearsay exception. But since the friend cannot be confronted at the defendant's criminal trial, the introduction of this statement raises Sixth Amendment concerns.

The Sixth Amendment **confrontation clause** secures a criminal defendant's right to cross-examine witnesses offering **testimonial evidence** against the defendant. Evidence is **testimonial** if it was made primarily for use in a **criminal investigation or prosecution**. And such evidence is inadmissible unless (1) the declarant is unavailable as a witness at trial and (2) the defendant had a prior opportunity to cross-examine the declarant.

Here, the friend's statement is admissible because it was made to his mother—not for an investigation or prosecutor—so it is not testimonial under the confrontation clause (**Choice A**).

(**Choice D**) Statements of a declarant's **then-existing state of mind** (eg, motive, intent, plan) are excepted from the rule against hearsay. Since that state of mind must exist at the time the statement is made, statements of past memory or events (as seen here) do not fall under this exception.

## Educational objective:

Statements against interest—eg, ones that expose the declarant to civil or criminal liability—are excepted from the rule against hearsay if they were made by an unavailable declarant. But these statements are only admissible in a criminal case if they comply with the confrontation clause.

## References

Fed. R. Evid. 804(b)(3) (hearsay exception for statements against interest).

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## Unavailable declarant and confrontation clause analysis

