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Lilly v. Virginia: Answering the *Williamson* Question—Is the Statement Against Penal Interest Exception "Firmly Rooted" Under Confrontation Clause Analysis?

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Lilly v. Virginia: Answering the *Williamson* Question—Is the Statement Against Penal Interest Exception "Firmly Rooted" Under Confrontation Clause Analysis?

In *Lilly v. Virginia*[1] the United States Supreme Court reaffirmed the principle that the statement against penal interest exception to the hearsay rule is too large a class for effective Confrontation Clause[2] analysis. However, the Court held that confessional statements made by an accomplice that incriminate a criminal defendant, a subcategory of this exception, are not within a "firmly rooted" exception as recognized under the Confrontation Clause.[3]

I. FACTUAL BACKGROUND

On December 4, 1995, Petitioner Benjamin Lilly, his brother Mark Lilly, and Gary Barker broke into a friend's home and stole a safe, some liquor, and three loaded guns. The next day they robbed a country store and abducted Alex DeFilippis. The three men then drove to a deserted location where one of them shot and killed DeFilippis. They then took DeFilippis's car and committed two more robberies. Late that evening, the police arrested all three men.[4]

After taking them into custody, the police questioned each of the three men separately. All three stories differed, but Mark and Barker stated that petitioner shot DeFilippis. Upon further questioning, Mark admitted that he participated in the burglary and robberies and also admitted he was present at the homicide. However, Mark maintained that petitioner was the one who killed DeFilippis. Mark's statements were recorded on tape.[5]

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1. 119 S. Ct 1887 (1999) (plurality opinion).
2. "In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with witnesses against him . . . ." U.S. CONST. amend. VI.
3. 119 S. Ct. at 1899.
4. *Id.* at 1892.
5. *Id.*

The Commonwealth of Virginia charged petitioner with several offenses, including DeFilippis' murder. In the Circuit Court of Montgomery County, petitioner was tried separately from Mark and Barker. During petitioner's trial, the Commonwealth called Mark as a witness to testify as to what he said during police questioning, but Mark invoked his Fifth Amendment privilege against self-incrimination. The Commonwealth then sought to introduce Mark's recorded confessions as statements against penal interest of an unavailable witness, but petitioner objected to their admissibility. Specifically, petitioner argued that Mark's statements were not actually statements against penal interest because the recorded statements shifted criminal liability to petitioner. Objecting further, petitioner argued that the admission of the tape recordings would violate his Sixth Amendment right to confront an accusing witness. Over petitioner's objection, the court admitted the recorded statements. Petitioner was found guilty of robbery and several other offenses for which the court imposed two life sentences plus twenty-seven years. Having also been found guilty for the capital murder of Alex DeFilippis, petitioner was sentenced to death.[6]

The Supreme Court of Virginia affirmed petitioner's convictions and sentences.[7] In its preliminary analysis, the court first concluded that Mark was an unavailable declarant.[8] The court then turned to the reliability issue and held that Mark's statements were sufficiently reliable to fall within the exception to the Virginia hearsay rule.[9] Accordingly, the court held that petitioner's Confrontation Clause right was not violated because the statements against penal interest exception is a firmly rooted exception to the hearsay rule.[10] Lastly, to the extent that Mark's statements shifted criminal liability to others, the court held that this "goes to the weight the jury could assign to them and not to their admissibility."[11] Concerned that the Commonwealth's decision significantly departed from Confrontation Clause jurisprudence, the United States Supreme Court granted certiorari,[12] reversed the Virginia Supreme Court's decision, and remanded for further proceedings.[13]

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6. *Id.* at 1892-93.

7. Lilly v. Commonwealth, 255 Va. 558, 580, 499 S.E.2d 522, 537-38 (1999).

8. *Id.* at 573, 499 S.E.2d at 533 (citing Boney v. Commonwealth, 16 Va. App. 638, 643, 432 S.E.2d 7, 10 (1993) ("The law is firmly established in Virginia that a declarant is unavailable if the declarant invokes the Fifth Amendment privilege to remain silent.")).

9. *Id.* at 574, 499 S.E.2d at 534.

10. *Id.*

11. *Id.*

12. Lilly v. Virginia, 119 S. Ct. 443 (1998).

13. *Lilly*, 119 S. Ct. at 1901.

II. LEGAL BACKGROUND

The interplay between the constitutional requirements set forth in the Confrontation Clause and the admissibility of evidence was first recognized in *Mattox v. United States*.[14] In *Mattox* the Court held that the Confrontation Clause's primary purpose was to prevent depositions and ex parte affidavits from being used against the accused in the place of in-person cross examination.[15] At the most fundamental level, the Confrontation Clause compels the witness to "stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."[16] Consistent with the purpose behind the Bill of Rights was the possibility that the Framers were attempting "to guard . . . society against the oppression of its rulers" in drafting the Confrontation Clause.[17] Although the right to confrontation is explicit in the express terms of the Constitution, the Framers "'obviously intended to . . . respec[t]'" exceptions to this right.[18] Accordingly, much of the Confrontation Clause jurisprudence has focused on when such exceptions are constitutionally proper.

Seventy years after *Mattox*, the Court in *Pointer v. Texas*[19] held that an accused's Sixth Amendment right to confront witnesses against him is a fundamental right and therefore made this right obligatory on the states through the Fourteenth Amendment.[20] Two years prior to *Pointer*, the Court in *Gideon v. Wainwright*[21] had similarly incorporated the Sixth Amendment's guarantee of the right to counsel under the Fourteenth Amendment.[22]

In 1968 the Supreme Court decided the seminal case involving the confessional testimony of an accomplice against the accused. In *Bruton v. United States*,[23] the Court held that a codefendant's own confession

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14. 156 U.S. 237 (1895). The Court explained that "[w]e have allowed the admission of statements falling within a firmly rooted hearsay exception since the Court's recognition in *Mattox* . . ." *Lilly*, 119 S. Ct. at 1894.

15. 156 U.S. at 259.

16. *Id.* at 242-43.

17. Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal For a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 560 (1992) (quoting THE FEDERALIST NO. 51, 320, 323 (James Madison) (Clinton Rossiter ed., 1961).

18. *Lilly*, 119 S. Ct. at 1894 (quoting *Mattox*, 156 U.S. at 243).

19. 380 U.S. 400 (1965).

20. *Id.* at 403.

21. 372 U.S. 335 (1963).

22. *Id.* at 342-43.

23. 391 U.S. 123 (1968).

was admissible against him but not against the other codefendant.[24] The two codefendants, Bruton and Evans, were tried together for robbery. During the trial, a witness testified that Evans had told him that Evans and Bruton had committed the robbery. The jury was instructed that this statement could be used against Evans, the hearsay declarant, but it could not be used against Bruton. Despite these instructions, the United States Supreme Court held Bruton's right to confront the witness had been compromised, and reversed.[25]

Two years later the Court analyzed the relationship between state hearsay rules and the Confrontation Clause. Reversing the California Supreme Court, the United States Supreme Court in *California v. Green*[26] held that although a state may have stringent requirements to satisfy a hearsay exception, evidence may nevertheless satisfy the Confrontation Clause even if it fails state requirements.[27] In *Green* the California rules of evidence prohibited the admission of prior inconsistent statements even when the prior statement was subjected to cross examination under oath. Though a minority approach, this was a permissible choice by the California legislature. However, the Court concluded that nothing in "the Confrontation Clause requires excluding the out-of-court statements of a witness who is available and testifying at trial."[28] Recognizing an overlap in analysis between the Confrontation Clause and hearsay rules because both are "designed to protect similar values," the Court re-emphasized that it has never established a complete overlap.[29]

In *Ohio v. Roberts*,[30] the Court sought to formalize the Confrontation Clause and the hearsay rule analytical interplay and in doing so, set forth the test that remains in effect today.[31] Writing for the majority, Justice Blackmun concluded that the Confrontation Clause operates in two ways under a hearsay analysis.[32] First, it establishes a "rule of

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24. *Id.* at 126.
25. *Id.*
26. 399 U.S. 149 (1970).
27. *Id.* at 153.
28. *Id.* at 161.
29. *Id.* at 155. However, one commentator has argued that the Supreme Court has "constitutionalized 804(b)(3) of the Federal Rules of Evidence" by reading the requirements under the Confrontation Clause and admission of statements against interest as being equivalent. John J. Capowski, *Statements Against Interest, Reliability, and the Confrontation Clause*, 28 SETON HALL L. REV. 471, 471 (1997).
30. 448 U.S. 56 (1980).
31. *Id.* at 65.
32. *Id.*

necessity."[33] Under this necessity rule, the prosecution must first either produce the declarant or demonstrate his or her unavailability.[34] As long as the prosecution can show a good faith attempt was made to secure the declarant's presence at trial, this standard is usually satisfied.[35] However, as the Court noted, the prosecution is not always required to demonstrate unavailability.[36]

Once the unavailability of the declarant is established, the Confrontation Clause operates under the reliability test.[37] The reliability aspect is further divided into a two prong test. Under the first prong, hearsay evidence will only be admitted over a Confrontation Clause objection when the evidence falls into a firmly rooted hearsay exception.[38] No further inquiry into reliability is needed when the evidence "falls within a firmly rooted hearsay exception."[39] The second prong, however, does not create such a per se rule. Under this prong, only evidence "showing particularized guarantees of trustworthiness" will be admitted in satisfaction of the Confrontation Clause.[40]

In applying the firmly rooted prong of the reliability test, the Court has taken great care in defining a firmly rooted exception, primarily because of the per se nature of this prong. Nevertheless, the Court has found certain hearsay exceptions that "rest upon such solid foundations that admission of virtually any evidence" under those circumstances would satisfy the Confrontation Clause.[41] Dying declarations appeared to be the first exception of this nature recognized by the Court.[42] Prior cross-examined testimony, like the testimony in *Green* and *Mancusi*, has also been held to be a firmly rooted exception that satisfies the

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33. *Id.*

34. *Id.*

35. *Id. See* Barber v. Page, 390 U.S. 719, 724 (1968) (holding that declarant was not unavailable for confrontation purposes because the prosecutorial authorities had made no effort to obtain the witness's presence for trial); Mancusi v. Stubbs, 408 U.S. 204, 212-13 (1972) (holding that declarant was unavailable because he resided in a foreign county and the authorities had no means of compelling his presence).

36. 448 U.S. at 65 n.7 (citing Dutton v. Evans, 400 U.S. 74 (1970) (finding the utility of trial confrontation so remote that it did not require the prosecution to produce a seemingly available witness)). Neither is it a requirement that the prosecution show the unavailability of a declarant when he or she is a nontestifying coconspirator. United States v. Inadi, 475 U.S. 387, 400 (1986).

37. 448 U.S. at 65 n.7.

38. *Id.* at 66.

39. *Id.*

40. *Id.*

41. *Id.*

42. *See, e.g., Mattox*, 156 U.S. at 243-44; *Pointer*, 380 U.S. at 407.

Confrontation Clause.[43] The Court has further held the coconspirator exception,[44] excited utterances,[45] and statements for the purpose of medical treatment[46] to be firmly rooted exceptions. In sum, the statement must fall into an exception "so trustworthy that adversarial testing would add little to their reliability."[47]

When the statement does not fall into a firmly rooted exception, it is analyzed under the second prong of the *Roberts* reliability test. Although the statement against penal interest exception is a well recognized exception to the hearsay rule, the Court has yet to rule that it is a firmly rooted exception. Therefore, the Court has analyzed such cases under the second prong. Like many cases regarding statements against penal interest, *Lee v. Illinois*[48] involved the statements of a codefendant used against the defendant. In *Lee* codefendants Lee and Thomas were tried together in a double murder trial. Although both confessed to the murders, Thomas's confession inculpated Lee. The Court held that the admission of Thomas's confession in convicting Lee violated Lee's right to confrontation.[49]

Instead of addressing whether the statements against penal interests exception was a firmly rooted exception, the Court in *Lee* determined that the confession lacked "indicia of reliability" to overcome the presumptive unreliability of such statements.[50] However, the Court did imply why statements against penal interests could not be analyzed under the firmly rooted prong.[51] Justice Brennan noted that labeling

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43. The concern in *Green* was minimal because the accused was actually given the opportunity to confront the witness both in the pretrial hearing and the trial. *Green*, 399 U.S. at 151-52. Unlike *Green* the accused in *Mancusi* did not get the opportunity to confront the witness at trial; however, the Court held the confrontation and cross examination at the pretrial hearing was sufficient to satisfy the Sixth Amendment. *Mancusi*, 408 U.S. at 213-16.

44. Bourjaily v. United States, 483 U.S. 171, 182-83 (1987) (holding that a court is not required by the Confrontation Clause to make an inquiry into the independent indicia of reliability of a statement by a coconspirator).

45. White v. Illinois, 502 U.S. 346, 356 (1992) (concluding that a statement "offered in a moment of excitement—without the opportunity to reflect on the consequences..." is so reliable that its reliability cannot be recaptured later in court).

46. *Id.* When a statement is given for the purpose of medical treatment, "the declarant knows that a false statement may cause misdiagnosis or mistreatment, [therefore, such reliability could not be] replicated by courtroom testimony." *Id.*

47. Idaho v. Wright, 497 U.S. 805, 820-21 (1990).

48. 476 U.S. 530 (1986).

49. *Id.* at 539.

50. *Id.* The Court examined *Douglas v. Alabama*, 380 U.S. 415 (1965), which unanimously held that accomplices' confessions that incriminate defendants are presumptively unreliable, to reach its decision. 476 U.S. at 541.

51. 476 U.S. at 544 n.5.

this case as a "simple 'declaration against penal interest'" was incorrect because "[t]hat concept defines too large a class for meaningful Confrontation Clause analysis."[52] Further, the Court reasoned that merely because Lee's and Thomas's confessions "interlock," this did not demonstrate the indicia of reliability necessary to satisfy the Confrontation Clause.[53]

Similarly, the Court in *Idaho v. Wright*[54] refused to find that corroborating evidence demonstrated sufficient indicia of reliability to satisfy the Confrontation Clause. In *Wright* the statement against penal interest exception was not involved; rather, the prosecution sought to introduce a child's out-of-court abuse accusation against the defendants. Specifically, the child's medical report corroborated her testimony of sexual abuse.[55] However, the Court held that "[a]dequate indicia of reliability . . . must be found in reference to circumstances surrounding the making of the . . . statement, and not from subsequent corroboration of the criminal act."[56] Allowing evidence to be admitted merely because it corroborates a hearsay statement is not the type of particularized guarantees of trustworthiness contemplated by the Confrontation Clause.[57] As the Court observed, admitting such evidence under these circumstances would allow "bootstrapping on the trustworthiness of other evidence at trial."[58]

Four years after *Wright*, the Court in *Williamson v. United States*[59] opened the door for the decision in *Lilly*. Without reaching either the Confrontation Clause issue or whether the statement against penal interest exception was firmly rooted, the Court held that the statements

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52. *Id.* However, at least one commentator has questioned the Court and viewed the Court's avoidance in ruling whether a statement against penal interest is a firmly rooted exception as an "unwillingness . . . to accept the full implications of the per se aspects of the . . . [firmly rooted] requirement . . . even if a statement . . . fits within a firmly rooted hearsay exception, its admission may violate the confrontation right." Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1019 (1998).

53. 476 U.S. at 545. The Court explained interlocking confessions are identical, "[b]ut a confession is not necessarily rendered reliable simply because some of the facts it contains 'interlock' with the facts in the defendant's statement." *Id.*

54. 497 U.S. 805 (1990).

55. *Id.* at 809.

56. *Id.* at 821 (quoting State v. Ryan, 691 P.2d 197, 204 (Wash. 1984)).

57. *Id.* at 823.

58. *Id.* Although the Court recognized that the plurality in *Dutton v. Evans* considered corroborating evidence as one of the four factors in determining indicia of reliability, "the presence of corroborating evidence" in that case dealt with whether the admission was harmless "rather than that any basis exists for presuming the declarant to be trustworthy." *Id.* (citing *Dutton*, 400 U.S. at 90) (Blackman, J., concurring).

59. 512 U.S. 594 (1994).

against penal interest exception does not allow the admission of nonself-inculpatory statements, even if they are contained in a generally self-inculpatory statement.[60] In a pure evidentiary analysis, the Court observed that, under Federal Rule of Evidence 804(b)(3),[61] statements that implicated a defendant would not be admissible, while "truly self-inculpatory" statements would be admissible.[62] As the Court explained, this is a "fact-intensive inquiry" which was not done by either of the two lower courts, thus the Court remanded for that very purpose.[63] Therefore, the Court avoided the constitutional issue altogether. However, the Court noted that a genuinely self-inculpatory statement "is itself one of the 'particularized guarantees of trustworthiness,'" suggesting that such statements, in the future, would not be analyzed under the firmly rooted prong.[64] This proved to be the case in *Lilly*.

Since the Court's pronouncement of the firmly rooted prong in *Roberts*, the Court has not been clear as to whether the statement against penal interest hearsay exception is firmly rooted. After the decision in *Williamson*, this question remained open. In *Lilly v. Virginia*,[65] a plurality of the Court answered a portion of this question and closed the door it left open in *Williamson*.

III. RATIONALE OF THE COURT

In a plurality opinion, the Court in *Lilly* held that confessional statements by an accomplice that shift criminal liability to the defendant do not satisfy the requirements for admission under the Confrontation Clause.[66] The plurality adhered to the Court's view that the general category of the statement against penal interest exception "defines too large a class for meaningful Confrontation Clause analysis."[67] However, the plurality broke down this large class into three manageable subcategories.[68] One such subcategory, confessional statements by accomplices that incriminate defendants, are presumptively unreli-

60. *Id.* at 600-01 (referring to FED. R. EVID. 804(b)(3), which, in pertinent part, reads, "statement[s] which . . . at the time of [their] making . . . so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in [the declarant's] position would not have made the statement[s] unless believing [them] to be true.")

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

62. 512 U.S. at 604.

63. *Id.*

64. *Id.* at 605.

65. 119 S.Ct. 1887 (1999).

66. *Id.* at 1901.

67. *Lee*, 476 U.S. at 544 n.5.

68. 119 S. Ct. at 1895.

able.[69] Accordingly, the plurality held that this subcategory is not a firmly rooted exception to the hearsay rule as defined by Confrontation Clause jurisprudence.[70]

Justice Stevens, writing for the plurality, delivered his opinion in six parts. Only Justices Breyer, Ginsburg, and Souter joined Justice Stevens in the entirety of his opinion. Although a majority of the Justices joined Justice Stevens in Parts I, II, and VI, these sections of the opinion contributed nothing to the reasoning. Respectively, Parts I and II set out the facts and procedural aspects[71] while Part VI essentially stated the reversal and remand order.[72] The remaining three parts, however, are where the Justices parted company. For the sake of simplicity, each of these remaining parts is individually analyzed.

In Part III, joined only by Justices Breyer, Ginsburg, and Souter, Justice Stevens discussed a criminal defendant's right under the Confrontation Clause and how this right may be limited.[73] Relying on the Court's precedent, Justice Stevens further explained that the purpose of the Confrontation Clause is to prevent the admission of unreliable evidence against the defendant by subjecting such evidence to the rigors of an adversarial proceeding.[74] Although the common law concern of "prosecuting a defendant through the presentation of *ex parte* affidavits, without the affiants ever being produced at trial" is a present concern, the Court has rejected construing the Confrontation Clause so narrowly as to apply only to such practices.[75] Consistent with the Court's prior cases, the plurality reasoned that such a restrictive reading would eliminate the admission of hearsay testimony.[76] Accordingly, the proper approach is the two-part test in *Roberts*.[77]

In Parts IV and V, the plurality turned to the *Roberts* dual inquiry devoting each part to each prong of the *Roberts* test.[78] Relying on *Mattox*, decided over one hundred years ago, the plurality acknowledged the admission of statements falling into a firmly rooted hearsay exception as well recognized Confrontation Clause jurisprudence.[79] Such statements are firmly rooted if they have a "longstanding judicial

69. *Id.* at 1897.
70. *Id.* at 1899.
71. *Id.* at 1892-93.
72. *Id.* at 1901.
73. *Id.* at 1893-94.
74. *Id.* at 1894 (citing Maryland v. Craig, 497 U.S. 836 (1990)).
75. *Id.* (citing *White*, 502 U.S. at 346).
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*

and legislative experience,"[80] or they "'rest [on] such [a] solid foundatio[n] that admission of virtually any evidence within [it] comports with the "substance of the constitutional protection."'"[81] In sum, the plurality reasoned that in "[e]stablished practice" statements must fall into a hearsay category that ensures guarantees "equivalent to, or greater than, those produced by the Constitution's preference for cross-examined trial testimony."[82]

As to the statement against penal interest exception, Justice Stevens distinguished the exception from other firmly rooted exceptions and for the first time, explicitly explained why this general category "'defines too large a class for meaningful Confrontation Clause analysis.'"[83] Firmly rooted exceptions, such as excited utterances, are presumed reliable because they are made without motive or time to reflect on the legal consequences of such statements.[84] However, a statement against penal interest "is founded on the broad assumption 'that a person is unlikely to fabricate a statement against his own interest at the time it is made.'"[85] Furthermore, unlike other firmly rooted exceptions, the statement against penal interest exception encompasses three categories: (1) statements made by the declarant and offered into evidence against the declarant; (2) confessional statements offered by the defendant as exculpatory evidence; and (3) an accomplice's confessional statement offered by the prosecution that incriminates a defendant.[86]

This third category, as the plurality observed, covers statements like the ones made by Mark Lilly.[87] Since *Crawford v. United States*[88] over ninety years ago, the Court has consistently held such statements to be presumptively unreliable.[89] In holding that such statements are

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80. *Wright*, 497 U.S. at 817.

81. *Lilly*, 119 S. Ct. at 1895 (quoting *Roberts*, 448 U.S. at 66).

82. *Id.*

83. *Id.* (quoting *Lee*, 476 U.S. at 544 n.5)

84. *Id.*

85. *Id.* (quoting Chambers v. Mississippi, 410 U.S. 284, 299 (1973)).

86. *Id.* Justice Stevens noted that because the second category of statements is offered by the accused, the Confrontation Clause is not implicated. *Id.* Moreover, only in cases similar to *Bruton* and *Lee*, where codefendants are tried together, does the first category implicate the Confrontation Clause. *Id.* at 1895-96.

87. *Id.* at 1897.

88. 212 U.S. 183 (1909).

89. 119 S. Ct. at 1897. In *Crawford* the Court stated that when the confession of an accomplice "incriminate[s] himself together with defendant . . . [this] ought to be received with suspicion . . . ." 212 U.S. at 204. This notion was adopted in *Douglas v. Alabama*, 380 U.S. 415 (1965), and reaffirmed in *Lee*. 119 S. Ct. at 1897.

not a firmly rooted exception, the plurality reasoned that it was merely reaffirming a long line of Supreme Court precedent.[90]

In Part V the plurality addressed the second prong of *Roberts* and rejected the assertion that the circumstances surrounding Mark Lilly's statements bore particularized guarantees of trustworthiness.[91] Although this inquiry is a fact-based inquiry, the plurality rejected the notion "that appellate courts should defer to the lower courts' determinations regarding whether a hearsay statement has particularized guarantees of trustworthiness."[92] However, the plurality accepted the Virginia courts' determination for the purposes of its state hearsay rule but held that courts need to perform an "independent review" as it relates to the Confrontation Clause.[93] The plurality did not explicitly state the distinction between the two inquires; however, it reasoned that "[i]t is highly unlikely that the presumptive unreliability . . . [of] accomplices' confessions that shift or spread blame can be effectively rebutted . . . ."[94]

Justice Stevens concluded the plurality opinion by reaffirming *Wright* and reasoning that the use of corroborating evidence does not demonstrate particularized guarantees of trustworthiness.[95] The fact that Mark was given his *Miranda* warnings and was not offered immunity adds nothing to the reliability of his statement.[96] Relying on the Court's language in *Wright*, the plurality further reasoned that admitting the statements would allow the "State to 'bootstrap on' the trustworthiness of other evidence."[97]

Justice Breyer filed a concurring opinion. Justice Breyer wrote separately to exclusively address amici curiae briefs and a groundswell of scholarly commentary criticizing the Court's effort to tie the Confrontation Clause so directly to the hearsay rule.[98] As Justice Breyer read this criticism, the current hearsay-based Confrontation Clause test is, on one hand, too narrow in that it allows the admission of hearsay evidence prepared for trial merely because it falls within a certain exception.[99]

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90. 119 S. Ct. at 1899 n.5.
91. *Id.* at 1899 (citing *Roberts*, 448 U.S. at 66).
92. *Id.* at 1900.
93. *Id.*
94. *Id.* The Court's repeated failure to concisely distinguish between the Confrontation Clause reliability and hearsay rule reliability has been a point of issue with at least one commentator. *See* Capowski, *supra* note 29, at 513.
95. 119 S. Ct. at 1900 (quoting *Wright*, 497 U.S. at 822).
96. *Id.*
97. *Id.* at 1900-01.
98. *Id.* at 1902 (Breyer, J., concurring).
99. *Id.*

On the other hand, it is too broad because it makes a constitutional issue out of the admission of any relevant hearsay statement.[100] Justice Breyer did not answer this concern directly because in this case the statement nevertheless violated the Confrontation Clause; however, he concluded that the issue is open to be evaluated at another time.[101]

Justice Scalia, concurring in part and concurring in the judgment, concluded that the introduction of the recorded tapes at trial without making Mark available for cross-examination was "a paradigmatic Confrontation Clause violation."[102] Justice Scalia chose not to join the plurality in its discussion of *Roberts* and stated "[s]ince the violation is clear, the case need be remanded only for a harmless-error determination."[103]

Also concurring in part and concurring in the judgment, Justice Thomas adhered to his view that the Confrontation Clause "'extends to any witness . . . testify[ing] at trial'" and only applies to out-of-court statements that are "'formalized testimonial material.'"[104] Unlike Justice Scalia, Justice Thomas agreed with Chief Justice Rehnquist that the Confrontation Clause does not require a "blanket ban" on accomplices' statements that incriminate a defendant.[105] Further agreeing with the Chief Justice, Justice Thomas concluded that the plurality should not have addressed the *Roberts* second prong because the Virginia Supreme Court did not analyze the statements under this prong.[106]

Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy, concurred in the judgment only.[107] Sounding more like a dissenting opinion, the Chief Justice first disagreed with the plurality attempting to "systematiz[e]" the statement against penal interest exception.[108] As a result, the plurality's "complete ban on the government's use of

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100. *Id.*

101. *Id.* at 1903.

102. *Id.* (Scalia, J., concurring in part and concurring in the judgment).

103. *Id.* Justice Scalia's originalist approach and his concurrence with Justice Thomas in *White* most likely explain Justice Scalia's decision in not joining the *Roberts* discussion. In *White* the two Justices concluded that "[t]he standards that the Court has developed to implement its assumption that the Confrontation Clause limits admission of hearsay evidence have no basis in the text of the Sixth Amendment." *White*, 502 U.S. at 363 (Thomas, J., concurring in part and concurring in the judgment); *see also* Cornelius M. Murphy, Note, *Justice Scalia and The Confrontation Clause: A Case Study in Originalist Adjudication of Individual Rights*, 34 AM. CRIM. L. REV. 1243, 1247-48 (1997).

104. 119 S. Ct. at 1903 (Thomas, J., concurring in part and concurring in the judgment) (quoting *White*, 502 U.S. at 365).

105. *Id.*

106. *Id.*

107. *Id.* (Rehnquist, C.J., concurring in the judgment).

108. *Id.* at 1904.

accomplice confessions that inculpate a codefendant" was overbroad.[109] In the Chief Justice's view, this broad holding failed to distinguish custodial statements given to law enforcement officials from non-custodial statements, like those given to family members or fellow prisoners.[110] As demonstrated in *Dutton v. Evans*,[111] non-custodial statements bear sufficient indicia of reliability to be placed before a jury without confrontation of the declarant.[112] Moreover, consistent with several Courts of Appeals, the Chief Justice saw no reason to exclude even custodial statements that equally inculpated the declarant and defendant.[113] Therefore, Chief Justice Rehnquist would have limited the holding only to self-serving custodial confessions.[114]

The Chief Justice also disagreed with the plurality's analysis of the second prong of the *Roberts* inquiry.[115] Both the trial court and the Virginia Supreme Court analyzed Mark's recorded statements solely under the firmly rooted prong and thus, never got to the second prong. Therefore, as Chief Justice Rehnquist observed, reviewing an issue that the lower court did not decide is at odds with Supreme Court precedent.[116]

IV. IMPLICATIONS

Prior to *Lilly* the Court had never directly answered the question of whether the statement against penal exception was firmly rooted. Since *Lee* the Court merely rested on Justice Brennan's footnote language that statements against penal interest "define[s] too large a class for meaningful Confrontation Clause analysis."[117] By subdividing this "large class" into its three subcategories, the plurality in *Lilly* has, in part, answered the question. The plurality made explicit that one of

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109. *Id.*

110. *Id.* at 1904-05. Specifically, the Chief Justice took issue with the fact that the plurality labeled *Dutton* as an exception to the "unbroken line of cases" demonstrating that accomplices' confessions are presumptively unreliable. *Id.* at 1905. The Chief Justice argued that *Dutton* was not an exception because that case involved a confession to a fellow prisoner, while the other cases cited by the plurality involved custodial statements to law enforcement officials. *Id.*

111. 400 U.S. 74 (1970).

112. *Id.* at 89.

113. 119 S. Ct. at 1904 n.2 (Rehnquist, C.J., concurring in the judgment) (citing Earnest v. Dorsey, 87 F.3d 1123, 1134 (10th Cir. 1996) (the "entire statement inculpated both . . . equally" and neither attempted to shift blame to his co-conspirators)).

114. *Id.* at 1905.

115. *Id.*

116. *Id.* at 1905-06.

117. 476 U.S. at 544 n.5.

these subcategories, confessional statements by accomplices that inculpate 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." [118]

However, *Lilly* probably goes further than what the plurality explicitly held and stands for the proposition that the entire exception is not firmly rooted. As the plurality observed, statements against penal interests arise in only three situations and the two other situations, or subcategories, rarely implicate the Confrontation Clause.[119]

The first of these remaining two subcategories, statements made by the declarant and offered into evidence against the declarant, is a classic declaration against interest scenario.[120] Unless there is an issue similar to that in *Bruton* or *Lee*, where codefendants are being tried together, this situation rarely implicates the Confrontation Clause. The declarant and defendant are the same person, thus no hearsay issues are present and consequently, no hearsay exception arises. Therefore, statements made under these circumstances are almost always admitted without invoking any hearsay or Confrontation Clause concerns.

Similarly, the other subcategory, confessional statements offered by the defendant as exculpatory evidence, almost never implicate the Confrontation Clause.[121] In this situation a hearsay concern may arise, but it is the defendant who is attempting to make use of the evidence. The Confrontation Clause only prohibits non-cross-examined statements from being used *against* the accused; nothing in the Confrontation Clause prohibits the defendant from introducing such evidence himself.[122]

Finally, with regard to Chief Justice Rehnquist's overbroadness concern, there is nothing in the plurality's opinion that would create a complete ban on non-custodial confessions like those in *Dutton*. In fact the plurality recognized *Dutton* as a case with "unique aspects" thus suggesting that such statements were not included in its holding.[123] Furthermore, admitting confessional statements that equally inculpate the declarant and defendant, as several Courts of Appeals have done, presents a danger already addressed by the Court. As Justice O'Connor

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118. 119 S. Ct. at 1899.

119. *Id.* at 1895-97.

120. *Id.* at 1895.

121. *Id.* at 1897.

122. *Id.* Moreover, "the Due Process Clause affords criminal defendants the right to introduce into evidence third parties' declarations against penal interests . . . " *Id.* (citing *Chambers*, 410 U.S. at 300).

123. *Id.* at 1899 n.5.

concluded in *Williamson*, "[o]ne of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature."[124] It is this type of unreliable testimony that the Court's Confrontation Clause jurisprudence seeks to exclude.

Effectively, the plurality held that all three categories of the statement against penal interest exception are not firmly rooted. However, the lower courts will nevertheless have to analyze such statements under the appropriate subcategory in making a Confrontation Clause determination. If the Court "duck[ed]" the constitutional issue in *Williamson*, as one commentator asserts, then in *Lilly* the Court met the issue head on and answered the question.[125]

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124. 512 U.S. at 599-600.

125. *See* Capowski, *supra* note 29, at 507. "This ducking of the Sixth Amendment issues is bound to continue the confusion and disarray among the circuit courts." *Id.*

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