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MY BROTHER, MY WITNESS AGAINST ME: THE CONSTITUTIONALITY OF THE “AGAINST PENAL INTEREST” HEARSAY EXCEPTION IN CONFRONTATION CLAUSE ANALYSIS

Lilly v. Virginia, 119 S. Ct. 1887 (1999)

I. INTRODUCTION

In *Lilly v. Virginia*,¹ the United States Supreme Court examined whether the admission of an accomplice's custodial confession violated a criminal defendant's Sixth Amendment right to confrontation.² The statement at issue was admitted into evidence under the “against penal interest” exception to the hearsay rule because the confession contained statements that inculpated both the declarant and the defendant.³ In a plurality opinion, the Supreme Court held that accomplice confessions that inculpate a criminal defendant do not fall within a firmly rooted hearsay exception.⁴ The Court also authorized appellate courts to independently review whether the government's “proffered guarantees of trustworthiness”⁵ are sufficient to satisfy the Confrontation Clause's residual admissibility test.⁶

This Note examines the history of the Court's Confrontation Clause jurisprudence and the development of the relationship between the “against penal interest” hearsay exception and the Clause. This Note also analyzes the implications of the *Lilly* decision on future prosecutions of co-defendants. This Note concludes that in *Lilly* the Supreme Court correctly heightened the standard for admissibility of accomplice statements. The decision in *Lilly* is especially important because the Supreme

¹ 119 S. Ct. 1887 (1999).

² See *id.* at 1892.

³ See *id.* at 1892.

⁴ See *id.* at 1899.

⁵ *Id.* at 1900.

⁶ See *id.* at 1899.

Court of Virginia's interpretation of the hearsay exception undermined the constitutional protections afforded criminal defendants by the Confrontation Clause.

II. BACKGROUND

The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment,⁷ provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"⁸ Scholars have debated the true origin of the Confrontation Clause, but most agree that the Clause was included in the Sixth Amendment to prevent the government's use of ex parte affidavits in lieu of live witnesses, a common practice in sixteenth- and seventeenth-century English criminal prosecution.⁹ The Framers believed strongly in the right to confront one's accuser through cross-examination and thus guaranteed it in the Sixth Amendment.¹⁰ During the last century, however, the Supreme Court has permitted the admission of certain hearsay statements in cases where the witness is unavailable to testify.¹¹

The constitutional guarantee of confrontation was not challenged in the United States Supreme Court until 1895 in *Mattox*

⁷ See *Pointer v. Texas*, 380 U.S. 400, 407 (1965) (applying Sixth Amendment to the States via the Fourteenth Amendment).

⁸ U.S. CONST. amend. VI.

⁹ See Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 568 (1992); see also Stanley A. Goldman, *Not So "Firmly Rooted": Exceptions to the Confrontation Clause*, 66 N.C. L. REV. 1, 4 (1987); Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 77 (1995). "Early American documents almost never mention the right, and the traditional sources for divining the Framers' intent yield almost no information about the clause." *Id.* The most prevalent abuse was the admission of ex parte affidavits accusing the defendant without an opportunity to question the affiant, illustrated best by Sir Walter Raleigh's 1603 treason trial where the principal witness, Lord Cobham, was never made to testify. See Berger, *supra* at 571. When Cobham's out-of-court statements—made during various government interrogations—were admitted into evidence to be used against Raleigh, he objected, asserting, "Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face, and I have done." *Id.* While commentators have debated at length whether Sir Walter Raleigh's experience actually influenced the Framers' decision to include the Confrontation Clause, it illustrates the abusive practices endemic to common law criminal prosecution. See *id.*

¹⁰ See Berger, *supra* note 9, at 585-86.

¹¹ See *Lilly*, 119 S. Ct. at 1894; see also FED. R. EVID. 804.

v. United States.¹² In *Mattox*, two central witnesses who had testified against the defendant at his first trial died before the second trial commenced and were thus unavailable for cross-examination at the second trial.¹³ The Court held that the transcribed testimony and cross-examinations of the unavailable witnesses from the first trial were admissible in the second trial.¹⁴ The Court stated for the first time that the:

primary object of the [Confrontation Clause] was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only testing the recollection and sifting the conscience of the witness, but of compelling him 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.¹⁵

The Court recognized, however, that particular situations—require a court to admit statements from unavailable witnesses despite the constitutional right to confrontation.¹⁶ The Court asserted that the Framers intended courts to make certain exceptions where public policy warranted them.¹⁷ A dying declaration by a witness to a crime, the Court argued, was such an exception.¹⁸ The Court found that a statement made before death was inherently reliable because one has no reason to lie when facing death.¹⁹

Although the *Mattox* Court never mentioned “hearsay” in its opinion, its decision created the first exception to the Confrontation Clause protections in criminal prosecution.²⁰ Since *Mattox*, the relationship between the Confrontation Clause and the evidentiary hearsay exceptions has plagued prosecutors, defen-

¹² 156 U.S. 237 (1895).

¹³ See *id.* at 238.

¹⁴ See *id.* at 248.

¹⁵ *Id.* at 242.

¹⁶ See *id.* at 243.

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ See *id.* at 243-44.

²⁰ See Berger, *supra* note 9, at 591-92.

dants, and trial courts.²¹ Despite the acknowledged exceptions,²² the Court maintains that the Confrontation Clause, essentially the right to cross-examine one's accuser, is the foundation of the truthseeking process.²³ According to the Court, the trier of fact cannot properly judge the accuser's nature or the circumstances surrounding the statement in the absence of a cross-examination.²⁴ In fact, the Court has asserted that the Confrontation Clause is the "greatest legal engine ever invented for the discovery of truth."²⁵

Although the Court continually emphasizes the importance of the right to cross-examine one's accuser, its recent Confrontation Clause opinions have facilitated admission of accusatory statements without cross-examination.²⁶ Much of the Court's leniency has come in decisions where it broadened its interpretation of permissible unavailability.²⁷ Seventy years after ruling that statements made prior to death were admissible in *Mattox*, the Court opined in *Douglas v. Alabama*²⁸ that invoking one's Fifth Amendment privileges also satisfied the unavailability requirement of the hearsay rule.²⁹

²¹ See, e.g., *White v. Illinois*, 502 U.S. 346, 356 (1992); *Idaho v. Wright*, 497 U.S. 805 (1990); *Ohio v. Roberts*, 448 U.S. 56, 68 (1980); *California v. Green*, 399 U.S. 149, 155 (1970); *Mattox*, 156 U.S. 237.

²² Congress codified the following exceptions to the hearsay rule if the declarant is unavailable as a witness: prior judicial testimony, statement under belief of impending death, statement against interest, statement of personal or family history, and forfeiture by wrongdoing. FED. R. EVID. 804 (b).

²³ *Lilly v. Virginia*, 119 S. Ct. 1887, 1894 (1999).

²⁴ See *Green*, 399 U.S. at 161-62.

²⁵ *Id.* at 158.

²⁶ See *Berger*, *supra* note 9, at 558 n.4 (citations omitted).

²⁷ See *Idaho v. Wright*, 497 U.S. 805, 809 (1990) (finding a three year-old girl unavailable because she was "not capable of communicating to the jury"); *Ohio v. Roberts*, 448 U.S. 56, 75 (1980) (stating that the prosecution must make a reasonable good-faith effort to locate the declarant before establishing "constitutional unavailability"); *Douglas v. Alabama*, 380 U.S. 415, 423 (1965) (concluding that invoking one's Fifth Amendment privileges against self-incrimination makes a declarant unavailable to testify); *Mattox v. United States*, 156 U.S. 237, 260-61 (1895) (holding that the death of the declarant is an acceptable exception to the constitutional right to confrontation).

²⁸ 380 U.S. 415 (1965).

²⁹ *Id.* at 420-21.

In *Douglas*, Loyd, an accomplice to the petitioner, invoked his Fifth Amendment privilege against self-incrimination³⁰ at the petitioner's trial.³¹ In response, the judge granted the prosecution's motion to name Loyd a hostile witness, thus permitting the prosecutor to cross-examine him.³² The prosecution proceeded to read Loyd his custodial confession sentence by sentence and required Loyd to affirm or deny the veracity of the statements.³³ The trial court found Douglas guilty and the Alabama Court of Appeals affirmed his conviction.³⁴ The United States Supreme Court granted certiorari and reversed.³⁵ The Court held that by invoking his Fifth Amendment privileges, Loyd was "unavailable" for trial. Further, admitting Loyd's statement without affording the petitioner an opportunity to cross-examine his accuser violated the petitioner's right to confrontation.³⁶ Justice Brennan, writing for the majority, asserted that the truth of an accuser's statement is properly tested only by cross-examination.³⁷ Brennan supported his assertion by citing the Court's opinion in *Mattox*, where it emphasized the importance of giving a jury the opportunity to consider whether an accuser "is worthy of belief."³⁸ Here, Brennan indicated, the jury was denied the opportunity to hear Loyd's testimony. As a result, the jury might have improperly construed the prosecutor's reading of the testimony as the truth. Without affording the defendant the right to cross-examine Loyd, the jury was unable to know if Loyd actually made the statements and whether they were true.³⁹ The Court opined that admission of Loyd's

³⁰ The Fifth Amendment of the United States Constitution provides "No person . . . shall be compelled in any criminal case to be a witness against himself" U.S. CONST. amend. V.

³¹ See *Douglas*, 380 U.S. at 416. Loyd was tried first and found guilty, but he planned to appeal his conviction. Accordingly, his attorney, also counsel to Douglas, advised him to invoke his privilege against self-incrimination. See *id.*

³² See *id.*

³³ See *id.*

³⁴ See *id.* at 417-18.

³⁵ See *id.*

³⁶ See *id.*

³⁷ See *id.* at 420.

³⁸ *Id.* at 419 (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895)).

³⁹ See *Douglas*, 380 U.S. at 420.

statements therefore violated the petitioner's Confrontation Clause rights.⁴⁰

While the Court recognized the need for exceptions to the hearsay rule,⁴¹ application of the "against penal interest" exception⁴² posed problems in cases where the declarant implicated himself while also accusing the defendant of the same crime or a more serious crime.⁴³ Just three years after *Douglas*, in *Bruton v. United States*, the declarant, Evans, confessed to committing armed postal robbery with the defendant.⁴⁴ In a joint trial, the judge admitted into evidence Evans's confession that inculpated the defendant in the robbery.⁴⁵ The judge gave the jury limiting instructions to disregard Evans's statement when determining Bruton's guilt, but despite the court's instructions, both Bruton and Evans were found guilty.⁴⁶ The Supreme Court reversed Bruton's conviction and held that the admission violated the defendant's right to confrontation because, despite the limiting instructions, the risk was too great that the jury might have considered the co-defendant's confession when making its decision.⁴⁷

⁴⁰ *Id.* at 418. The Court also ruled in *Douglas* that the Confrontation Clause of the Sixth Amendment is applicable to the states. *See id.* (citing *Pointer v. Texas*, 380 U.S. 400 (1965)).

⁴¹ *See, e.g., Mattox*, 156 U.S. at 243.

⁴² The Federal Rules of Evidence define statements against penal interest as follows:

(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 the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing 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).

⁴³ *See Bruton v. United States*, 391 U.S. 123 (1968).

⁴⁴ *See id.* at 124.

⁴⁵ *See id.*

⁴⁶ *See id.* at 124-25. The Eighth Circuit affirmed Bruton's conviction because the trial court judge relied on *Delli Paoli v. United States*, 352 U.S. 232 (1957) (holding that limiting jury instructions protects a defendant's Sixth Amendment confrontation right, even in cases where an incriminating statement is admitted in full) and instructed the jury to disregard Evans' statement. The Supreme Court granted certiorari to reconsider *Delli Paoli* and overruled it in *Bruton*. *Id.* at 126.

⁴⁷ *See Bruton*, 391 U.S. at 135-36.

The Court's decision established the *Bruton* rule that restricted limiting instructions in joint trials.⁴⁸ The Court suggested that giving limiting instructions is equivalent to giving no instructions to a jury.⁴⁹ The Court recognized that its ruling might hinder criminal prosecution in joint trials, but reasoned that, in many cases, there are less harmful ways to prove the confessor's guilt than by admitting a statement that incriminates a co-defendant.⁵⁰ The Court said that where the confessor's co-defendant is denied the opportunity to cross-examine the declarant, the jury cannot know if the confession was truthful or an attempt to shift the blame to the co-defendant.⁵¹ The Court held, therefore, that the admission of a co-defendant's statement that inculpatates the defendant, even if the jury is instructed to ignore the incriminating portions, violates the defendant's Confrontation Clause rights.⁵²

These earlier cases were important in shaping the way the Court dealt with the admission of hearsay evidence, but they did not instruct the courts below how to determine what is admissible under the Confrontation Clause.⁵³ The Court finally established a test in *Ohio v. Roberts*⁵⁴ for determining admissibility of out-of-court statements in the event the witness is "unavailable" for trial.⁵⁵ In *Roberts*, the respondent was charged with check forgery and possession of stolen credit cards belonging to Bernard and Amy Isaacs.⁵⁶ At a preliminary hearing, Roberts called the Isaacs' daughter, Anita, as his only witness.⁵⁷ During a lengthy direct examination, Anita denied giving Roberts the checks and credit cards.⁵⁸ At Roberts' jury trial a year later,

⁴⁸ See *id.* at 137.

⁴⁹ See *id.*

⁵⁰ See *id.* at 133-34.

⁵¹ See *id.* at 136.

⁵² See *id.*

⁵³ See *Ohio v. Roberts*, 448 U.S. 56, 64-65 (1980). In this line of cases, "the Court has not sought to 'map out a theory of the Confrontation Clause that would determine the validity of all . . . hearsay exceptions.'" *Id.* (quoting *California v. Green*, 399 U.S. 149, 162 (1970)). See, e.g., *Bruton v. United States*, 391 U.S. 123 (1968); *Douglas v. Alabama*, 380 U.S. 415 (1965); *Delli Paoli v. United States*, 352 U.S. 232 (1957); *Mattox v. United States*, 156 U.S. 237 (1895).

⁵⁴ 448 U.S. 56, 66 (1980).

⁵⁵ See *id.* at 65-66.

⁵⁶ *Id.* at 58.

⁵⁷ *Id.*

⁵⁸ *Id.*

Roberts testified that Anita gave him use of her father's checks and credit cards.⁵⁹ Anita, however, did not appear at trial and her parents maintained that they did not know where she resided.⁶⁰ The trial court found her "unavailable" for trial and admitted her preliminary hearing testimony over the respondent's objection that it violated his Confrontation Clause rights.⁶¹ After conducting a voir dire hearing as to the admissibility of Anita's preliminary hearing testimony, the court ruled that Anita was unavailable because no one, including her parents, knew how to reach her.⁶² The Supreme Court of Ohio held that Anita was not unavailable and "the mere opportunity to cross-examine at a preliminary hearing did not afford constitutional confrontation for purposes of trial."⁶³ The United States Supreme Court granted certiorari to examine the relationship between the Confrontation Clause and the hearsay rule exceptions and reversed.⁶⁴

The Court held that Anita was, in fact, constitutionally unavailable for respondent's trial because the prosecution made a good faith effort to locate her before the trial.⁶⁵ The Court also held that the preliminary hearing afforded the respondent an adequate opportunity to cross-examine the witness and that the transcript "bore sufficient indicia of reliability" to provide the trier of fact with "a satisfactory basis for evaluating the truth of the prior statement."⁶⁶

The *Roberts* Court took this opportunity to erect a two-pronged inquiry for determining when statements admissible under an exception to the hearsay rule also satisfy the Confrontation Clause.⁶⁷ First, the prosecution must demonstrate that the declarant is unavailable to testify.⁶⁸ Once unavailability is proven and the necessity of the statement is determined, the

⁵⁹ *Id.* at 59.

⁶⁰ *See id.* at 60. Between November 1975 and March 1976, five subpoenas for four different trial dates were sent to Anita at her parents' address. She never responded to the subpoenas. *See id.*

⁶¹ *See id.* at 73, 77.

⁶² *See id.* at 60.

⁶³ *Id.* at 61.

⁶⁴ *See id.* at 62.

⁶⁵ *See id.* at 76-77.

⁶⁶ *Id.* at 65-66 (quoting *California v. Green*, 399 U.S. 149, 161 (1970)).

⁶⁷ *See id.* at 65.

⁶⁸ *See id.*

statement must be deemed to be sufficiently reliable to make the right to confrontation unnecessary.⁶⁹ A statement is sufficiently dependable if: (1) it falls within a "firmly rooted hearsay exception"; or (2) it contains "particularized guarantees of trustworthiness, such that adversarial testing would be expected to add little, if anything, to the statements' reliability."⁷⁰ The Court has continued to shape the *Roberts* test into a useful tool for determining reliability in cases where the witness is unavailable to testify.⁷¹

Six years after *Roberts* in *Lee v. Illinois*,⁷² the Court utilized the *Roberts* test to determine whether a confession by a co-defendant was admissible in a joint trial.⁷³ In this case, the petitioner, Lee, and her boyfriend, Thomas, were tried jointly in a bench trial for a double murder; neither Lee nor Thomas testified.⁷⁴ In proving Lee guilty of the murders, the prosecutor depended heavily on portions of Thomas's police confession obtained at the time of the arrest.⁷⁵ The appeals court affirmed the use of the confession because the co-defendants' stories "interlocked," suggesting reliability.⁷⁶ The United States Supreme Court reversed, however, and held that admission of Thomas's confession violated Lee's right to confrontation.⁷⁷ The Court followed the analysis set forth in *Roberts* and concluded that accomplice statements in general are presumptively suspect and in this case the circumstances surrounding the statement did not provide sufficient indicia of reliability to override the presumption.⁷⁸ The Court also asserted that "a confession is not necessarily rendered reliable simply because some of the facts it contains

⁶⁹ See *id.*

⁷⁰ *Id.* at 66. The Court did not define "firmly rooted." See Goldman, *supra* note 9, at 3. Since *Roberts*, courts have referred to the second prong as the "residual admissibility test" to suggest that a statement not falling into a firmly rooted exception must satisfy this test to be admitted into evidence under the Confrontation Clause. *Lilly v. Virginia*, 119 S. Ct. 1887, 1899 (1999).

⁷¹ *Lilly*, 119 S. Ct. at 1894.

⁷² 476 U.S. 530 (1986).

⁷³ See *id.* at 543, 546.

⁷⁴ See *id.* at 531.

⁷⁵ See *id.*

⁷⁶ *Id.* at 538.

⁷⁷ See *id.* at 547.

⁷⁸ *Id.* at 546.

'interlock' with the facts in the defendant's statement."⁷⁹ The Court established that a co-defendant's or accomplice's confession inculcating the accused is presumptively unreliable and violates the accused's right to confrontation.⁸⁰

The Court followed its reasoning in *Lee* regarding selective reliability in a case involving the admissibility of a child's statement to a medical examiner.⁸¹ In *Idaho v. Wright*,⁸² Laura Lee Wright was convicted on two counts of lewd conduct with a minor under the age of sixteen.⁸³ At Wright's trial, a voir dire hearing revealed that Wright's three-year-old daughter was unable to testify.⁸⁴ The court permitted the doctor who examined the young girl to testify about the younger daughter's statement.⁸⁵ The court admitted the doctor's testimony under Idaho's residual hearsay exception⁸⁶ and a jury found her guilty.⁸⁷ Wright appealed to the Idaho Supreme Court and argued, *inter alia*, that her Confrontation Clause rights were violated because the statements did not fall within a firmly rooted

⁷⁹ *Id.* at 545. The Court found that the statements differed on the material issues, specifically the roles the two defendants played in the murder and the question of premeditation. *See id.* at 546.

⁸⁰ *See id.* at 546. The Court also noted that "the arrest statements of a co-defendant have traditionally been viewed with special suspicion." *Id.* at 541 (internal quotations omitted).

⁸¹ *See Idaho v. Wright*, 497 U.S. 805, 824 (1990).

⁸² 497 U.S. 805 (1990).

⁸³ *See id.* at 808. Wright was jointly charged and tried with Robert L. Giles for lewd conduct with Wright's two daughters, ages 5 1/2 and 2 1/2, in violation of IDAHO CODE § 18-1508 (1987). They were convicted on both counts. Wright and Giles appealed only the conviction for lewd conduct with Wright's 2 1/2 year-old daughter. Giles unsuccessfully appealed on the basis that the trial court erred in admitting the doctor's testimony under the residual hearsay exception. Wright, however, argued that the admission under the residual hearsay exception violated her Confrontation Clause rights. *See id.* at 812.

⁸⁴ *See id.* at 809.

⁸⁵ *See id.*

⁸⁶ Rule 803 provides in part,

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

IDAHO R. EVID. 803(24).

⁸⁷ *See Wright*, 497 U.S. at 812.

hearsay exception and the interview lacked substantial guarantees of trustworthiness.⁸⁸ The Idaho Supreme Court agreed and reversed her conviction.⁸⁹ The United States Supreme Court granted certiorari and affirmed.⁹⁰

The Court held that the medical examiner's testimony reiterating statements made by Wright's younger daughter violated Wright's Confrontation Clause protections.⁹¹ Using the *Roberts* test, the Court reasoned that Idaho's residual hearsay exception was not a firmly rooted exception and that the young girl's statements lacked the particularized guarantees of trustworthiness necessary to satisfy the requirements of the Clause.⁹² The Court stated that corroborating evidence does not make a statement more reliable.⁹³ Instead the statement at issue must bear "particularized guarantees of trustworthiness" on its own merits.⁹⁴ Admitting hearsay statements simply because other evidence corroborates them, the Court said, would permit "bootstrapping" of presumptively unreliable evidence onto the trustworthiness of other evidence at trial.⁹⁵ The Court, however, did not establish a per se rule excluding statements made by declarants unable to communicate to the jury at the time of trial.⁹⁶ The Court argued that a "per se rule of exclusion would not only frustrate the truthseeking purpose of the Confrontation Clause, but would also hinder States in their own 'enlightened development in the law of evidence.'"⁹⁷ The Court maintained that lower courts must engage in a factual determination of the trustworthiness of each statement on its own merits.⁹⁸

In *White v. Illinois*,⁹⁹ the Court again tried to clarify its interpretation of hearsay exceptions under a Confrontation Clause

⁸⁸ See *id.*

⁸⁹ See *id.* at 813.

⁹⁰ See *id.*

⁹¹ See *id.* at 827.

⁹² See *id.*

⁹³ See *id.* at 822.

⁹⁴ *Id.*

⁹⁵ See *id.* at 823.

⁹⁶ See *id.* at 825.

⁹⁷ *Id.* (quoting *Dutton v. Evans*, 400 U.S. 74, 95 (1970) (Harlan, J., concurring in result)).

⁹⁸ *Id.*

⁹⁹ 502 U.S. 346 (1992).

analysis.¹⁰⁰ In *White*, S.G., a four-year-old girl told several people, including her mother, her doctor, and a friend, that the petitioner had sexually assaulted her.¹⁰¹ Her confidants testified at the petitioner's trial and recounted her statements.¹⁰² The trial court admitted S.G.'s hearsay statements under Illinois' "spontaneous declaration" exception.¹⁰³ The Court held that her statements were admissible because they were made in a context "that provide[s] substantial guarantees of their trustworthiness."¹⁰⁴

Chief Justice Rehnquist wrote for the Court and quickly rejected petitioner's argument that the Court should limit its interpretation of "witness against" to cases analogous to the abuses common in the sixteenth- and seventeenth-centuries.¹⁰⁵ The Court argued that such a narrow reading of the Confrontation Clause "would virtually eliminate [the Clause's] role in restricting the admission of hearsay testimony."¹⁰⁶ The Court sought instead to "steer a middle course" that permits certain exceptions to the hearsay rule when appropriate.¹⁰⁷ The Court recognized that certain statements of unavailable witnesses should be admitted if they fit within "firmly rooted exceptions" to the hearsay rule and are thus so trustworthy that cross-examination would add little or no value for the trier of fact.¹⁰⁸ The Court reasoned that exceptions become firmly rooted as, over time, courts recognize that the context in which the statements are made suggest "substantial guarantees of their trustworthiness."¹⁰⁹ The Court stated, however, that despite the permissive use of hearsay statements in cases where the statement was a spontaneous declaration, in cases where a co-defendant or accomplice

¹⁰⁰ See *id.* at 348.

¹⁰¹ See *id.* at 349.

¹⁰² See *id.* at 350.

¹⁰³ See *id.* The trial court agreed with the prosecutor that the girl was too young to testify but that her statements provided sufficient guarantees of trustworthiness rendering cross-examination of her unnecessary. See *id.*

¹⁰⁴ *Id.* at 355.

¹⁰⁵ See *id.* at 352. References to prosecuting using the admission of ex parte affidavits while never producing the affiants at trial. See *id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (quoting *Ohio v. Roberts*, 448 U.S. 56, 68 n.9 (1980)).

¹⁰⁸ *Id.* at 353.

¹⁰⁹ *Id.* at 355.

inculpatates the defendant, testimony is preferred because cross-examination is the most effective tool in unveiling the truth.¹¹⁰

Justice Thomas wrote separately in *White*, concurring in part and concurring in the judgment.¹¹¹ Justice Thomas argued that the Court's current Confrontation Clause jurisprudence differs from the Framers' intent.¹¹² He contended that this line of Supreme Court cases "unnecessarily ha[s] complicated and confused the relationship between the constitutional right of confrontation and the hearsay rules of evidence."¹¹³ He suggested that the Framers intended a more narrow reading of "witness against" to include only those individuals who testify at trial, not merely people who saw the crime.¹¹⁴ Justice Thomas suggested that statements made by a "witness against" the accused should also incorporate extrajudicial testimony, including affidavits, depositions, and custodial confessions.¹¹⁵ Justice Thomas concluded that historical evidence does not support the "notion that the Confrontation Clause was intended to constitutionalize the hearsay rule and its exceptions."¹¹⁶

Not surprisingly, the Court granted certiorari just two years after *White* in another attempt to clarify its position regarding the admission of "against penal interest" statements.¹¹⁷ In *Williamson v. United States*,¹¹⁸ Reginald Harris was stopped by the police for weaving on the highway.¹¹⁹ The police searched his car, discovered cocaine, and arrested him.¹²⁰ Harris confessed to a Drug Enforcement Administration agent that he was transport-

¹¹⁰ *Id.* at 356. The Court distinguished this case from *Roberts* and recognized that spontaneous declarations have proven more reliable than statements made by accomplices as part of a judicial proceeding. *See id.*

¹¹¹ *Id.* at 358 (Thomas, J., concurring).

¹¹² *See id.* (Thomas, J., concurring).

¹¹³ *Id.* (Thomas, J., concurring).

¹¹⁴ *See id.* at 359 (Thomas, J., concurring).

¹¹⁵ *See id.* at 365 (Thomas, J., concurring).

¹¹⁶ *Id.* at 366. Justice Thomas's position was argued in *Lilly v. Virginia*, 119 S. Ct. 1887 (1999), in an attempt to limit the admission of Mark Lilly's statement, but Justice Stevens quickly rejected it. *See Lilly*, 119 S. Ct. at 189.

¹¹⁷ *See Williamson v. United States*, 512 U.S. 594 (1994). *Williamson* was not a Confrontation Clause case, but the Court's discussion of the "against penal interest" hearsay exception is important to this analysis.

¹¹⁸ 512 U.S. 594 (1994).

¹¹⁹ *See id.* at 596.

¹²⁰ *See id.*

ing the cocaine for his accomplice, Williamson.¹²¹ Williamson later was arrested and tried for various drug offenses.¹²² Although Harris fully incriminated himself as an accomplice during his police confession, he refused to testify at Williamson's trial.¹²³ The trial court allowed the DEA agent to recount the confession to the jury under the "against penal interest exception."¹²⁴ The Supreme Court reversed the decision and held that Rule 804(b)(3), the "against penal interest" exception, did not permit the admission of non-self-inculping statements even if they were contained in a statement that is self-inculping on the whole.¹²⁵ The Court argued that self-inculping did not make the non-self-inculping statement more credible, particularly where the declarant accuses another of a more serious crime.¹²⁶ In fact, a reasonable person might try to mask the exculpatory language with a general statement implicating him or herself for the less serious crime.¹²⁷

The Court noted that its decision to bar admission of any non-self-inculping statements would limit the prosecutors' ability to use custodial confessions during trial, but it suggested that truly self-inculping statements would continue to be admissible.¹²⁸ The Court recommended reviewing the context in which the statement was made in determining whether it can be classified as an exception.¹²⁹ The Court carefully removed the ability of accomplices and co-defendants to bury self-exculpating statements in a self-inculping confession, thus restoring some of the constitutional guarantees of the Sixth Amendment.¹³⁰

Despite this line of cases, litigants and courts continue to struggle with the relationship between the Confrontation Clause

¹²¹ See *id.* 596-97.

¹²² See *id.* at 597.

¹²³ See *id.*

¹²⁴ See *id.* at 598.

¹²⁵ See *id.* at 600. See *supra* note 42 for the text of Rule 804(b)(3).

¹²⁶ See *id.* at 599.

¹²⁷ See *id.* at 600.

¹²⁸ See *id.* at 603.

¹²⁹ See *id.* at 604. The Court appeared to adopt the *Roberts* test in its inquiry as to whether "a reasonable person in the declarant's position would not have made the statement unless believing it to be true." *Id.*

¹³⁰ See *id.* at 605.

and hearsay exceptions.¹³¹ Justice Harlan suggested almost thirty years ago in *California v. Green* that the Court needed to clarify its instructions to the lower courts as to how to determine admissibility of out-of-court statements.¹³² *Lilly v. Virginia* represents another effort by the Court to clarify this complex relationship.¹³³

III. STATEMENT OF FACTS AND PROCEDURAL HISTORY

On December 4, 1995, Benjamin Lilly, Petitioner, his brother Mark Lilly, the declarant, and Mark Lilly's roommate Gary Wayne Barker embarked on a twenty-four hour crime spree that culminated in the carjacking and murder of Alex DeFilippis on December 5, 1995.¹³⁴ The crime spree began when the three men, who had been drinking and smoking marijuana at Petitioner's home, drove in Petitioner's car to the home of Danny Sanders, a friend of Petitioner.¹³⁵ When they arrived, Sanders was not there.¹³⁶ They broke into his home and stole several bottles of liquor, a safe, and three guns.¹³⁷ They then went to the home of another friend, Warren Nolan, where they

¹³¹ Although the *Roberts* tests purports to instruct lower courts in their determinations of admissibility, determinations by state and federal courts are often challenged and reversed. See *Lilly v. Virginia*, 119 S. Ct. 1887, 1893 (1999) (stating that the Supreme Court of Virginia's decision "represented a significant departure from our Confrontation Clause jurisprudence"); see also American Civil Liberties Union Brief as Amicus Curiae in Support of Petitioner at 17, *Lilly v. Virginia*, 119 S. Ct. 1887 (1999) (No. 98-5881) (arguing that lower courts have tremendous leeway to admit hearsay statements subject to review only in the rare case in which the Supreme Court grants certiorari); Charles F. Williams, *Tangled Up In Tape: Accomplice's Blame-Shifting Recorded Confession Tests Sixth Amendment*, 85 A.B.A. J. 36 (May 1999) (stating that prosecutors often argue to appellate courts that the self-inculpatory nature of a confession is a fact-based determination to protect the statements from appellate review).

¹³² See *California v. Green*, 399 U.S. 149, 172 (1970) (Harlan, J., concurring). Justice Harlan argued that the Framers' intent when drafting the Sixth Amendment has been lost in the complexities of the hearsay rule. Several cases dealing with redaction illustrate these inconsistencies. See, e.g., *Gray v. Maryland*, 118 S. Ct. 1151 (1998); *Richardson v. Marsh*, 481 U.S. 200 (1987); *Bruton v. United States*, 391 U.S. 123 (1968).

¹³³ See *Lilly*, 119 S. Ct. at 1893.

¹³⁴ See *id.* at 1892.

¹³⁵ See Brief for the Petitioner at 4, *Lilly v. Virginia*, 119 S. Ct. 1887 (1999) (No. 98-5881).

¹³⁶ See *id.*

¹³⁷ See *id.*; see also *Lilly v. Virginia*, 499 S.E.2d. 522, 565 (Va. 1998).

tried unsuccessfully to “trade the guns for some dope.”¹³⁸ After Barker stated that “he would shoot the police if they attempted to arrest him,”¹³⁹ Nolan’s girlfriend asked them to leave.¹⁴⁰ The three men then drove to the trailer where Mark Lilly and Barker rented a room and proceeded to “drink all night.”¹⁴¹

The following morning, the three men left the trailer and drove around the countryside.¹⁴² They stopped at the home of Mike Lang, another friend of Mark Lilly and Barker, and asked him to join them. Lang’s mother, however, refused to let Lang go with Mark Lilly and Barker after Barker stated in front of her that he could kill his best friend and not feel remorse.¹⁴³

After they left Lang’s house, Petitioner, Mark Lilly, and Barker drove around the area, drank the stolen liquor, robbed a convenience store, and shot geese with the stolen guns.¹⁴⁴ Later that day, they drove back to the trailer where they again tried unsuccessfully to sell or trade the stolen pistol for marijuana.¹⁴⁵ They then drove to a bar where Mark Lilly unsuccessfully tried to sell the rifle to a co-worker.¹⁴⁶

Early that evening, as Petitioner, Mark Lilly, and Barker cruised around the countryside, Petitioner’s car broke down.¹⁴⁷ He coasted down a hill and stopped across the street from a convenience store where the three men took the license plates off the car and removed the guns.¹⁴⁸ They intended to hide the guns and the license plates in the woods until they could find another car to use.¹⁴⁹ Meanwhile, DeFilippis and his college roommate arrived at the convenience store at approximately the same time.¹⁵⁰ When DeFilippis’s roommate went into the store,

¹³⁸ Joint Appendix at 105-107, *Lilly v. Virginia*, 119 S. Ct. 1887 (1999) (No. 98-5881).

¹³⁹ Petitioner’s Brief at 4, *Lilly* (No. 98-5881)

¹⁴⁰ *See id.*

¹⁴¹ *Id.*

¹⁴² *See id.*

¹⁴³ *Id.*

¹⁴⁴ *See* Brief for the Respondent at 2, *Lilly v. Virginia*, 119 S. Ct. 1887 (1999) (No. 98-5881).

¹⁴⁵ *See id.*

¹⁴⁶ *See id.*

¹⁴⁷ *See id.*

¹⁴⁸ *See id.*

¹⁴⁹ *See id.*

¹⁵⁰ *See id.*

DeFilippis waited in the parking lot.¹⁵¹ Petitioner approached DeFilippis, pointed the gun at him and demanded his money.¹⁵² DeFilippis gave Petitioner his wallet.¹⁵³ Petitioner then called to Mark Lilly and Barker and told them to get in DeFilippis's car.¹⁵⁴ He told DeFilippis to sit in the back seat with Mark Lilly.¹⁵⁵ Petitioner quickly drove out of the parking lot, but did not disclose where the four men were going. As they drove, DeFilippis repeatedly asked Petitioner to return to the convenience store so he could pick up his roommate.¹⁵⁶ DeFilippis also offered to drive Petitioner wherever he wanted to go.¹⁵⁷ Petitioner ignored DeFilippis's requests and instead drove to a deserted piece of property.¹⁵⁸ When Petitioner stopped the car, Mark Lilly and Barker told DeFilippis to close his eyes so he could not look at their faces.¹⁵⁹ The four men exited the car and Mark Lilly told DeFilippis to start walking.¹⁶⁰ Petitioner shouted after him to take off all of his clothes.¹⁶¹ After DeFilippis started walking and Mark Lilly and Barker returned to the car, Petitioner demanded that Mark Lilly give him the stolen .38 caliber pistol.¹⁶² Mark Lilly gave him the pistol and instead of getting into the car, Petitioner ran after DeFilippis into the woods.¹⁶³ DeFilippis was shot four times; three shots were to his head and one went through his forearm.¹⁶⁴ DeFilippis died quickly after being shot in the brain.¹⁶⁵ When Petitioner returned to the car, he told Mark Lilly and Barker that DeFilippis had seen his face, so he had to shoot

¹⁵¹ See *id.* at 3.

¹⁵² See *id.*

¹⁵³ See *id.*

¹⁵⁴ See *id.*

¹⁵⁵ See *id.*

¹⁵⁶ See *id.*

¹⁵⁷ See *id.*

¹⁵⁸ See *id.*

¹⁵⁹ See *id.*

¹⁶⁰ See *id.*

¹⁶¹ See *id.*

¹⁶² See *id.*

¹⁶³ See *id.*

¹⁶⁴ See *id.* at 4.

¹⁶⁵ See *id.*

him.¹⁶⁶ He allegedly told the two, “‘I’ve been to the penitentiary and I ain’t going back.’”¹⁶⁷

The men subsequently drove to the river to discard the items they believed had their fingerprints on them, including DeFilippis’s clothes and backpack and the plastic cover on the speedometer.¹⁶⁸ Soon thereafter, the three men robbed two more convenience stores.¹⁶⁹ The owner of the second store followed Petitioner, Mark Lilly, and Barker and reported to the police the license plate number of the car stolen from DeFilippis.¹⁷⁰ Driving away from the second store, however, the stolen car broke down.¹⁷¹ The police arrived on the scene shortly after the car stopped.¹⁷² When the police arrived, Mark Lilly and Barker fled into the woods and Petitioner stayed in the car.¹⁷³

The police arrested Petitioner for the two convenience store robberies¹⁷⁴ and held him at the scene for about two hours.¹⁷⁵ Approximately ten to thirty minutes later, the police found Barker a few yards from the road sitting with the rifle pointed at his head.¹⁷⁶ The police convinced him to surrender and took him immediately to the station for questioning.¹⁷⁷ Several hours later, Petitioner called to his brother on a loud speaker and encouraged him to come out of the woods.¹⁷⁸ Petitioner yelled, “‘You’re not the one that’s really in trouble here. You’re not

¹⁶⁶ *See id.*

¹⁶⁷ *Id.*

¹⁶⁸ *See id.*

¹⁶⁹ *See Lilly v. Virginia*, 119 S. Ct. 1887, 1892 (1999).

¹⁷⁰ *See* Respondent’s Brief at 5, *Lilly* (No. 98-5881).

¹⁷¹ *See id.*

¹⁷² *See id.*; *see also* Petitioner’s Brief at 5, *Lilly* (No. 98-5881).

¹⁷³ *See* Respondent’s Brief at 5, *Lilly* (No. 98-5881).

¹⁷⁴ *See id.* at 6. The robberies were the only crimes the police knew about at the time. *See id.*

¹⁷⁵ *See* Petitioner’s Brief at 5, *Lilly* (No. 98-5881). While Petitioner was waiting in the car, he allegedly asked one of the officers to “put the barrel of the officer’s shotgun in his mouth and pull the trigger.” Respondent’s Brief at 6, *Lilly* (No. 98-5881). When the officer refused and asked Petitioner something to the effect of “what does a murderer look like?” Petitioner responded, “me.” *Id.*

¹⁷⁶ *See* Petitioner’s Brief at 5, *Lilly* (No. 98-5881); *see also* Respondent’s Brief at 5-6, *Lilly* (No. 98-5881).

¹⁷⁷ *See* Respondent’s Brief at 6, *Lilly* (No. 98-5881).

¹⁷⁸ *See id.*

the one that's really done anything wrong."¹⁷⁹ Shortly thereafter, the police found Mark Lilly walking along the road.¹⁸⁰ When apprehended, Mark Lilly falsely identified himself as Mark Rader.¹⁸¹ The police took Mark Lilly to the police station for questioning.¹⁸²

At the police station, Barker was interrogated first, beginning at 9:47 P.M.¹⁸³ He was very emotional but "recounted in detail what had happened, including the fact that Ben Lilly had shot and killed Alex DeFilippis."¹⁸⁴ Barker also directed the police to DeFilippis's body and told them where to find his clothes.¹⁸⁵

After the police finished questioning Barker, they informed Mark Lilly that Barker and Petitioner both stated that he [Mark Lilly] was not the triggerman.¹⁸⁶ The audio tape of the investigation indicates that the police questioned Mark Lilly from 1:35 A.M. until 2:12 A.M. and again between 2:30 and 2:53 A.M.¹⁸⁷ Mark Lilly repeatedly told the officers that he was drunk during the entire spree. He confessed to participating in the thefts of the alcohol, but told the police that he was simply present during the more serious robberies and the homicide.¹⁸⁸ Upon prompting by police to "break family ties" to avoid a life sentence, Mark Lilly admitted that Petitioner instigated the carjacking and that he [Mark Lilly] did not have anything to do with the shooting.¹⁸⁹ Mark Lilly also told the police that Petitioner "was the one who shot DeFilippis."¹⁹⁰

Petitioner was questioned last.¹⁹¹ He maintained that there were three other accomplices including Mark Lilly, Barker, and "Mike Rader."¹⁹² He denied that he knew who owned the stolen

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *See id.*

¹⁸² *See* Petitioner's Brief at 5, *Lilly* (No. 98-5881).

¹⁸³ *See id.* at 6.

¹⁸⁴ Respondent's Brief at 7, *Lilly* (No. 98-5881).

¹⁸⁵ *See id.*

¹⁸⁶ *See* Petitioner's Brief at 6, *Lilly* (No. 98-5881).

¹⁸⁷ *See* *Lilly v. Virginia*, 119 S. Ct. 1887, 1892 (1999).

¹⁸⁸ *See id.*

¹⁸⁹ *See id.*

¹⁹⁰ *Id.*

¹⁹¹ *See* Respondent's Brief at 7, *Lilly* (No. 98-5881).

¹⁹² *See id.*

car.¹⁹³ He claimed that he was forced at gunpoint to participate in the robberies, but made no mention of stealing the guns from Sanders's home.¹⁹⁴ Petitioner also did not mention the murder and robbery of DeFilippis.¹⁹⁵ After the interrogation, Petitioner refused to submit to a gunshot residue test and immediately rubbed his hands together and on his pants.¹⁹⁶

The physical evidence supported Mark Lilly and Barker's stories.¹⁹⁷ Blood was found on Petitioner's jeans, although the amount was too small for a DNA test.¹⁹⁸ The bullet recovered from DeFilippis's head matched the .38 caliber revolver that was stolen from Sanders' home.¹⁹⁹

The Commonwealth of Virginia charged Petitioner with several offenses, including the murder of DeFilippis.²⁰⁰ He was tried separately.²⁰¹ At Petitioner's trial, Barker testified against Petitioner and accused him of shooting DeFilippis.²⁰² Mark Lilly, however, invoked his right against self-incrimination under the Fifth Amendment and refused to testify.²⁰³ In response, the Commonwealth moved to admit Mark Lilly's custodial confession and argued it was admissible under the hearsay exception for "declarations of an unavailable witness against penal interest."²⁰⁴ Petitioner objected and argued that the statements were not self-inculpatory because they shifted blame for the

¹⁹³ *See id.*

¹⁹⁴ *See id.* at 7-8.

¹⁹⁵ *See id.*

¹⁹⁶ *See id.* at 8. Both Mark Lilly and Barker submitted to the test. *See id.*

¹⁹⁷ *See id.*

¹⁹⁸ *See id.*

¹⁹⁹ *See id.*

²⁰⁰ *See Lilly v. Virginia*, 119 S. Ct. 1887, 1892 (1999).

²⁰¹ *See id.*

²⁰² *See* Respondent's Brief at 8-9, *Lilly* (No. 98-5881). Barker had entered into a plea bargain with the Commonwealth and was required to testify. *See* Record at 29, *Lilly* (No. 98-5881). According to the Commonwealth, Barker's testimony and cross-examination "mirrored the confession given by Mark [Lilly] in all material respects except that it contained far greater detail about petitioner's actions." Respondent's Brief at 8, *Lilly* (No. 98-5881).

²⁰³ *See Lilly*, 119 S. Ct. at 1892-93. Mark Lilly had not yet been tried for his involvement in the crimes. Thus, the Commonwealth still had the power to implicate him as the "triggerman" subjecting him to charges of capital murder if he changed his story under oath at Benjamin Lilly's trial. *See* Brief for the National Association of Criminal Defense Lawyers as Amici Curiae in support of Petitioner at 10-11, *Lilly v. Virginia*, 119 S. Ct. 1887 (1999) (No. 98-5881).

²⁰⁴ *See Lilly*, 119 S. Ct. at 1893.

murder to Petitioner and admission of the statements would violate Petitioner's Sixth Amendment right to confrontation.²⁰⁵ The court overruled the objection and admitted Mark Lilly's confessional statements in their entirety.²⁰⁶

The jury found Petitioner guilty of robbery, abduction, carjacking, possession of a firearm by a felon, and four counts of illegal use of a firearm, and sentenced him to two consecutive life terms plus twenty-seven years for these crimes.²⁰⁷ The jury also found Petitioner guilty of capital murder and sentenced him to death.²⁰⁸

On petition to the Supreme Court of Virginia, Petitioner argued that pursuant to Virginia state law, the "against penal interest" hearsay exception never should apply to evidence offered by the Commonwealth against the defendant.²⁰⁹ Petitioner also argued that according to Virginia case law, Mark Lilly's statements were not against his penal interest.²¹⁰ Although Petitioner's arguments were based on state, not federal law, he cited *Lee v. Illinois* and *Williamson v. United States* in his reply brief to support his argument that accomplice statements are presumptively unreliable.²¹¹ The Supreme Court of Virginia rejected Petitioner's arguments and affirmed the trial court's decision on April 17, 1998.²¹² The court held that Mark Lilly's custodial confession did not violate Petitioner's Confrontation Clause rights.²¹³ The court reasoned that Mark Lilly's confession was a declaration against penal interest because he implicated himself as a participant in numerous crimes.²¹⁴ It also found

²⁰⁵ See *id.*

²⁰⁶ See *id.*

²⁰⁷ See *id.*

²⁰⁸ See *id.* It is well established under Virginia law that "only the person who is the immediate perpetrator [of the killing] may be a principal in the first degree and thus liable to conviction for capital murder." *Johnson v. Commonwealth*, 255 S.E.2d 525, 527 (Va. 1979) (interpreting VA. CODE ANN. § 18.2-18), *quoted in* Brief of National Association of Criminal Defense Lawyers as Amici Curiae in support of Petitioner at 15-16, *Lilly* (No. 98-5881).

²⁰⁹ See Respondent's Brief at 12, *Lilly* (No. 98-5881).

²¹⁰ See *id.* at 13.

²¹¹ See *id.*

²¹² *Lilly v. Virginia*, 499 S.E.2d 522, 537 (Va. 1998).

²¹³ See *id.* at 534.

²¹⁴ See *id.* The Court stated that the lower court's determination that Mark Lilly's statement was self-serving goes to the weight the jury could assign to the statement and not to its admissibility. See *id.*

that Mark Lilly's hearsay statements had "sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule" thus "adversarial testing would add little to its reliability."²¹⁵

Benjamin Lilly petitioned the Supreme Court of Virginia for a rehearing.²¹⁶ He argued that the Confrontation Clause prohibited the admission of a custodial confession because that hearsay exception was not firmly rooted and, pursuant to *Idaho v. Wright*,²¹⁷ the court should not consider corroborating evidence as validation of Mark Lilly's statements.²¹⁸ The Virginia Supreme Court denied the petition for rehearing on June 5, 1998, in an unpublished, summary order.²¹⁹

The United States Supreme Court granted certiorari on November 9, 1998, to resolve whether the accused's Confrontation Clause rights were "violated by admitting into evidence at his trial a nontestifying accomplice's entire confession that contained some statements against the accomplice's penal interest and others that inculpated the accused."²²⁰ The Court stated that the Supreme Court of Virginia's decision conflicted with the United States Supreme Court's history of Confrontation Clause jurisprudence and warranted the Court's review.²²¹

IV. SUMMARY OF OPINIONS

A. THE PLURALITY OPINION

Writing for the plurality,²²² Justice Stevens reversed the decision of the Supreme Court of Virginia and held that the admission of Mark Lilly's custodial confession violated petitioner's Confrontation Clause rights.²²³ Justice Stevens asserted that "'accomplices' confessions that inculpate a criminal defendant

²¹⁵ *Id.*

²¹⁶ See Respondent's Brief at 18, *Lilly* (No. 98-5881).

²¹⁷ 497 U.S. 805 (1990).

²¹⁸ See Respondent's Brief at 18, *Lilly* (No. 98-5881).

²¹⁹ See *id.*

²²⁰ *Lilly v. Virginia*, 119 S. Ct. 1887, 1892 (1999).

²²¹ See *id.* at 1893.

²²² Justices Breyer, Ginsburg, and Souter joined in all parts of the opinion. Justice Breyer filed a concurring opinion. Justice Scalia concurred in the judgment and Parts I and II. Justice Thomas concurred in the judgment and Part I. Chief Justice Rehnquist and Justices O'Connor and Kennedy concurred with the judgment.

²²³ See *id.* at 1901.

are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence.”²²⁴ Justice Stevens also held that appellate courts should independently review the government’s proffered guarantees of trustworthiness under the second half of the *Roberts* inquiry.²²⁵

Justice Stevens asserted in Part II of the opinion that the Court had subject matter jurisdiction over this case despite the Commonwealth of Virginia’s claim to the contrary.²²⁶ Although Petitioner had focused on state hearsay law in his appeal to the Supreme Court of Virginia, he argued in his brief to that court that the admission of Mark Lilly’s statements violated his Sixth Amendment right to confrontation.²²⁷ Petitioner also cited *Lee v. Illinois*²²⁸ and *Williamson v. United States*²²⁹ in his reply brief to the Supreme Court of Virginia.²³⁰ Justice Stevens concluded that these references to United States Supreme Court opinions were sufficient to raise the constitutional issue of confrontation in the court below, and the Supreme Court therefore had jurisdiction over this case.²³¹

Having established jurisdiction, Justice Stevens asserted in Part III that admission of Mark Lilly’s statements raised a Confrontation Clause issue.²³² The Court adhered to its holding in *Roberts* and reiterated that hearsay statements are admissible where the declarant is unavailable and the statement falls within a firmly rooted hearsay exception or contains “particularized guarantees of trustworthiness” sufficient to satisfy the Clause’s residual admissibility test.²³³ The *Roberts* test supports the premise that a defendant must be allowed to confront his accusers

²²⁴ *Id.* at 1899.

²²⁵ *See id.* at 1900. The second prong of the *Roberts* test asks whether the truth of hearsay statements is sufficiently dependable to allow the untested admission of such statements against the accused if it contains “particularized guarantees of trustworthiness” such that cross-examination would add little to the statement’s reliability. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). This test is often called the “residual trustworthiness” test. *See Lilly*, 119 S. Ct. at 1899-1900.

²²⁶ *See Lilly*, 119 S. Ct. at 1893.

²²⁷ *See id.*

²²⁸ 476 U.S. 530 (1986).

²²⁹ 512 U.S. 594 (1994).

²³⁰ *See Lilly*, 119 S. Ct. at 1893.

²³¹ *See id.*

²³² *See id.* at 1894.

²³³ *Id.*

unless adversarial testing would add little to the reliability of the statements.²³⁴

Justice Stevens acknowledged the argument made most recently in *White v. Illinois*²³⁵ for a narrow reading of the Confrontation Clause, particularly with respect to the phrase "witnesses against."²³⁶ Justice Stevens maintained, however, that the right to confrontation should not be limited only to preventing practices analogous to prosecution by ex parte affidavits.²³⁷ The Court concluded that such a narrow reading of "witnesses" "would have virtually eliminated the Clause's role in restricting the admission of hearsay testimony," something the Court was unprepared to do.²³⁸ Justice Stevens noted, however, that Mark Lilly's statements were analogous to the use of ex parte affidavits because they were obtained by police with the intention of using them as evidence at a future trial.²³⁹ Accordingly, Justice Stevens concluded that admission of Mark Lilly's statements raised a Confrontation Clause issue regardless of the Court's interpretation of the Clause's language.²⁴⁰

Justice Stevens applied the first prong of the *Roberts* test to Mark Lilly's confession in Part IV and held that his statements did not fall within a firmly rooted exception to the hearsay rule.²⁴¹ Although the Commonwealth of Virginia argued that his

²³⁴ See *id.* (citing *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)).

²³⁵ 502 U.S. 346, 352 (1992).

²³⁶ See *Lilly*, 119 S. Ct. at 1894. The issue before the Court in *White* and in *California v. Green*, 399 U.S. 149 (1970), was whether the Confrontation Clause should be used only to protect against the abuses endemic to "16th- and 17th-century England: prosecuting a defendant through the presentation of ex parte affidavits, without the affiants ever being produced at trial." *White*, 502 U.S. at 352. The Court held that this narrow reading of the Confrontation Clause would "virtually eliminate [the Clause's] role in restricting the admission of hearsay testimony" as permitted by Supreme Court precedent. *Id.*

²³⁷ See *Lilly*, 119 S. Ct. at 1894..

²³⁸ *Id.* See also *White*, 502 U.S. at 352, where the Court rejected the request to narrowly interpret the Clause and instead relied on *Ohio v. Roberts*, 448 U.S. 56 (1980), where the Court focused on the reliability of the statement.

²³⁹ *Lilly*, 119 S. Ct. at 1894. This theory of the Confrontation Clause's origin has been debated and challenged. See Berger, *supra* note 9, at 568-86; Jonakait, *supra* note 9, at 77-79. Regardless of the origin, however, Mark Lilly's statements meet the criteria typically used for Confrontation Clause analysis. *Lilly*, 119 S. Ct. at 1894.

²⁴⁰ See *Lilly*, 119 S. Ct. at 1894.

²⁴¹ See *id.* at 1894-98. Justice Stevens conceded that the confession must have included statements against Mark Lilly's penal interest according to Virginia state law.

confession was admissible under the “against penal interest” exception,²⁴² Justice Stevens indicated that accomplice confessions that incriminate a defendant “fall outside the realm of those ‘hearsay exception[s] [that are] so trustworthy that adversarial testing can be expected to add little to [the statements’] reliability.’”²⁴³

The “against penal interest” exception proposed by the Commonwealth in *Lilly* is based on the presumption that a person is unlikely to lie to inculcate himself.²⁴⁴ In *Lee v. Illinois*,²⁴⁵ however, the Court determined that the simple characterization of “against penal interest” defines a class too large for Confrontation Clause analysis.²⁴⁶ Justice Stevens, therefore, discussed three common scenarios where the “against penal interest” exception is invoked in criminal cases.²⁴⁷ He stated that the exception is invoked when hearsay statements are offered into evidence:

(1) as voluntary admissions against the declarant; (2) as exculpatory evidence offered by a defendant who claims that the declarant committed, or was involved in, the offense; and (3) as evidence offered by the prosecution to establish guilt of an alleged accomplice of the declarant.²⁴⁸

According to Justice Stevens, Mark Lilly’s statements fall under the third general category, where the government seeks to introduce a statement by an accomplice that incriminates the defendant.²⁴⁹ This category presents particular problems to the Court.²⁵⁰ First, admission of these statements under the “against penal interest” exception is of “fairly recent vintage.”²⁵¹ Second, it typically includes statements that when “offered in the absence of the declarant function similarly to those used in the

See id. at 1894. He stated that the question for this Court was whether the statements were admissible under the Confrontation Clause. *See id.*

²⁴² *See id.* at 1894.

²⁴³ *See id.* at 1898.

²⁴⁴ *See id.* at 1895.

²⁴⁵ 476 U.S. 530 (1986)

²⁴⁶ *Id.* at 544 n.5.

²⁴⁷ *Lilly*, 119 S. Ct. at 1895.

²⁴⁸ *Id.*

²⁴⁹ *See id.* at 1897.

²⁵⁰ *See id.*

²⁵¹ *Id.*

ancient ex parte affidavit system."²⁵² Third, statements admitted under this category are often "inherently unreliable."²⁵³

Justice Stevens contended that the Supreme Court has viewed accomplice statements with suspicion for almost a century.²⁵⁴ In *Crawford v. United States*,²⁵⁵ the Court first stated its distrust of accomplice statements that inculcate the declarant and the defendant.²⁵⁶ It stated that statements inculcating the declarant and the defendant together "ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses."²⁵⁷ Since *Crawford*, the Court has "spoken with one voice in declaring presumptively unreliable accomplice confessions that incriminate defendants."²⁵⁸

According to Justice Stevens, the Court's holdings in *Crawford*, *Douglas*, *Lee*, *White*, and *Williamson* demonstrated its reluctance to admit into evidence presumptively unreliable statements made by accomplices that often demonstrate blame-shifting and self-exculpation.²⁵⁹ Therefore, he concluded, accomplice statements are less credible than most ordinary hearsay evidence.²⁶⁰ Accordingly, because the premise of permitting hearsay exceptions is based on the notion that certain statements "carr[y] special guarantees of credibility,"²⁶¹ accomplice statements incriminating a defendant do not meet this criterion.²⁶² Justice Stevens held, therefore, that "accomplices' confessions that inculcate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence."²⁶³

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *See id.*

²⁵⁵ 212 U.S. 183 (1909).

²⁵⁶ *See Lilly*, 119 S. Ct. at 1897.

²⁵⁷ *Id.* (quoting *Crawford*, 212 U.S. at 204) (quotations omitted).

²⁵⁸ *Id.* (quoting *Lee v. Illinois*, 476 U.S. 530, 541 (1986)). Justice Stevens proceeded to discuss the holdings in *Douglas*, *Lee*, and *Williamson* to further illustrate the consistency in the Court's opinions on this issue. *See id.* at 1897-98.

²⁵⁹ *See id.* at 1897.

²⁶⁰ *See id.* at 1898.

²⁶¹ *Id.* at 1895 (quoting *White*, 502 U.S. at 356)).

²⁶² *Id.* at 1898.

²⁶³ *Id.* at 1899. Justice Stevens asserted that this case made "explicit what was heretofore implicit." *Id.* at 1899 n.5. Justice Stevens noted that this decision reaffirmed the holdings in *Bruton v. United States*, 391 U.S. 123 (1968), *Cruz v. New York*, 481 U.S. 186 (1987), *Gray v. Maryland*, 523 U.S. 185 (1998), and *Lee v. Illinois*, 476 U.S. 530

Under the *Roberts* test, if a statement does not fall within a firmly rooted hearsay exception, it must bear particularized guarantees of trustworthiness such that adversarial testing would add little to its reliability, thus satisfying the residual admissibility test.²⁶⁴ In Part V, Justice Stevens held that it is "highly unlikely" that the government will be able to rebut the presumptive unreliability attached to accomplices' custodial confessions necessary to satisfy the *Roberts* residual admissibility test.²⁶⁵

Justice Stevens concluded that the circumstances surrounding Mark Lilly's statements did not provide a guarantee of trustworthiness that would have made a cross-examination superfluous.²⁶⁶ Justice Stevens rejected the Commonwealth's position that Mark Lilly's statements were trustworthy simply because (1) Gary Barker's testimony and the physical evidence corroborated Mark Lilly's statements; (2) the police read Mark Lilly his *Miranda* rights before he made his statements and thus Mark appreciated the seriousness of his accusation; and (3) Mark implicated himself in other serious crimes.²⁶⁷ A determination regarding whether a hearsay statement has particularized guarantees of trustworthiness is a mixed question of fact and constitutional law.²⁶⁸ Appellate courts, therefore, have a responsibility to review *de novo* lower courts' determinations of the trustworthiness of a custodial statement.²⁶⁹ The tendency for accomplices to shift or spread blame makes it difficult for prosecutors to overcome the presumptive unreliability the Court has attached to accomplice confessions.²⁷⁰

Nevertheless, Justice Stevens analyzed the circumstances surrounding Mark Lilly's statements to determine their trust-

(1986), where the court found that accomplice confessions that inculcate a defendant are not per se admissible, even if they include a statement or statements that incriminate the declarant. *See Lilly*, 119 S. Ct. at 1899.

²⁶⁴ *See Lilly*, 119 S. Ct. at 1899.

²⁶⁵ *See id.*

²⁶⁶ *See id.* at 1901.

²⁶⁷ *See id.* at 1899.

²⁶⁸ *Id.* at 1900.

²⁶⁹ *Id.*

²⁷⁰ *Id.* *See, e.g., Williamson v. United States*, 512 U.S. 594, 599-601 (1994) ("[N]on-self-inculpatory portions of a statement are presumptively unreliable."); *Lee v. Illinois*, 476 U.S. 530, 541 (1986) ("[W]hen one person accuses another of a crime under circumstances where the declarant stands to gain by inculcating another, the accusation is presumptively suspect. . .").

worthiness in light of the presumption of unreliability. First, he rejected the claim that Mark Lilly's statement was sufficiently reliable simply because the other evidence, including Barker's testimony, corroborated the story.²⁷¹ Justice Stevens argued that in *Wright*, the Court held that "hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial."²⁷²

Justice Stevens also dismissed the Commonwealth's argument that Mark Lilly's statements were more reliable because the police informed him of his Miranda rights.²⁷³ The Court concluded that knowledge of one's rights typically has very little bearing on the truth of one's statements when the declarant is being questioned about her involvement in a serious crime.²⁷⁴

Third, the Court rejected the Commonwealth's argument that Mark Lilly must have been telling the truth simply because he implicated himself in the crime spree.²⁷⁵ Justice Stevens asserted that a confession that includes self-inculping statements does not make the non-self-inculping portions more credible.²⁷⁶ In this case, specifically, the police asked leading questions and suggested to Mark Lilly that he had a motive to exculpate himself from the serious crime of capital murder.²⁷⁷ Furthermore, Mark Lilly admitted to being under the influence of drugs and alcohol during his questioning.²⁷⁸ All of these factors supported the Court's conclusion that Mark Lilly's statements were not sufficiently reliable to eliminate the need for confrontation and cross-examination.²⁷⁹

Finally, in Part VI the Court held that admitting Mark Lilly's custodial confession accusing the defendant of capital murder violated Petitioner's Confrontation Clause rights.²⁸⁰ The Court

²⁷¹ See *Lilly*, 119 S. Ct. at 1900-01.

²⁷² *Id.* at 1901 (quoting *Idaho v. Wright*, 497 U.S. 805, 822 (1990)).

²⁷³ See *id.*

²⁷⁴ *Id.*

²⁷⁵ See *id.*

²⁷⁶ *Id.*

²⁷⁷ See *id.* During Mark Lilly's taped interrogation, the police told him that he would face a life sentence unless he "broke 'family ties'" and told them what happened. *Id.* at 1892.

²⁷⁸ See *id.*

²⁷⁹ See *id.*

²⁸⁰ See *id.* at 1901.

reversed the Supreme Court of Virginia's decision and remanded the case to the Virginia courts for a harmless-error determination and for further proceedings not inconsistent with its opinion.²⁸¹

B. JUSTICE BREYER'S CONCURRENCE

Justice Breyer wrote separately, arguing that the Court should reexamine its view of the relationship between the Confrontation Clause and the hearsay rule.²⁸² Currently, a statement against a defendant must fall within a firmly rooted hearsay exception or bear particularized guarantees of trustworthiness to be admitted under the Confrontation Clause.²⁸³ This close connection between the Confrontation Clause and the hearsay rule is of relatively recent vintage, whereas the Confrontation Clause has "ancient origins that predate the hearsay rule."²⁸⁴ Justice Breyer reiterated that the right to confrontation was established originally to prevent abuses by the government against a criminal defendant on trial.²⁸⁵ This right, he argued, has been undermined by the numerous exceptions to the hearsay rule the Court has permitted under Confrontation Clause analysis.²⁸⁶

Justice Breyer asserted that the "current hearsay-based Confrontation Clause test" is "both too narrow and too broad."²⁸⁷ The test is too narrow because it permits admission of out-of-court statements that fall within a "firmly rooted hearsay excep-

²⁸¹ *See id.*

²⁸² *See id.* at 1902 (Breyer, J., concurring). Justice Breyer noted that the ACLU amicus brief, citing opinions of this Court and scholars, suggested that the relationship be reexamined. *See id.* *See also* *White v. Illinois*, 502 U.S. 346, 358 (Thomas, J., concurring in part and concurring in judgment); AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 129 (1997); Berger, *supra* note 9, at 557; Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011 (1998).

²⁸³ *Lilly*, 119 S. Ct. at 1901-02 (Breyer, J., concurring) (citing *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)).

²⁸⁴ *Id.* at 1902 (Breyer, J., concurring). Justice Breyer suggested that the Bible, Shakespeare, and sixteenth- and seventeenth-century English statutes all referenced one's right to face his or her accuser. *Id.*

²⁸⁵ *Id.* (Breyer, J., concurring). Exemplified by the abuses in Sir Walter Raleigh's trial for treason, it has been suggested that the Framers feared convictions based on out-of-court confessions by accusers who were unavailable at trial to defend their statements in open court. *See id.*

²⁸⁶ *Id.* (Breyer, J., concurring).

²⁸⁷ *Id.* (Breyer, J., concurring).

tion" regardless of their reliability.²⁸⁸ Justice Breyer used the co-conspiracy exception as an example and suggested that if the conspiracy happened to continue through the time of police questioning, the confession could be admitted without cross-examination.²⁸⁹ Criminal defendants, Breyer contended, should not be denied the right to "come face to face" with their accusers simply because of fortuitous circumstances.²⁹⁰

At the same time, Justice Breyer contended that the current test is too broad because it requires the Court to make a "constitutional issue out of the admission of any relevant hearsay statement, even if that hearsay statement is only tangentially related to the elements in dispute."²⁹¹ That is, if a statement does not fall within a firmly rooted exception, the Court must evaluate its reliability under the *Roberts* test even if the statement was made without any relation to the trial.²⁹² In this case, he argued that admission of evidence like a "scrawled note, 'Mary called,' dated many months before the crime," does not seem to violate the defendant's Confrontation Clause rights.²⁹³ It does not, however, fit into a traditional hearsay exception or demonstrate particularized guarantees of trustworthiness.²⁹⁴ Justice Breyer suggested, therefore, that the test appears to protect "trustworthiness" instead of "confrontation."²⁹⁵

Justice Breyer concluded by suggesting that reexamination of the Confrontation Clause test was not critical in this case because Mark Lilly's statements so clearly violated Petitioner's Confrontation Clause rights regardless of the Confrontation Clause analysis.²⁹⁶ Nonetheless, in Breyer's opinion, the Court's failure to reexamine the relationship between the Clause and

²⁸⁸ *Id.* (Breyer, J., concurring).

²⁸⁹ *Id.* (Breyer, J., concurring).

²⁹⁰ *Id.* (Breyer, J., concurring).

²⁹¹ *Id.* (Breyer, J., concurring).

²⁹² *See id.* at 1903 (Breyer, J., concurring).

²⁹³ *Id.* (Breyer, J., concurring).

²⁹⁴ *See id.* (Breyer, J., concurring).

²⁹⁵ *Id.* (Breyer, J., concurring). Justice Breyer reiterated Justice Scalia's dissent in *Maryland v. Craig*, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting), in which Scalia asserted that the Confrontation Clause guarantees particular trial procedures, not reliable evidence. *Id.*

²⁹⁶ *Lilly*, 119 S.Ct. at 1903 (Breyer, J., concurring).

the hearsay rules in this case "leaves the question open for another day."²⁹⁷

C. JUSTICE SCALIA'S CONCURRENCE

Justice Scalia joined parts I, II, and VI of the Court's opinion and concurred in the judgment.²⁹⁸ Justice Scalia wrote separately because he concluded the admission of Mark Lilly's statement was a "paradigmatic" violation of the Confrontation Clause.²⁹⁹ Admission of a taped confession without the right to cross-examination, Scalia argued, violated Petitioner's Sixth Amendment rights.³⁰⁰ Because one's constitutional right to confrontation extends to "extrajudicial statements insofar as they are contained in formalized testimonial material, such as . . . confessions,"³⁰¹ the "violation is clear."³⁰² Justice Scalia maintained that the Court, therefore, should remand the case solely for a harmless-error determination.³⁰³

D. JUSTICE THOMAS'S CONCURRENCE

Justice Thomas concurred in parts I and VI of the Court's opinion and concurred in the judgment.³⁰⁴ While Justice Thomas reiterated his position in *White v. Illinois*³⁰⁵ and posited that a defendant's Sixth Amendment confrontation rights implicate statements contained in confessions, he agreed with the Chief Justice that the Confrontation Clause "does not impose a 'blanket ban on government's use of accomplice statements that incriminate a defendant.'"³⁰⁶ He stated that such a ban would

²⁹⁷ See *id.* (Breyer, J., concurring).

²⁹⁸ See *id.* at 1903 (Scalia, J., concurring).

²⁹⁹ *Id.* (Scalia, J., concurring).

³⁰⁰ See *id.* (Scalia, J., concurring).

³⁰¹ *Id.* (Scalia, J., concurring) (quoting *White v. Illinois*, 502 U.S. 346, 364-65 (1992) (Thomas, J., concurring)).

³⁰² *Id.* (Scalia, J., concurring).

³⁰³ See *id.* (Scalia, J., concurring).

³⁰⁴ See *id.* (Thomas, J., concurring).

³⁰⁵ 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in judgment). Here, Justice Thomas asserted that the Confrontation Clause "extends to any witness who actually testifies at trial" and "is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial material, such as affidavits, depositions, prior testimony, or confessions." *Id.*

³⁰⁶ *Lilly*, 119 S. Ct. at 1903 (Thomas, J., concurring) (quoting *id.* at 1905 (Rehnquist, C.J., concurring)).

contradict the historical basis of the Confrontation Clause and make appellate review of admission of accomplice statements impossible.³⁰⁷ Justice Thomas also agreed with the Chief Justice's assertion that the Court should not have analyzed the reliability of the confession under the second prong of the *Roberts*³⁰⁸ test since the courts below did not address that issue.³⁰⁹

E. CHIEF JUSTICE REHNQUIST'S CONCURRENCE

The Chief Justice³¹⁰ concurred in the judgment reversing the decision of the Supreme Court of Virginia but disagreed with both of the plurality's major holdings.³¹¹ He disagreed with the Court's declarations (1) that all accomplice confessions inculcating a criminal defendant are not within a firmly rooted hearsay exception, and (2) that appellate courts should independently review the government's proffered guarantees of trustworthiness under the second prong of the *Roberts* test.³¹²

The Chief Justice argued first that Mark Lilly's statements were not against his penal interest.³¹³ The self-inculpatory portion of Mark Lilly's confession suggesting he aided and abetted the petitioner was very separate from the portion where he accused his brother of murdering DeFilippis.³¹⁴ Mark Lilly's entire statement, therefore, could not be characterized as against his penal interest.³¹⁵ Consequently, the Chief Justice contended that this case did not raise the question whether a genuinely self-inculpatory statement that also inculcates a co-defendant

³⁰⁷ *Id.* (Thomas, J., concurring).

³⁰⁸ *Ohio v. Roberts*, 448 U.S. 56, 65 (1980).

³⁰⁹ *Lilly*, 119 S. Ct. at 1903 (Thomas, J., concurring).

³¹⁰ The Chief Justice was joined by Justices O'Connor and Kennedy.

³¹¹ *Lilly*, 119 S. Ct. at 1903 (Rehnquist, C.J., concurring).

³¹² *See id.* (Rehnquist, C.J., concurring).

³¹³ *See id.* at 1904. (Rehnquist, C.J., concurring).

³¹⁴ *See id.* (Rehnquist, C.J., concurring). The Chief Justice indicated that Mark Lilly identified Ben as the "triggerman" in the following colloquy:

M.L.: I don't know, you know, dude shoots him.

G.P.: When you say "dude shoots him" which one are you calling a dude here?

M.L.: Well, Ben shoots him.

G.P.: Talking about your brother, what did he shoot him with?

M.L.: Pistol.

G.P.: How many times did he shoot him?

M.L.: I heard a couple of shots go off. I don't know how many times he hit him.

Id. at 1904 n.1 (Rehnquist, C.J., concurring)

³¹⁵ *See id.* (Rehnquist, C.J., concurring).

violates the Confrontation Clause.³¹⁶ The Chief Justice asserted that given the facts of this case, "our precedent does not compel the broad holding suggested by the plurality. . . ."³¹⁷

The Chief Justice reasoned that the cases cited by the plurality in support of its "broad holding" involved custodial confessions by accomplices taken by police for prosecution.³¹⁸ He argued that incriminating statements made during custodial confessions have always been viewed with special suspicion by the Court given the declarant's motivation to shift blame to a co-defendant.³¹⁹ The Chief Justice agreed with the Court that admission of these statements violates the right to confrontation, but there are some situations, he contended, where accomplice statements may fall under a firmly rooted hearsay exception.³²⁰

The Chief Justice suggested that certain statements, such as confessions made to family members and friends or fellow prisoners, bear sufficient indicia of reliability that would make confrontation superfluous.³²¹ Because the Court has always distinguished these cases from custodial confessions, the Chief Justice argued that the Court should continue to permit admission of such statements.³²² The Chief Justice noted, however, that Mark Lilly's statements did not fall into this category because his confession was exculpatory in nature and might have been motivated by blame-shifting.³²³ The Chief Justice asserted that he would hold only that Mark Lilly's statement cannot satisfy a firmly rooted hearsay exception and it should not be admissible without the right to confrontation.³²⁴ According to the

³¹⁶ See *id.* (Rehnquist, C.J., concurring).

³¹⁷ *Id.* (Rehnquist, C.J., concurring).

³¹⁸ *Id.* at 1904-05 (Rehnquist, C.J., concurring).

³¹⁹ *Id.* at 1905 (Rehnquist, C.J., concurring).

³²⁰ See *id.* (Rehnquist, C.J., concurring).

³²¹ See *id.* (Rehnquist, C.J., concurring). The Chief Justice argued that the plurality mischaracterized *Dutton v. Evans*, 400 U.S. 74 (1970). He asserted that *Dutton* was not an "exception" to the line of cases, but distinguishable because the confession was made to a fellow inmate, not to the police in a custodial inquiry. *Lilly*, 119 S. Ct. at 1905 (Rehnquist, C.J., concurring).

³²² See *id.* (Rehnquist, C.J., concurring).

³²³ See *id.* (Rehnquist, C.J., concurring).

³²⁴ *Id.* (Rehnquist, C.J., concurring).

Chief Justice, therefore, this case did not warrant such a broad ruling by the Court.³²⁵

Secondly, the Chief Justice argued that the Court should have remanded the case to the Supreme Court of Virginia to decide the harmless-error question and whether Mark Lilly's confession bears "particularized guarantees of trustworthiness" under *Roberts*.³²⁶ The Virginia court addressed whether the confession was admissible under state hearsay rules, but not whether it violated the Confrontation Clause.³²⁷ The Chief Justice concluded that the court below did not address the issue and thus the plurality should not have ruled on whether Mark's statements were admissible under the second prong of *Roberts*.³²⁸

Furthermore, the Chief Justice argued that in the absence of a lower court ruling as to the reliability of the statements under the Confrontation Clause, the Court cannot rationalize its ruling that appellate courts must independently review a lower court's determination of trustworthiness.³²⁹ The Chief Justice asserted that the Court should have deferred to trial court judges' determinations of reliability.³³⁰ Although a determination of reliability is a mixed question of fact and law, the Chief Justice argued that it "weighs heavily on the 'fact' side."³³¹ He maintained that an independent review of trustworthiness undermines the accuracy of a trial court judge's factual determination.³³² Appellate courts and the Supreme Court in particular, therefore, should defer to the factual findings of the trial courts that are better positioned to evaluate the reliability of hearsay statements.³³³

V. ANALYSIS

In *Lilly v. Virginia*, the Court properly held that an accomplice's confession inculcating a criminal defendant does not fall

³²⁵ See *id.* (Rehnquist, C.J., concurring).

³²⁶ *Id.* at 1905 (Rehnquist, C.J., concurring).

³²⁷ See *id.* (Rehnquist, C.J., concurring).

³²⁸ See *id.* (Rehnquist, C.J., concurring).

³²⁹ See *id.* at 1905-06 (Rehnquist, C.J., concurring).

³³⁰ See *id.* at 1906 (Rehnquist, C.J., concurring).

³³¹ *Id.* (Rehnquist, C.J., concurring).

³³² See *id.* (Rehnquist, C.J., concurring).

³³³ See *id.* (Rehnquist, C.J., concurring).

within a firmly rooted hearsay exception.³³⁴ The Court did not, however, establish a per se rule barring admission of accomplices' confessions as proposed by the ACLU.³³⁵ Because the Court decided to reaffirm the *Roberts* test in lieu of a bright line test for admissibility, Justice Stevens authorized appellate courts to independently review lower courts' determinations of trustworthiness under the residual admissibility test.³³⁶ *Lilly* will make it more difficult for the government to prosecute co-defendants, but the Court properly bolstered criminal defendants' Sixth Amendment rights against the government's interest in expedient criminal prosecution.³³⁷ Nevertheless, *Lilly* did not significantly impact the Court's Confrontation Clause jurisprudence except to affirmatively declare that accomplices' statements inculcating a criminal defendant must be carefully scrutinized for sufficient guarantees of trustworthiness.

A. DEFINING "FIRMLY ROOTED"

The Chief Justice criticized the plurality for broadly holding that accomplices' confessions inculcating a criminal defendant do not fall within a firmly rooted exception to the hearsay rule.³³⁸ The Chief Justice suggested that the holding was unnecessary in light of the facts of this case.³³⁹ This Note argues, however, that Justice Stevens' discourse served to dispel some of the confusion as to what makes certain hearsay exceptions "firmly rooted."³⁴⁰

Justice Stevens used the *Roberts* residual admissibility test to justify his holding that these "against penal interest" exceptions

³³⁴ See *id.* at 1900.

³³⁵ See Brief for the American Civil Liberties Union as Amicus Curiae in support of Petitioner at 2, *Lilly* (No. 98-5881).

³³⁶ See *id.*

³³⁷ *Lilly*, 119 S. Ct. at 1903 (Rehnquist, C.J., concurring); see also Brief of the States of Nebraska et al. as Amici Curiae in support of Respondent at 1, *Lilly* (No. 98-5881) [hereinafter States' Brief] ("The amici states are charged with the responsibility of protecting the citizens of their respective states by the capture, conviction and removal of criminals from the general civilian population.").

³³⁸ *Lilly*, 119 S. Ct. at 1903 (Rehnquist, C.J., concurring).

³³⁹ *Id.* at 1904 (Rehnquist, C.J., concurring). The Chief Justice explained that Mark Lilly's confession was exculpatory in nature and the statements incriminating his brother were "not in the least against [his] penal interest." *Id.*

³⁴⁰ See Goldman, *supra* note 9, at 3. Goldman argued that the "firmly rooted" distinction is "neither workable nor useful" and proposed that a better method for determining admissibility is a case-by-case analysis of trustworthiness. *Id.*

are not firmly rooted hearsay exceptions.³⁴¹ In so doing, Justice Stevens suggested that a statement falls within a firmly rooted exception if it has historically satisfied the residual admissibility test.³⁴² Because Confrontation Clause requirements were satisfied when the statement was made under circumstances that provided sufficient "indicia of reliability" and "the demands of the Confrontation Clause 'can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception,'"³⁴³ it is logical to conclude that a statement falls within a firmly rooted hearsay exception only if it has historically been made under circumstances that provided sufficient indicia of reliability. Statements that fall within a firmly rooted exception, therefore, have provided sufficient indicia of reliability over time to make a fact-specific determination unnecessary.³⁴⁴

Justice Stevens properly concluded that this category of "against penal interest" exceptions does not fall within a firmly rooted exception. Justice Stevens laboriously demonstrated that this category of statements lacks both historic precedent and presumptive reliability to warrant admission without adversarial testing.³⁴⁵ While the Chief Justice argued that the plurality's discussion of the various "against penal interest" categories was unnecessary, this Note contends that Justice Stevens's explanation provided lower courts with the Court's reasoning behind the first prong of the *Roberts* test and may serve to limit the use

³⁴¹ *Lilly*, 119 S. Ct. at 1895-99.

³⁴² *Id.* at 1895.

³⁴³ Goldman, *supra* note 9, at 6 (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)).

³⁴⁴ See *Lilly*, 119 S. Ct. at 1898. The Court has been criticized for not defining clearly the indicia of reliability necessary to satisfy the *Roberts* test. Although it did not explicitly propose what appropriate "indicia" would be, it discussed at length some of the factors necessary for such an inquiry, such as history of the exception, length of use, and judicial precedent. See Goldman, *supra* note 9, at 2-3. The ACLU argued, however, that "trustworthiness" must be better defined. See Motion For Leave to File and Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Virginia, In Support of Petitioner at 18, *Lilly* (No. 98-5881) [hereinafter ACLU's Brief]. As it stands, it provides insufficient guidance as to what is or is not admissible. See *id.*

³⁴⁵ *Lilly*, 119 S. Ct. at 1894-98. Justice Stevens explained that the category is of "quite recent vintage" and the Court has previously declared that accomplice statements are "inherently unreliable." *Id.* at 1897; for further discussion, see *supra* Part IV.A.

of "firmly rooted" as justification for admission of unreliable statements in criminal prosecution.³⁴⁶

B. REEXAMINING THE RELATIONSHIP BETWEEN THE
CONFRONTATION CLAUSE AND APPLICABLE HEARSAY EXCEPTIONS

Lilly provided the Court with another opportunity to reexamine its interpretation of the relationship between the Confrontation Clause and the hearsay rule.³⁴⁷ The Confrontation Clause and the hearsay rule are similar in that both exclude from evidence certain out-of-court statements, but not every statement "admissible under all judicially or statutorily created hearsay exceptions will necessarily comply with the requirements of confrontation."³⁴⁸ Nevertheless, the Court has, in effect, merged the two in its Confrontation Clause jurisprudence.³⁴⁹ As a result, the Court has been criticized both for denigrating the right to confrontation and constitutionalizing evidentiary rules.³⁵⁰

In his concurrence, Justice Breyer argued that the plurality should have reexamined the relationship between the Confrontation Clause and the hearsay rule.³⁵¹ This Note argues, however, that Justice Stevens adopted much of the ACLU's argument for greater protection of Sixth Amendment rights without jeopardizing the public interest in prosecuting criminals.³⁵² The ACLU argued that the Court should adopt a per se rule for the exclusion of certain accomplice statements³⁵³ while sixteen state Attorneys General argued that the hearsay rule should be broadened to provide triers of fact with the maximum amount of evidence possible.³⁵⁴

³⁴⁶ See Goldman, *supra* note 9, at 13; see also *United States v. Valenzuela*, 53 F. Supp. 2d 992, 999 (N.D. Ill. 1999) (refusing to admit inculpatory statement because the government failed to establish the trustworthiness of the statement).

³⁴⁷ *Lilly*, 119 S. Ct. at 1902 (Breyer, J., concurring).

³⁴⁸ Goldman, *supra* note 9, at 4-5.

³⁴⁹ See ACLU's Brief at 13, *Lilly* (No. 98-5881).

³⁵⁰ See *id.* at 2; see also *White v. Illinois*, 502 U.S. 346, 366 (1992) (Thomas, J., concurring); Berger, *supra* note 9, at 559.

³⁵¹ *Lilly*, 119 S. Ct. at 1903 (Breyer, J., concurring).

³⁵² See generally ACLU's Brief at 19, *Lilly* (No. 98-5881); States' Brief at 1, *Lilly* (No. 98-5881).

³⁵³ ACLU's Brief at 19, *Lilly* (No. 98-5881).

³⁵⁴ States' Brief at 2, *Lilly* (No. 98-5881).

The ACLU made a historical, textual, and prudential argument for the adoption of a per se rule that states certain kinds of confessions never satisfy the Confrontation Clause.³⁵⁵ The ACLU first explained the historical premise of the Confrontation Clause.³⁵⁶ The ACLU argued that the Framers did not intend the right to confrontation to be qualified by the Court's evaluation of the witness' statement.³⁵⁷ The ACLU also asserted that the Confrontation Clause should be analyzed within the context of the Sixth Amendment as a whole.³⁵⁸ Confrontation is not purely an evidentiary fact-finding tool, the ACLU contended, but an integral piece of the general protections afforded criminal defendants.³⁵⁹ Rights enunciated in the Sixth Amendment, such as the rights to an impartial jury, to obtain witnesses in one's favor, and to have defense counsel, suggest that fact-finding was not the Framers' primary concern.³⁶⁰ The ACLU asserted that the Supreme Court had lost sight of the historical and textual basis for the Confrontation Clause and had focused too heavily on its fact-finding role.³⁶¹ The ACLU proposed that the Court reestablish the constitutional protections of the Confrontation Clause as intended by the Framers and significantly limit the permissible exceptions in an effort to "reinvigorate the clause."³⁶²

The ACLU argued the Confrontation Clause needs reinvigorating from a prudential standpoint as well.³⁶³ The ACLU argued that a per se exclusion of accomplice statements that

³⁵⁵ ACLU's Brief at 19-28, *Lilly* (No. 98-5881).

³⁵⁶ See *id.* at 3-11. The ACLU reiterated the Sir Walter Raleigh story, see *supra* note 9. It then explained why the Framers included the Confrontation Clause in the Sixth Amendment. *Id.* at 10; see also *supra* Part II.

³⁵⁷ ACLU's Brief at 4, *Lilly* (No. 98-5881).

³⁵⁸ *Id.* at 14.

³⁵⁹ *Id.*

³⁶⁰ See *id.* The ACLU contended that the Court has not taken similar liberties with other Sixth Amendment rights. *Id.* For example, one's right to a jury trial is not waived simply because a judge might better understand complex legal issues. See *id.* Analogously, a defendant's right to an attorney is never waived just because capable counsel might interfere with the prosecution's case by making objections and challenging the admission of evidence. See *id.*

³⁶¹ *Id.* at 11-12. The ACLU blamed the change on Wigmore who "subordinated the confrontation right to hearsay." *Id.* at 12 (citing 5 WIGMORE, EVIDENCE ch. 47 (Chadbourn rev. 1974) ("The Hearsay Rule Satisfied by Confrontation")).

³⁶² *Id.* at 1.

³⁶³ *Id.* at 23-24.

incriminate a defendant would provide greater consistency in criminal prosecution.³⁶⁴ The current test focuses on trustworthiness and affords courts too much discretion in determining admissibility since the Court has not instructed lower courts as to what factors to consider when making a trustworthiness determination.³⁶⁵ The ACLU also contended that a per se rule would serve as a check on police power.³⁶⁶ The right to confrontation protects criminal defendants from admission of statements that the government might have obtained through coercion and thus permits the public to scrutinize the government's process in obtaining confessions and accusatory statements.³⁶⁷ Without confrontation, the government "has the huge advantage of choosing whether to offer the contents of the statement through the testimony of the often discreditable declarant, or through the testimony of a presumptively upright person involved in law enforcement"³⁶⁸ This practice, the ACLU argued, mirrors the abuses prevalent in sixteenth- and seventeenth-century English criminal prosecution.³⁶⁹

The National Association of Criminal Defense Lawyers³⁷⁰ suggested that this practice is especially endemic in states with

³⁶⁴ *Id.* at 19 (asserting that the "trustworthiness view of confrontation" affords courts "enormous, virtually unreviewable, discretion" in determining admissibility of hearsay evidence). *But cf.* Brief Amicus Curiae for the Criminal Justice Legal Foundation ("CJLF") in support of Respondent at 6, *Lilly* (No. 98-5881) (asserting that jurors are sufficiently savvy to recognize that accomplices' statements are not as reliable as other out-of-court statements). This Note contends that the CJLF's argument contradicts the *Bruton* rule which states that jury limiting instructions are equivalent to no instructions, since the jury is likely to consider the evidence regardless of the instructions. *See Bruton v. United States*, 391 U.S. 123, 137 (1968); *supra* Part II.

³⁶⁵ *See* ACLU's Brief at 19, *Lilly* (No. 98-5881).

³⁶⁶ *Id.* at 23.

³⁶⁷ *See id.*

³⁶⁸ *Id.*

³⁶⁹ *See id.* at 22-23; *see also* Berger, *supra* note 9, at 609.

³⁷⁰ *See* Motion for Leave to File Brief Amici Curiae and Brief of National Association of Criminal Defense Lawyers et al. as Amici Curiae in support of Petitioner at 1, *Lilly* (No. 98-5881) [hereinafter NACDL's Brief]. The Brief was filed by the National Association of Criminal Defense Lawyers ("NACDL"), an organization that seeks to defend individual liberties guaranteed by the Bill of Rights, the Virginia College of Criminal Defense Attorneys, NACDL's Virginia state affiliate, and the Virginia Capital Case Clearinghouse, a clinical program at Washington and Lee University committed to making the right to effective assistance of counsel meaningful in Virginia capital cases.

sentencing laws like Virginia's "triggerman" statute.³⁷¹ In cases where the government lacks concrete evidence to prosecute one defendant for murder, co-participants have a strong incentive to confess early and blame a cohort for the actual murder.³⁷² Because the government faces significant societal pressure to convict, especially in heinous crimes like the murder of DeFilippis in *Lilly*, the prosecution has strong incentive to believe the declarant.³⁷³ In such cases, however, the prosecution prefers to protect the declarant from potentially damaging cross-examination.³⁷⁴ At Petitioner's post-sentencing hearing, for example, Mark Lilly recanted his statements to the police and claimed that he lied during his custodial confession.³⁷⁵ Had Mark Lilly been cross-examined at Petitioner's trial, he might have admitted to the jury that he lied to police, thus undermining the prosecution's entire case.

Despite the ACLU's strong argument for a per se rule barring admission of accomplices' confessions, the Court stated over a century ago in *Mattox* that the Framers intended there to be exceptions to the Confrontation Clause when warranted by

³⁷¹ See *id.* at 13. Petitioner was convicted of capital murder under VA. CODE ANN. § 18.2-31(4) (Michie Supp. 1999). The Supreme Court of Virginia interpreted the code provision in *Coppola v. Commonwealth*, 257 S.E.2d 797, 806 (Va. 1979), and held that "[e]xcept in the case of murder for hire, only the immediate perpetrator of a homicide, the one who fired the fatal shot, and not an accessory before the fact or a principal in the second degree, may be convicted of capital murder under the provisions of § 18.2-31." A defendant convicted of capital murder in Virginia faces either the death sentence or life in prison without the possibility of parole. VA. CODE ANN. § 19.2-164.4 (Michie Supp. 1998) (cited in NACDL's Brief at 7 n.6, *Lilly* (No.98-5881)).

³⁷² See NACDL's Brief at 12, *Lilly* (No. 98-5881).

³⁷³ See *id.* at 13.

³⁷⁴ See *id.* Another Virginia case analogous to *Lilly* illustrated the value of cross-examination. See *id.* In 1997 two Virginia men, Ceparano and Cressell, were charged with the murder of G.P. Johnson. See *id.* at 13-14 (citing *Commonwealth v. Ceparano*, Nos. 97-186, 97-187 (Cir. Ct. Grayson County 1997); *Commonwealth v. Cressell*, No. 98-73 (Cir. Ct. Grayson County 1997)). Cressell was charged with capital murder and Ceparano entered into a plea agreement with the government to testify that Cressell murdered Johnson. See *id.* at 13. After an intense two-hour cross-examination of the accuser, the jury returned a verdict downgrading the defendant's conviction to first degree murder, sparing him from a death sentence. See *id.* at 14. Had the accomplice's confession been admitted without subjecting him to confrontation and cross-examination, the jury might not have drawn the same conclusion. Thus, admission of incriminating statements without the right to cross-examination interferes with the truthfinding process. See *id.*

³⁷⁵ See Petitioner's Brief at 7, *Lilly* (No. 98-5881).

public policy.³⁷⁶ Since then, the Court has repeatedly refused to create a *per se* rule excluding hearsay statements, choosing instead to rely on a trustworthiness determination.³⁷⁷ Accordingly, Justice Stevens utilized the ACLU's argument to the fullest extent possible without jeopardizing the government's ability to prosecute criminals and utilize permissible exceptions to the hearsay rule. There are times when even accomplice statements, which the Court has deemed to be presumptively unreliable, are made in circumstances that guarantee trustworthiness.³⁷⁸

The sixteen states writing as *Amici Curiae* in support of Virginia argued that these particular circumstances actually warrant greater leniency in the hearsay rule.³⁷⁹ The states argued that the "search for truth," arguably the goal of every trial and the premise on which the Confrontation Clause was based, can only be realized by providing the trier of fact with all the relevant information available.³⁸⁰ This Note suggests that Justice Stevens recognized the government's need to introduce as much *reliable* evidence as possible in a criminal prosecution and therefore reaffirmed and explained the *Roberts* residual admissibility test. Had Justice Stevens adopted the states' position and *broadened* permissible hearsay exceptions, the Court would have threatened the constitutional right to confrontation.

This Note recognizes that the Court's ruling will make it more difficult to prosecute in cases with multiple defendants because custodial confessions cannot be easily admitted into evidence. *Lilly*, however, permits prosecutors to introduce accomplice statements so long as they can overcome the presumption of unreliability under careful scrutiny by the court by demonstrating sufficient guarantees of trustworthiness.³⁸¹

While this Note agrees with the states that fact-finding and truthseeking are critical to a fair trial, the plurality properly pro-

³⁷⁶ See *Mattox v. United States*, 156 U.S. 237, 243 (1895); see also *supra* Part II.

³⁷⁷ See ACLU's Brief at 19, *Lilly* (No. 98-5881); see also *White v. Illinois*, 502 U.S. 346, 352 (1992) (citing *Idaho v. Wright*, 497 U.S. 805, 814 (1990); *Roberts v. Ohio*, 448 U.S. 56, 68 n.9 (1980)).

³⁷⁸ See *Dutton v. Evans*, 400 U.S. 74 (1970) (holding that the admission of an accomplice's confession to a fellow prison inmate did not violate the defendant's right to confrontation).

³⁷⁹ States' Brief at 2, *Lilly* (No. 98-5881).

³⁸⁰ *Id.*

³⁸¹ *Id.* at 3.

tected criminal defendants' Sixth Amendment rights. Accordingly, the Court rejected the per se rule against the admission of accomplices' statements incriminating a defendant.³⁸² Unfortunately, however, the Court provided little direction to courts as to what is or is not trustworthy or what are "indicia of reliability."³⁸³ Although the Court is properly committed to "steer[ing] a middle course,"³⁸⁴ a stronger ruling that more clearly delineates the distinctions between the Confrontation Clause and admissible hearsay statements would provide better direction to courts resulting in more consistency while simultaneously protecting criminal defendants' constitutional guarantees.

C. INDEPENDENT REVIEW

In light of the plurality's decision not to establish a per se rule regarding admission of accomplice statements under the Confrontation Clause, Justice Stevens properly gave appellate courts authority to review determinations of reliability *de novo*.³⁸⁵

Although determinations of reliability are mixed questions of law and fact,³⁸⁶ the Virginia prosecutor argued, and Chief Justice Rehnquist agreed, that the determination is very "fact-intensive" and should be left to a jury to evaluate.³⁸⁷ The Chief Justice contended that the plurality's decision to give appellate courts the authorization to review *de novo* undermines the power and discretion of the trial courts.³⁸⁸ Commentators suggested, however, that had the Court agreed with the Commonwealth and deferred to the lower court's determination of whether the statement was self-inculpatory, "*Lilly* [would have] prove[d] a significant boon to prosecutors" because no one

³⁸² *Lilly*, 119 S. Ct. at 1899 n.5.

³⁸³ The Court did not present a list of factors in *Lilly* or in its precedent cases for lower courts to consider in determining admissibility of hearsay statements. Stanley Goldman contended that the Court's failure to discuss factors that suggest reliability "is a major flaw in the Supreme Court's attempt to set forth a definitive standard for determining which hearsay statement can be admitted without violating the confrontation clause." Goldman, *supra* note 9, at 14.

³⁸⁴ *Ohio v. Roberts*, 448 U.S. 56, 68 n.9 (1980).

³⁸⁵ *Lilly*, 119 S. Ct. at 1903 (Thomas, J., concurring); *id.* at 1906 (Rehnquist, C.J., concurring).

³⁸⁶ See *id.* at 1906 (Rehnquist, C.J., concurring).

³⁸⁷ Williams, *supra* note 131, at 36.

³⁸⁸ *Lilly*, 119 S. Ct. at 1906 (Rehnquist, C.J., concurring).

could review admission of questionable hearsay statements.³⁸⁹ Without independent review by appellate courts, the commentators said, "prosecutors everywhere w[ould have] really push[ed] it,"³⁹⁰ and thus jeopardized the protections afforded criminal defendants by the Confrontation Clause.³⁹¹

Appellate review, therefore, serves as check on prosecutorial power.³⁹² Independent review protects criminal defendants from trial courts' broad discretion to admit hearsay statements pursuant to the second prong of the *Roberts* test.³⁹³ As Justice Stevens suggested, "independent review is . . . necessary . . . to maintain control of, and to clarify the legal principles' governing the factual circumstances necessary to satisfy the protections of the Bill of Rights."³⁹⁴

D. THE IMPLICATION OF *LILLY* ON FUTURE ACCOMPLICES AND CO-DEFENDANTS

Lilly did not significantly change the Court's Confrontation Clause jurisprudence. While the plurality explicitly stated that accomplice statements inculpatory criminal defendant did not fall within a firmly rooted exception,³⁹⁵ the Court had already established that, albeit implicitly.³⁹⁶ Furthermore, *Lilly* simply reiterated the Court's prior finding that accomplices' confessions taken by the government for the use at trial are presumptively unreliable.³⁹⁷ The combination of the two provisions, however, raised the burden for prosecutors to introduce such statements.³⁹⁸ Nevertheless, the Court did not completely bar ac-

³⁸⁹ See Williams, *supra* note 131, at 36.

³⁹⁰ *Id.* (quoting Mark Dobson, a Nova University School of law professor); see also ACLU's Brief at 16, *Lilly* (No. 98-5881) (arguing that "lower courts [have] enormous leeway to admit hearsay against a criminal defendant, subject to correction on in the rare instance in which this Court grants certiorari").

³⁹¹ See Williams, *supra* note 131, at 36.

³⁹² See ACLU's Brief at 17, *Lilly* (No. 98-5881).

³⁹³ See *id.* at 19.

³⁹⁴ *Lilly v. Virginia*, 119 S. Ct. 1887, 1900 (1999) (quoting *Ornelas v. United States*, 517 U.S. 690, 697 (1996)).

³⁹⁵ *Id.* at 1899.

³⁹⁶ *Id.* at 1899 n.5 (where the Court notes that several of its previous decisions "were all premised, explicitly or implicitly, on the principle that accomplice confessions that inculcate a criminal defendant . . . fall outside a firmly rooted hearsay exception . . .").

³⁹⁷ *Id.* at 1900.

³⁹⁸ See *id.*

complice statements from admission as suggested by the Chief Justice and Justice Thomas.³⁹⁹ So long as the circumstances surrounding a statement bear particularized guarantees of trustworthiness, the prosecution can rebut the presumption of unreliability and introduce an accomplice's statement.⁴⁰⁰ Thus, *Lilly* made it more difficult to admit accomplices' confessions, but it did not make it impossible.⁴⁰¹

Since the Supreme Court announced *Lilly v. Virginia* on June 10, 1999, several federal courts have cited *Lilly* in Confrontation Clause cases.⁴⁰² In *United States v. Valenzuela*, for example, the district court excluded a statement made by a co-defendant in which the defendant was accused of being the "ringleader" of a drug operation.⁴⁰³ Its decision, reached before *Lilly*, was consistent with the Supreme Court's holding.⁴⁰⁴ In an addendum to the *Valenzuela* opinion, Judge Castillo praised the *Lilly* decision for its "scholarly review of the constitutional dangers inherent in the government's use of an unavailable accomplice's out-of-court statements."⁴⁰⁵ The court expressed its hope that the reader of *Lilly* will similarly scrutinize the admission of accomplice statements because "the government and the interests of justice are always better served by live accomplice testimony that can be tested by in-court cross examination and, thus, appropriately evaluated by the trier of fact."⁴⁰⁶

Other courts, however, have not demonstrated the same commitment to Justice Stevens' opinion.⁴⁰⁷ Several simply cited the "*Lilly* rule" holding that accomplice statements inculcating a defendant do not fall within a firmly rooted hearsay excep-

³⁹⁹ See *id.* But see *id.* at 1905 (Rehnquist, C.J., concurring); *id.* at 1903 (Thomas, J., concurring).

⁴⁰⁰ See *id.*

⁴⁰¹ *Id.* at 1899 n.5.

⁴⁰² See, e.g., *United States v. Gallego*, 191 F.3d 156 (2nd. Cir. 1999); *United States v. Petrillo*, 60 F. Supp. 2d 217 (S.D.N.Y. 1999); *United States v. Valenzuela*, 53 F. Supp. 2d. 992 (N.D. Ill. 1999); *State v. Gonzalez*, 989 P.2d 419 (N.M. 1999).

⁴⁰³ *Valenzuela*, 53 F. Supp. 2d. at 993.

⁴⁰⁴ *Id.* at 999. Judge Castillo also noted that the *Venezuela* decision "is in full conformity with the *Lilly* holding that, under circumstances similar to those in this case, an unavailable co-defendant's confession to police that incriminates the defendant is inherently suspect and, therefore, inadmissible as a declaration against interest." *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.*

⁴⁰⁷ See *Gallego*, 191 F.3d 156; *United States v. Lopez-Garcia*, 1999 WL 707783 (10th Cir. Aug. 18, 1999); *Petrillo*, 60 F. Supp. 2d 217; *Gonzales*, 989 P.2d 419.

tion.⁴⁰⁸ In fact, the Southern District of New York suggested in *United States v. Petrillo* that *Lilly* did little more than place a "gloss" on prior law.⁴⁰⁹ This Note contends that while the plurality carefully balanced the competing interests of defendants' rights and prosecutorial efficiency, its decision not to create a bright line rule for admissibility of accomplice statements inculcating a defendant makes it likely that the Court has not heard its last case regarding the interplay of against penal interest exceptions and the Confrontation Clause.⁴¹⁰

E. IMPACT OF THE PLURALITY OPINION ON FUTURE LITIGATION

Finally, it should be noted that while the Court's plurality decision left the door open for the government to push for a more lenient rule for the admission of accomplices' statements, the concurring opinions did not provide much reasoning on which future litigants can rely.⁴¹¹ Justice Breyer argued that the Court should have reexamined the relationship between the Confrontation Clause and the hearsay rule to alleviate some of the confusion regarding admissibility of hearsay evidence under the Clause.⁴¹² Justice Scalia, on the other hand, asserted that the facts so clearly indicated a Confrontation Clause violation that no further discussion was warranted by the Court.⁴¹³ Chief Justice Rehnquist and Justice Thomas, however, contended that the plurality moved too far from the "middle ground" on which the Court had rested.⁴¹⁴ Although Justice Stevens did not establish a "blanket ban" on the admission of all accomplice state-

⁴⁰⁸ See, e.g., *Gallego*, 191 F.3d at 167; *Lopez-Garcia*, 1999 WL 707783, at *3; *Petrillo*, 60 F. Supp. 2d at 218; *Gonzales*, 989 P.2d at 427 (all citing to *Lilly v. Virginia*, 119 S. Ct. 1887 (1999)).

⁴⁰⁹ *Petrillo*, 60 F. Supp. 2d at 218.

⁴¹⁰ Because the Court gave appellate courts authorization to independently review determinations of trustworthiness, the defendant in *Gonzales*, 989 P.2d 417 might petition the Court for certiorari. In this case, the Supreme Court of New Mexico distinguished *Lilly* and held that the accomplice's statement made during casual conversation with an acquaintance bore sufficient guarantees of trustworthiness to overcome the presumption of unreliability. *Id.* at 422. Contrary to the concerns voiced by Chief Justice Rehnquist and Justice Thomas, the *Gonzales* holding illustrated that on occasion a court will decide an accomplice statement inculcating a criminal defendant is trustworthy and should be admitted.

⁴¹¹ *Lilly v. Virginia*, 119 S. Ct. 1187, 1901-06 (1999).

⁴¹² *Id.* at 1901-03 (Breyer, J., concurring).

⁴¹³ *Id.* at 1903 (Scalia, J., concurring).

⁴¹⁴ *Id.* at 1904 (Rehnquist, C.J., concurring); *id.* at 1903 (Thomas, J., concurring).

ments incriminating a defendant as the Chief Justice and Justice Thomas suggested, the plurality did make it more difficult for prosecutors to introduce such statements into evidence.⁴¹⁵ Justice Thomas and the Chief Justice apparently feared the plurality moved too close to a “per se rule” and argued that the facts of this case did not warrant the broad holding.⁴¹⁶

With the exception of Justice Breyer, therefore, the concurring justices based their opinions on the specific facts of this case. As Justice Breyer anticipated, therefore, *Lilly* left “the question [of the current connection between the Confrontation Clause and the hearsay rule] open for another day.”

VI. CONCLUSION

In *Lilly v. Virginia*, the Court properly held that accomplices’ statements that inculcate a criminal defendant are not within a firmly rooted hearsay exception.⁴¹⁷ Furthermore, the Court stated that the circumstances surrounding accomplice custodial confessions incriminating a defendant are presumptively unreliable.⁴¹⁸ Thus, the prosecution must prove that the circumstances in which the statements were made bear sufficient guarantees of trustworthiness to make cross-examination unnecessary.⁴¹⁹ The Court also authorized appellate courts to independently review the government’s “particularized guarantees of trustworthiness” when deciding if admission of a declarant’s out-of-court statement violates the Confrontation Clause.⁴²⁰

The plurality’s explanation of the rationale behind the “firmly rooted” hearsay exception served to clarify some of the confusion about admissibility of hearsay exceptions. The Court properly reaffirmed the *Roberts* test, which permits courts to admit such statements if they can overcome the presumption of unreliability and demonstrate sufficient trustworthiness so as to make confrontation and cross-examination unnecessary, but failed to articulate what factors courts should consider in determining trustworthiness. Because *Lilly* did not establish a per se rule excluding accomplice statements that inculcate a crimi-

⁴¹⁵ *Id.* at 1900.

⁴¹⁶ *Id.* at 1904 (Rehnquist, C.J., concurring).

⁴¹⁷ *Id.* at 1899.

⁴¹⁸ *Id.* at 1900.

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

nal defendant, the Court authorized appellate courts to review the determinations of trustworthiness to ensure protection of the defendant's Sixth Amendment rights.

While *Lilly* provided an excellent discussion of the constitutional dangers inherent in admitting an accomplice's custodial confession, it is unlikely that the Court has heard its last case on the admission of hearsay evidence under a Confrontation Clause analysis.

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