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INTERPRETING THE CONFRONTATION CLAUSE: IS THERE DISSENSION AMONG THE RANKS?

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

Kimberly G. Gore

I. INTRODUCTION

The right of an accused to confront witnesses against him has ancient roots. The Hebrews recognized the right of the accused to hear testimony given against him.[1] The Romans also allowed the accused to confront witnesses in person before conviction and sentencing.[2] Likewise, early English courts also recognized confrontation rights by allowing written questions to be given to witnesses.[3]

The development of the confrontation doctrine in England faltered throughout the sixteenth and seventeenth centuries.[4] Some courts refused to allow confrontation rights to the accused.[5] Other courts only allowed the accused to confront witnesses in felony cases.[6] Often, politics interfered with procedure, and the right to confrontation was discarded in many treason cases.[7]

In America, the right to confrontation developed quickly because of the adversarial approach to criminal procedure adopted by the colonies.[8] Also, as England attempted to regulate the colonies and the American Revolution approached, the right to confront accusers became more crucial; the colonists wanted desperately to avoid the abuses that were occurring in sixteenth century England.[9] The Framers emphasized the confrontation right by placing it within the Bill of Rights, establishing the confrontation right as a constitutional protection.[10] Under the Sixth Amendment, "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him."[11]

Although the Confrontation Clause is a constitutional right and not an evidentiary standard, it often intertwines with the hearsay doctrine. Both the Confrontation Clause and the hearsay doctrine "stem from the same roots"[12] and "protect similar values."[13] The main purpose of the Confrontation Clause is "to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing [cross-examination] in the context of an adversary proceeding before the trier of fact."[14]

1. Amicus Br., 1998 WL 901782 at *4 (1998).
2. *Id.* at *5.
3. *Id.*
4. *Id.* at *5-8.
5. *Id.* at *7.
6. *Id.*
7. *Id.* The Crown often used criminal law procedures to control its adversaries. The treason cases in Stuart and Tudor England are good examples of how the right to confrontation was disregarded. *Id.*
8. *Id.* at *10.
9. *Id.* at *10-11.
10. U.S. Const. amend. VI.
11. *Id.*
12. Dutton v. Evans, 400 U.S. 74, 86 (1970).
13. California v. Green, 399 U.S. 149, 155 (1970).
14. Maryland v. Craig, 497 U.S. 836, 845 (1990).

Similarly, the hearsay doctrine excludes out-of-court statements because they are presumptively unreliable and cannot be tested by cross-examination, "the greatest legal engine ever invented for the discovery of truth."[15] With time, though, courts and legislatures have carved out many exceptions to the hearsay rule. Where the reliability of hearsay statements is sufficient and will not increase with cross-examination, hearsay statements are admissible.

This similarity of purpose has resulted in a weaving together of the two doctrines. The Confrontation Clause requires a higher standard of reliability; hearsay statements may fall within a hearsay exception yet still violate the Confrontation Clause. In *Mattox v. United States*,[16] the Supreme Court first held that certain types of hearsay statements were compatible with the Confrontation Clause. Since the decision in *Mattox*, courts have increased the range of hearsay statements that meet Confrontation Clause standards, changing Confrontation Clause analysis into more of a hearsay reliability test than a constitutional safeguard. The Supreme Court's decision in *Ohio v. Roberts*,[17] in particular, opened the door to a hearsay analysis for Confrontation Clause issues.

Now it appears that the pendulum may be swinging in the opposite direction, moving away from a hearsay reliability test and back to a constitutional safeguard analysis. *Lilly v. Virginia*[18] highlighted the split in the Supreme Court's Confrontation Clause analysis. In *Lilly*, the Court unanimously agreed that admission of an accomplice's confession against the defendant violated the defendant's Confrontation Clause rights.[19] The plurality opinion adhered strongly to the *Ohio v. Roberts* test, but three of the four concurring opinions strongly suggested that a hearsay analysis could not effectively solve Confrontation Clause issues.

II. SUPREME COURT PRECEDENT - INTERPRETING THE CONFRONTATION CLAUSE

Because both doctrines rely heavily on cross-examination, the United States Supreme Court must regularly define the parameters of the Confrontation Clause as it relates to the hearsay doctrine. Hearsay evidence may fall within an exception yet still be excluded under the Confrontation Clause, because the accused is denied the right to cross-examine the declarant. In these situations, the courts must decide whether the hearsay evidence is reliable enough to satisfy the heightened standard of the Confrontation Clause. The following cases demonstrate that the Confrontation Clause is not absolute-it has been expanded and contracted by the Supreme Court over the years to accommodate the various interpretations adopted by the members of the Court.

1. Mattox v. United States [20]

Mattox was charged with and convicted of murder.[21] On appeal, the conviction

15. *Green*, 399 U.S. at 158.
16. 156 U.S. 237 (1895).
17. 448 U.S. 56 (1980).
18. 119 S. Ct. 1887 (1999).
19. *Id.* at 1901.
20. 156 U.S. 237 (1895).
21. *Id.*

was reversed, and the case was remanded for a new trial.[22] Before the new trial, two of the most important prosecutorial witnesses died.[23] These two witnesses had testified at the first trial and were subjected to both direct examination and cross-examination.[24] At the second trial, the testimony of these two witnesses was read into the record from the first trial transcript over the defendant's objections.[25] The defendant was convicted again of murder.[26] Mattox also appealed the second conviction, claiming that admission of the deceased witnesses' testimony violated his rights under the Confrontation Clause.[27]

The United States Supreme Court upheld the admission of the testimony of the two deceased witnesses.[28] Justice Brown, writing for the Court, first stated that all states regularly admitted the former testimony of deceased witnesses as evidence.[29] Justice Brown also stated that over a dozen state supreme courts had examined whether admission of former testimony of deceased witnesses violated the Confrontation Clause.[30] Those courts unanimously admitted the former testimony, holding that "the right of cross-examination having once been exercised, it was no hardship upon the defendant to allow the testimony of the deceased witness to be read."[31] The Supreme Court agreed.[32]

The Confrontation Clause's primary objective, according to Justice Brown, was to prevent *ex parte* affidavits or depositions from being admitted in lieu of live testimony.[33] Live testimony, particularly cross-examination, served several purposes: 1) to test the recollection of a witness, 2) to "sift[] the conscience" of a witness, and 3) to give the jury an opportunity to test the witness' credibility by observing his demeanor.[34] For these reasons, live testimony is preferable to all out-of-court statements. However,

> general rules of law of this kind, . . . must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent.[35]

The Confrontation Clause, according to Justice Brown, was not absolute.[36] The substance of the Confrontation Clause had been preserved because Mattox had previously cross-examined the witnesses under oath.[37] Nothing in the wording of

22. *Id.*
23. *Id.* at 240.
24. *Id.*
25. *Id.*
26. *Id.* at 238.
27. *Id.*
28. *Id.* at 250.
29. *Id.* at 240-41.
30. *Id.* at 242.
31. *Id.*
32. *Id.* at 244.
33. *Id.* at 242.
34. *Id.*
35. *Id.* at 243.
36. *Id.* at 244.
37. *Id.*

the Confrontation Clause granted Mattox the right of repeated cross-examination.[38] The former testimony, therefore, satisfied the Confrontation Clause; Mattox's constitutional rights were not violated by admission of the former testimony.[39]

Justice Brown, in his opinion, never mentioned that the testimony of the two deceased witnesses was hearsay evidence. However, the admission of former testimony of deceased witnesses is now a codified hearsay exception.[40] *Mattox v. United States*, therefore, was the first Supreme Court case to admit hearsay evidence against a claim under the Confrontation Clause. The next significant interpretation of the Confrontation Clause was set forth in *Douglas v. Alabama*.[41]

2. Douglas v. Alabama[42]

Douglas was on trial for assault with intent to murder.[43] His accomplice, Loyd, had already been tried separately and convicted.[44] At Douglas' trial, the Solicitor[45] called Loyd to the stand; Loyd invoked his Fifth Amendment right against self-incrimination and refused to answer any questions.[46] The prosecutor was allowed to treat Loyd as a hostile witness.[47] Over defense objections, the Solicitor read a copy of Loyd's confession, implicating Douglas as the shooter, into the record as a means of refreshing Loyd's memory.[48] Loyd persisted in invoking his right against self-incrimination and never responded to the prosecutor's questions.[49] Likewise, Loyd refused to respond to any questions from Douglas' attorney.[50] Three law enforcement officers then testified that the confession read into the record was made and signed by Loyd.[51]

The jury found Douglas guilty of assault with intent to murder.[52] On appeal, Douglas argued that his rights under the Confrontation Clause were violated because he did not have an opportunity to cross-examine Loyd about the confession.[53] The Court of Appeals of Alabama agreed.[54] The court held that the confession was inadmissible because Loyd was not cross-examined and noted that the Solicitor's reading the confession into the record "might have been an indi-

38. *Id.*
39. *Id.*
40. Federal Rule of Evidence 804 creates a hearsay exception for unavailable witnesses in a two-part test. Under FRE 804(a)(4), a deceased person is unavailable as a witness. Once a witness is declared unavailable, certain statements are considered hearsay exceptions. Former testimony is one of those exceptions. FRE 804(b)(1).
41. 380 U.S. 415 (1965).
42. *Id.*
43. *Id.* at 416.
44. *Id.*
45. "Solicitor" is Alabama's term for a prosecutor.
46. *Id.* Loyd was planning to appeal his conviction, so his lawyer advised him to invoke his Fifth Amendment right against self-incrimination.
47. *Id.* When the court grants permission to treat a witness as hostile, the examiner is allowed to treat the witness as if he was under cross-examination. For further explanation, see Federal Rule of Evidence 611.
48. *Id.* Because Loyd was treated as a hostile witness, the prosecution was able to enter his confession in the record by reading a few sentences at a time and then asking the question, "Did you make that statement?" *Id.* The confession inculpated Douglas. For an explanation of this technique, see Federal Rule of Evidence 612.
49. *Id.*
50. *Id.*
51. *Id.* at 417.
52. *Id.*
53. *Id.*
54. *Id.* at 418.

rect mode of getting the inadmissible confession in evidence."[55] The appellate court upheld the conviction, however, because although Douglas' attorney initially objected to the reading of Loyd's confession, he did not object after each question during the reading.[56] Failure to object, the court held, constituted a waiver.[57]

The United States Supreme Court reversed the conviction.[58] Justice Brennan, writing for the Court, reasoned that

> [a]lthough the Solicitor's reading of Loyd's alleged statement, and Loyd's refusals to answer, were not technically testimony, the Solicitor's reading may well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement; and Loyd's reliance upon the privilege created a situation in which the jury might improperly infer both that the statement had been made and that it was true.[59]

Justice Brennan further stated that Douglas' right to cross-examination had been violated on several levels.[60] First, the Solicitor, by reading the confession into the record, created an inference that Loyd made the statement.[61] This inference could not be tested by cross-examination because the Solicitor was not a witness.[62] Second, Loyd could not be cross-examined because he invoked his Fifth Amendment privilege against self-incrimination, leaving both the inference that he made the statement and the truth of that statement untested by cross-examination.[63] Finally, the cross-examination of the three law enforcement officers who authenticated Loyd's confession was inadequate to compensate for Douglas' inability to cross-examine both the Solicitor and Loyd.[64]

Justice Brennan viewed the reading of the confession into the record as a means to refresh Loyd's memory as the equivalent of testimony.[65] Therefore, the only way to have avoided a Confrontation Clause violation in reading the confession was for Douglas to have an opportunity to cross-examine Loyd.[66] Loyd's refusal to answer "added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant."[67]

Justice Harlan and Justice Stewart concurred in the judgment.[68] In separate opinions, they held that the Fourteenth Amendment guarantee of due process, rather than the Sixth Amendment right to confrontation, was violated because Douglas was unable to cross-examine Loyd.[69] Both justices refer to their concur-

55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 423.
59. *Id.* at 419.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 420.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* (citations omitted).
68. *Id.* at 423.
69. *Id.*

ring opinions in *Pointer v. Texas*,[70] where they stated that the Sixth Amendment was inapplicable to the States, but that the right of an accused to confront witnesses was fundamental to the concept of a fair trial.[71]

Douglas v. Alabama first applied the Sixth Amendment to the States. In applying the Sixth Amendment, the Court refused to allow an accomplice's confession to be used against the defendant without providing the defendant an opportunity to cross-examine the accomplice in court.

As in *Mattox*, the Court in *Douglas* makes no mention of hearsay. The hearsay at issue in Douglas is particularly notable because it was an accomplice's confession that inculpated a defendant, the same type of hearsay statement at issue in *Lilly v. Virginia*. The Court found Loyd's custodial confession unreliable because the confession was the only direct evidence linking Douglas to the murder. Because it was unreliable and Douglas was denied an opportunity to cross-examine Loyd, admission of the confession violated the Confrontation Clause.

3. Bruton v. United States[72]

The defendant and his accomplice, Evans, were convicted in a joint trial of armed postal robbery.[73] Evans confessed twice to a postal inspector; in the first confession, Evans named Bruton, but in the second confession, he only admitted to having an unnamed accomplice.[74] These confessions were admitted into evidence, with a limiting jury instruction that the confessions could only be used against Bruton.[75]

Both Evans and Bruton appealed their convictions.[76] The Court of Appeals for the Eighth Circuit reversed Evans' conviction because his oral confessions should not have been entered against him.[77] The court affirmed Bruton's conviction, however, because the jury instruction to disregard Evans' confession was properly given.[78]

The United States Supreme Court granted certiorari and reversed Bruton's conviction.[79] Justice Brennan, writing for the Court,[80] compared Bruton's case with the circumstances of *Douglas v. Alabama*.[81] In *Douglas*, the lack of opportunity to cross-examine an accomplice about the accomplice's confession violated the defendant's Confrontation Clause rights.[82] The confession was not admitted as evidence, but the prosecutor read it into the record.[83]

70. 380 U.S. 400 (1965). Pointer v. Texas was decided on the same day as Douglas v. Alabama.
71. *Id.* at 408-409.
72. 391 U.S. 123 (1968).
73. *Id.* at 124.
74. *Id.*
75. *Id.* at 125. The instruction was given in accordance with Delli Paoli v. United States, 352 U.S. 232 (1957). *Delli Paoli* held that clear instructions to disregard a confessor's extrajudicial statement that the codefendant participated in the crime satisfied the Confrontation Clause. *Id.* at 126.
76. *Id.* at 124.
77. *Id.*
78. *Id.* at 125.
79. *Id.* at 125-26.
80. *Id.* at 123.
81. *Id.* at 126-28.
82. Douglas v. Alabama, 380 U.S. 415, 416 (1965).
83. *Id.*

The ruling in *Douglas*, Justice Brennan reasoned, provided stronger motivation to reverse Bruton's conviction.[84] In Bruton's case, Evans' accomplice confession was actually admitted into evidence.[85] Evans did not take the stand, so Bruton had no opportunity to cross-examine him about the confessions.[86] Bruton, therefore, was denied his rights under the Confrontation Clause.[87] The limiting instruction could not substitute for the constitutionally guaranteed right to confrontation, even when considering public policy concerns, such as the efficiency of joint trials.[88]

Justice White dissented.[89] According to Justice White, the confessions were hearsay evidence, inadmissible against Bruton.[90] As hearsay evidence, it carried the usual hearsay "dangers of inaccuracy."[91] Additionally, though, "the [arrest] statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence."[92]

Despite these concerns, White was concerned that the majority opinion laid down a rigid and unworkable rule.[93] After balancing the Confrontation Clause with policy considerations, he determined that the limiting instruction was sufficient.[94] Without evidence that the jury had relied on Evans' confession in convicting Bruton, any error was harmless.[95]

The effect of the new rule on joint trials also concerned Justice White.[96] Joint trials promote judicial economy and efficiency.[97] The majority ruling, White feared, would burden the judicial system with either the time and cost of separate trials or the necessity of obtaining a ruling of harmless error before admitting an accomplice's confession in a joint trial.[98]

Bruton reemphasized the importance of the Confrontation Clause in criminal trials and expanded its reading of the Confrontation Clause. The Court had always maintained that the Confrontation Clause did not exclude all hearsay. *Bruton* ruled, however, that a limiting jury instruction is not a sufficient substitute when an accomplice's hearsay statements are admitted into evidence. The majority rule implied that adequate substitutes for cross-examination exist, but it did not attempt to define any cross-examination substitutes. Again, the type of hearsay statement at issue was an accomplice statement that inculpated the defendant.

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84. *Id.*
85. *Bruton*, 391 U.S. at 127.
86. *Id.* at 128.
87. *Id.*
88. *Id.* at 137.
89. *Id.* at 138.
90. *Id.*
91. *Id.* at 141.
92. *Id.* (citations omitted).
93. *Id.* at 139.
94. *Id.*
95. *Id.*
96. *Id.* at 143-44.
97. *Id.*
98. *Id.*

4. Ohio v. Roberts[99]

Police arrested Roberts and charged him with forgery and receiving stolen property.[100] Specifically, he was charged with forging a check in Bernard Isaac's name and with possession of Isaac's stolen credit cards.[101] At the preliminary hearing, the defense called the daughter of the victim, Anita, to testify.[102] She admitted that she knew the defendant and that she had given him permission to use her apartment while she was out of town.[103] Despite leading questions and a lengthy examination, however, she denied that she had given the defendant the checks and credit cards.[104]

Before the trial, Anita was subpoenaed to appear.[105] When Anita failed to appear at the trial, the prosecution offered the transcript of her preliminary hearing testimony.[106] The defense objected.[107] During the voir dire hearing to determine the admissibility of the transcript, Anita's mother testified that she had no way to reach Anita.[108] On the basis of this testimony, the trial court ruled that Anita was unavailable as a witness and admitted her preliminary hearing testimony into evidence.[109]

The defendant appealed the admission of Anita's testimony on Confrontation Clause grounds.[110] The Court of Appeals of Ohio reversed, holding that the prosecution failed to make a good faith effort to bring Anita to the trial.[111] The Supreme Court of Ohio affirmed the appellate court, holding that "the mere opportunity to cross-examine at a preliminary hearing did not afford constitutional confrontation for purposes of trial."[112] The supreme court reasoned that there was "little incentive to cross-examine a witness at a preliminary hearing, where the 'ultimate issue' is only probable cause . . . ."[113]

The Supreme Court granted certiorari[114] and reversed.[115] Justice Blackmun delivered the Court's opinion.[116] After reviewing prior Confrontation Clause cases, Justice Blackmun noted that the Court had repeatedly rejected a literal reading of the Confrontation Clause, which would exclude all hearsay statements.[117] The

99. 448 U.S. 56 (1980).
100. *Id.* at 58.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 59.
106. *Id.*
107. *Id.*
108. *Id.* at 59-60. In the year between the preliminary hearing and the trial, Anita left for Tucson, Arizona. *Id.* The Isaacs had heard from Anita twice, once through a welfare social worker in San Francisco, and again from somewhere "outside Ohio." *Id.* To the Isaacs' knowledge, Anita had not contacted anyone else. *Id.*
109. *Id.* at 60.
110. *Id.* at 59.
111. *Id.* at 60.
112. *Id.* at 61.
113. *Id.*
114. *Id.* at 62.
115. *Id.* at 76.
116. *Id.* at 58.
117. *Id.* at 63. Mattox v. United States, 156 U.S. 237 (1895), specifically rejected a literal reading by admitting the prior testimony of deceased witnesses. *Id.*

Court recognized, however, that the Confrontation Clause did intend the exclusion of some hearsay statements.[118] Deciding when to exclude hearsay statements on Confrontation Clause grounds required balancing the utility and necessity of cross-examination in upholding the "'integrity of the fact-finding process'" with public policy concerns and the "'necessities of the case.'"[119] Although the Court was unwilling to "'map out a theory of the Confrontation Clause that would determine the validity of all . . . hearsay 'exceptions,'"'[120] the Court was willing to map out a "general approach to the problem."[121]

The Court developed a two-part test to examine the admissibility of hearsay within the confines of the Confrontation Clause. First, as a threshold determination, the witness must be unavailable to testify.[122] Justice Blackmun did not define the meaning of unavailable; he did, however, place the burden on the prosecution to "either produce, or demonstrate the unavailability of, [sic] the declarant whose statement it wishes to use against the defendant."[123] Although Blackmun stated that the Sixth Amendment required unavailability, he also noted that it had not been required in *Dutton v. Evans*.[124]

Once the court has determined that a witness is unavailable for cross-examination, the Confrontation Clause requires that the hearsay evidence be excluded unless 1) "the evidence falls within a firmly rooted hearsay exception" or 2) the evidence has "particularized guarantees of trustworthiness."[125] Justice Blackmun again emphasized the necessity of accuracy in fact-finding as the basis for this two-prong "'indicia of reliability'" test.[126]

Applying this approach, the Court determined first, that Anita was unavailable for cross-examination at trial.[127] The court held secondly, that her preliminary hearing testimony had "sufficient 'indicia of reliability'"[128] because it was "tested . . . with the equivalent of significant cross-examination," both in form and in substance.[129] Although Anita was called as a defense witness, defense counsel used leading questions and repeatedly tested Anita's veracity, perception, and memory through her examination.[130]

Justices Brennan, Marshall, and Stevens dissented.[131] In the dissenting opinion, Justice Brennan agreed with the test applied in the majority opinion, but disagreed with the majority opinion's finding that Anita was unavailable.[132] Brennan emphasized the heavy burden placed on the prosecution to make a diligent, good-faith effort to locate the witness and bring them to the trial to testi-

118. *Id.*
119. *Id.* at 64 (citation omitted).
120. *Id.* at 64-5.
121. *Id.* at 65.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 66.
126. *Id.* (citation omitted).
127. *Id.* at 73.
128. *Id.* (citation omitted).
129. *Id.* at 70.
130. *Id.* at 70-1.
131. *Id.* at 77.
132. *Id.* at 79.

fy.[133] He concluded that the State had failed to meet this burden.[134]

Ohio v. Roberts solidified the Court's interpretation of the Confrontation Clause by creating the two-part test. The Court emphatically refused to adopt a strict reading of the Confrontation Clause that would exclude all hearsay statements.[135] *Roberts*, however, did more than provide a guideline for lower courts to apply; the Court expanded admissibility of hearsay statements under the Confrontation Clause. Before *Roberts*, the Court had recognized only a few types of exceptions as complying with the Confrontation Clause: prior testimony of deceased witnesses,[136] prior testimony of otherwise unavailable witnesses,[137] and coconspirator statements.[138]

With the adoption of the *Roberts* test, any hearsay statement falling within a firmly rooted exception or having particularized guarantees of trustworthiness complied with the constitutional guarantee of the Confrontation Clause. The Court did not define which hearsay exceptions are firmly rooted, other than to state that "certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'"[139] Additionally, some hearsay statements outside firmly rooted exceptions could now be admitted without violating the Confrontation Clause so long as they carried adequate indicia of reliability. The Court also failed to define indicia of reliability. *Roberts* adopted a hearsay-based approach to Confrontation Clause issues. Since *Roberts*, the Court has explained proper application of the two-part test through the following cases.

5. Lee v. Illinois[140]

The defendant and her boyfriend, Thomas, were charged with the double murder of Lee's aunt and the aunt's friend, Harris.[141] Each gave a confession to the police.[142] Lee's confession indicated that the killings were sudden, provoked by the two victims.[143] According to Lee, Thomas killed Harris, and Lee killed her aunt after a struggle over a knife.[144] Thomas' account, however, described a premeditated plan to kill Lee's aunt.[145] According to Thomas, Harris just happened to be visiting when the opportunity to carry out the plan arose.[146]

The two defendants were tried together in a bench trial.[147] Counsel for both sides and the judge agreed that the judge would consider each defendant's con-

133. *Id.* (citations omitted).
134. *Id.*
135. *Id.* at 66, n. 9.
136. Mattox v. United States, 156 U.S. 237 (1895).
137. Mancusi v. Stubbs, 408 U.S. 204 (1972).
138. Dutton v. Evans, 400 U.S. 74 (1970).
139. *Roberts*, 448 U.S. at 66.
140. 476 U.S. 530 (1986).
141. *Id.* at 532.
142. *Id.*
143. *Id.* at 533-34.
144. *Id.*
145. *Id.* at 534-35.
146. *Id.*
147. *Id.* at 536.

fession as evidence against the confessor only.[148] In closing arguments, Lee's attorney argued that Lee had nothing to do with Harris' murder and that Lee killed her aunt either in self-defense or in the heat of passion.[149] In rebuttal, the prosecution referred to Thomas' confession, pointing out that there was a plan to kill Lee's aunt and that Lee assisted in Harris' murder.[150]

The judge found Lee guilty of both murders.[151] In his order, the judge "expressly relied on Thomas' confession and his version of the killings . . . . Lee's contentions [of self-defense and heat of passion]. . . were 'disputed by the statement of her co-defendant . . . .'"[152] The state appellate court upheld the convictions,[153] holding that although the trial court considered Thomas' confession in determining Lee's guilt, the two confessions were "'interlocking'" and did not "fall within the rule of *Bruton v. United States*, . . . that the 'admission of a codefendant's extrajudicial statement that inculpates the other defendant violates the defendant's Sixth Amendment right to confront witnesses against him.'" [154]

The Supreme Court reversed Lee's conviction,[155] applying the two-part test set forth in *Ohio v. Roberts*.[156] Justice Brennan delivered the Court's opinion.[157] First, Justice Brennan determined that under either *Douglas v. Alabama*[158] or *Bruton v. United States*,[159] Thomas confession failed to fall under a firmly rooted hearsay exception.[160] Bruton specifically held that codefendant confessions violated the Confrontation Clause.[161] Without the right to cross-examine the codefendant, the confession cannot be entered into evidence.[162] Although *Bruton* applied to Lee's case, Brennan reasoned that *Douglas* provided a closer parallel.[163]

In *Douglas*, as in Lee's case, the State attempted to use an accomplice's confession as evidence.[164] Reading the confession into the record violated Douglas' Confrontation Clause rights.[165] In *Douglas*, however, the confession was not technically evidence; there was just a fear that the jury had considered reading the confession as a writing to refresh the witness' memory as evidence against the defendant.[166]

Thomas' statement, however, was used as evidence; the judge relied upon it to convict Lee.[167] "In this case, the Court d[id] not address a hypothetical. The danger against which the Confrontation Clause was erected-the conviction of a defendant

148. *Id.*
149. *Id.* at 536-37.
150. *Id.* at 537.
151. *Id.* at 538.
152. *Id.*
153. *Id.*
154. *Id.* at 538-39.
155. *Id.* at 547.
156. 448 U.S. 56, 66 (1980).
157. *Lee*, 476 U.S. at 531.
158. 380 U.S. 415 (1965).
159. 391 U.S. 123 (1968).
160. *Lee*, 476 U.S. at 541-42.
161. 391 U.S. 123, 127-28 (1968).
162. *Id.*
163. *Lee*, 476 U.S. at 542.
164. 391 U.S. at 127.
165. 476 U.S. at 542-43.
166. *Id.*
167. *Id.* at 538.

based, at least in part, on presumptively unreliable evidence-actually occurred."[168]

Having determined that codefendant confessions do not fall within a firmly rooted hearsay exception, Justice Brennan also determined that Thomas' confession did not have particularized guarantees of trustworthiness.[169] Codefendant confessions bear a presumption of unreliability.[170] Thomas' confession did not overcome that presumption, despite its voluntary nature and common threads with Lee's confession.[171]

Justice Blackmun dissented; the Chief Justice, Justice Powell, and Justice Rehnquist joined him.[172] Blackmun agreed that *Ohio v. Roberts* provided the proper test to

> ensure that an out-of-court statement is admitted only when it does not threaten the central mission of the Confrontation Clause, which is 'to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that the trier of fact has a satisfactory basis for evaluating the truth of the prior statement.'[173]

In Lee's case, the Confrontation Clause was not violated.[174] Both parts of the *Roberts* test were satisfied.[175]

First, Thomas' Fifth Amendment right against self-incrimination rendered him unavailable as a witness.[176] According to Justice Blackmun, this finding satisfied both the *Roberts* Confrontation Clause requirement of unavailability and the hearsay principle codified in Federal Rule of Evidence 804(a)(1).[177] Second, Thomas' confession bore sufficient indicia of reliability.[178] Thomas' confession was "thoroughly and unambiguously adverse to his penal interest."[179] Such statements fall within a firmly established hearsay exception, based upon the reasoning that "a statement asserting a fact distinctly against one's interest is unlikely to be deliberately false or heedlessly incorrect."[180] Blackmun noted that the Confrontation Clause and hearsay analyses were separate, but the hearsay analysis did weigh heavily in constitutional determinations under the Confrontation Clause.[181] A reliable hearsay statement, therefore, was entitled to a presumption of reliability under the Confrontation Clause.[182]

In Lee's case, Thomas' statement was both an accomplice confession and a

168. *Id.* at 543.
169. *Id.*
170. *Id.* at 544-46.
171. *Id.*
172. *Id.* at 547.
173. *Id.* at 548 (citations omitted).
174. *Id.*
175. *Id.*
176. *Id.* at 549-50.
177. *Id.* at 550-51.
178. *Id.* at 551.
179. *Id.*
180. *Id.* at 551 (citation omitted).
181. *Id.* at 552.
182. *Id.*

statement against his penal interest. Blackmun reasoned that although codefendant confessions are customarily presumed unreliable, they had never been held per se inadmissible under the Confrontation Clause.[183] The Court had previously dealt with codefendant confessions that were not against the confessor's penal interest.[184] Thomas' statement, however, was entirely against his penal interest.[185] In no way did it minimize his involvement in the crime or shift blame to Lee; rather, it was more against his own interests that Lee's confession was against her interests.[186]

Thomas' statements bore two other indicia of reliability. First, Lee's own confession corroborated Thomas' statements.[187] Second, the physical evidence corroborated Thomas' confession.[188] The weapons and the tools used to dispose of the bodies were found based upon both Thomas' and Lee's confessions.[189] Additionally, the autopsy results were consistent with the confessions.[190] Blackmun concluded that these indicia of reliability satisfied the *Roberts* test; the confession fell within a firmly rooted hearsay exception and bore independent indicia of reliability.[191]

Lee v. Illinois held firmly to the rule set forth in *Bruton v. United States* that codefendant confessions violate the Confrontation Clause. The Court further clarified that even similar confessions could not be deemed reliable; any discrepancies between the two confessions created a need for cross-examination.[192] Justice Blackmun, in his dissent, agreed that accomplice confessions raise great concerns, but he emphasized a practical, realistic approach.[193] Rather than a per se inadmissible rule concerning accomplice confessions, he suggested focusing on the individual facts of each case.[194]

Two interpretations of the Confrontation Clause emerged from *Lee v. Illinois*. The five justices joining in the majority opinion adopted a per se inadmissibility standard for hearsay exceptions under the Confrontation Clause.[195] The majority held that accomplice confessions violated the Confrontation Clause.[196] Accomplice confessions violated the Sixth Amendment in both *Douglas v. Alabama* and *Bruton v. United States*; Lee simply followed the rule established by precedent.

The four dissenting justices, however, preferred a common-sense approach to Confrontation Clause issues.[197] Case-by-case adjudication, they reasoned, would result in better decisions, even though a per se rule would create uniformity, eas-

183. *Id.*
184. *Id.* at 553.
185. *Id.* at 551.
186. *Id.* at 553.
187. *Id.* at 555.
188. *Id.* at 556.
189. *Id.*
190. *Id.*
191. *Id.* at 557.
192. *Id.* at 546.
193. *Id.* at 547.
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*

ing the burden on the lower courts to make Confrontation Clause rulings.[198] *Lee v. Illinois* presented an interesting comparison of the two lines of argument within the Supreme Court, but the 5-4 decision indicated a move toward a more controlled reading of the Confrontation Clause. *Idaho v. Wright*[199] continued that move toward a closer reading of the Confrontation Clause.

6. Idaho v. Wright[200]

Defendant Wright divorced her husband.[201] As part of an informal agreement, the couple agreed that their oldest child would spend six months with each parent.[202] During the child's stay with her father, Wright's daughter, then five years old, told her father that Wright's boyfriend, Giles, was sexually abusing her.[203] The next day, a doctor examined the five-year-old; the doctor found evidence of sexual abuse.[204] The defendant's younger daughter, then two-and-a-half years old, was taken into protective custody and examined by a doctor.[205] During the examination, the younger daughter admitted that Giles had touched her inappropriately.[206] She also stated that her older sister was subjected to the abuse more often.[207]

Soon afterward, the state filed charges against both Wright and her boyfriend, Giles.[208] At the trial, the statements that the younger daughter made to the doctor during his examination were admitted as evidence under the state's residual hearsay exception.[209] The doctor testified that she admitted to being touched by her father, Giles.[210] He also testified that she volunteered a statement that Giles abused the older daughter more often.[211]

The jury convicted both defendants of all counts and sentenced them to twenty years in prison.[212] Wright appealed, and the Idaho Supreme Court reversed the defendant's conviction, holding that admission of the doctor's testimony under

198. *Id.*
199. 497 U.S. 805 (1990).
200. *Id.*
201. *Id.* at 809.
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.* at 811.
207. *Id.*
208. *Id.*
209. *Id.* at 810-12. At the trial, both parties and the court agreed that the younger daughter, then three years old, was unable to testify because she "was 'not capable of communicating to the jury.'" *Id.* at 809. The Supreme Court decided (without ruling on the issue of whether an allegedly abused child who does not testify is unavailable) that the younger daughter was unavailable for purposes of analyzing the hearsay under the Confrontation Clause. *Id.* at 816. The residual hearsay exception provides that "'[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 a 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.'" *Id.* at 812.
210. *Id.* at 811.
211. *Id.*
212. *Id.* at 812.

the residual hearsay exception violated the defendant's rights under the Confrontation Clause.[213] The Supreme Court affirmed.[214]

Justice O'Connor delivered the Court's opinion.[215] She reiterated the Court's test for analyzing hearsay statements under the Confrontation Clause, the *Ohio v. Roberts* test.[216] *Roberts* requires that for a hearsay exception to be compatible with Confrontation Clause requirements, the evidence must 1) "fall[] within a firmly rooted hearsay exception" or 2) have "particularized guarantees of trustworthiness."[217] For a hearsay exception to be firmly rooted, it must "possess 'the imprimatur of judicial and legislative experience . . . .'"[218] "Admission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements."[219]

Residual hearsay exceptions, by definition, do not fall within a firmly rooted hearsay exception.[220] Justice O'Connor states that these exceptions "accommodate[] ad hoc instances in which statements not otherwise falling within a firmly recognized hearsay exception might nevertheless be sufficiently reliable to be admissible at trial."[221] Recognizing the residual hearsay exception as firmly rooted would render all hearsay exceptions firmly rooted, and all hearsay statements would pass the constitutional requirement of the Confrontation Clause.[222] The Court, Justice O'Connor emphasized, refused to take that step.[223]

If a hearsay exception is not firmly rooted, it may still be admissible within the confines of the Confrontation Clause if it has "particularized guarantees of trustworthiness."[224] The Supreme Court agreed with the Idaho Supreme Court that the younger daughter's statements to the doctor lacked guarantees of trustworthiness.[225] The Supreme Court, however, rejected the Idaho Supreme Court's reliance on procedural safeguards.[226]

Instead, Justice O'Connor reasoned, finding guarantees of trustworthiness depended upon the "totality of the circumstances" in each case.[227] The relevant circumstances "include only those that surround the making of the statement and that render the declarant particularly worthy of belief."[228] The Court rejected both procedural safeguards and corroborating evidence as circumstances worthy of consideration under the particularized guarantees of trustworthiness test.[229] Instead, Justice O'Connor stated, courts should inquire whether "the declarant's

213. *Id.*
214. *Id.* at 813.
215. *Id.* at 808.
216. *Id.* at 814-15.
217. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).
218. *Wright*, 497 U.S. at 817.
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.* at 817-18.
224. Ohio v. Roberts, 448 U.S. 56, 66 (1980).
225. *Wright*, 497 U.S. at 818.
226. *Id.*
227. *Id.* at 819.
228. *Id.*
229. *Id.* at 818-19, 823.

truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility . . . ."[230]

Justice Kennedy, Chief Justice Rehnquist, Justice White, and Justice Blackmun dissented.[231] Justice Kennedy wrote that the majority erred in dismissing corroborating evidence as an indicator of a hearsay statement's trustworthiness.[232] Such an approach, Kennedy stated, violated the Court's own precedent, particularly *Lee v. Illinois*.[233] Relying on corroborating evidence was a common sense approach to analyzing the trustworthiness of a statement and was certainly a factor for juries to consider.[234] In the present case, the younger daughter's statements were substantially corroborated.[235] Justice Kennedy recommended that the judgment be vacated and that the case be remanded for consideration of guarantees of trustworthiness.[236]

Idaho v. Wright appeared to emphasize a common sense, factual approach to the *Roberts* test, but the Court also appeared to read the Confrontation Clause more expansively. A "totality of the circumstances" test certainly provided lower courts with greater discretion in evaluating hearsay statements under the Confrontation Clause. Excluding corroborating evidence as a circumstance to consider, however, heightened the constitutional standard. A hearsay statement must meet the particularized guarantees of trustworthiness on its own. Overall, however, the Court's decision in *Idaho v. Wright* continued the trend of a more controlled reading of the Confrontation Clause.

Interestingly, neither the majority nor dissenting opinions discussed the possibility of classifying the younger daughter's statements under the medical diagnosis hearsay exception. The Court simply accepted the lower court's ruling that the statement fell under the residual hearsay exception. Regardless of how the statement was categorized at trial, as a statement for the purpose of medical diagnosis, the statement carried particularized guarantees of trustworthiness. The Court explicitly adopted this type of statement in its next Confrontation Clause case, *White v. Illinois*.[237]

7. White v. Illinois[238]

The defendant, White, was charged and convicted of aggravated criminal sexual assault, residential burglary, and unlawful restraint.[239] A babysitter testified that he saw the defendant leaving the room of the four-year-old victim.[240] When the babysitter questioned the child, she stated that the defendant had choked and

230. *Id.* at 820.
231. *Id.* at 827.
232. *Id.* at 828.
233. *Id.* at 831.
234. *Id.* at 828.
235. *Id.* at 834.
236. *Id.* at 834-35.
237. 502 U.S. 346 (1992).
238. *Id.*
239. *Id.* at 349.
240. *Id.*

threatened her and then sexually assaulted her.[241] The child's mother, a police officer, an emergency room nurse, and a physician subsequently questioned the child and she told them the same story she had related to the babysitter.[242] At trial, the victim tried unsuccessfully to testify.[243] She approached the witness stand twice, but she became too emotional to testify.[244] The babysitter, the child's mother, the police officer, the nurse, and the doctor then took the stand and testified to the victim's statements.[245]

The defendant appealed the conviction, claiming his Confrontation Clause rights were violated because he could not confront the victim.[246] The Illinois Appellate Court affirmed the conviction.[247] After the Illinois Supreme Court refused to hear the appeal, the Supreme Court granted certiorari and the Supreme Court affirmed.[248]

Chief Justice Rehnquist wrote the majority opinion of the Court.[249] He reemphasized that the *Roberts* test was the Court's method for determining the admissibility of hearsay statements under the Confrontation Clause.[250] Rehnquist explained, though, that the scope of the *Roberts* test had changed.[251] In *Roberts*, the Court "used language that might suggest that the Confrontation Clause generally requires that a declarant . . . be found unavailable before his out-of-court statement may be admitted into evidence."[252] The scope of *Roberts* was later clarified by *United States v. Inadi*,[253] a Confrontation Clause challenge concerning the admissibility of coconspirator statements made during the course of the conspiracy.[254] In *Inadi*, the Court concluded that "Roberts stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding."[255] The Court based its decision on two principles. First, "coconspirator statements 'provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court.'"[256] Live testimony "is a poor substitute for the full evidentiary significance that flows from statements made when the conspiracy is operating in full force."[257] Second, Rehnquist reasoned that the unavailability rule did not affect the admission of coconspirator statements.[258] Requiring the prosecution to prove a witness unavailable simply imposed a burden on the State; many state-

241. *Id.*
242. *Id.* at 349-50.
243. *Id.* at 350.
244. *Id.*
245. *Id.*
246. *Id.* at 351.
247. *Id.*
248. *Id.* at 358.
249. *Id.* at 348.
250. *Id.* at 353.
251. *Id.*
252. *Id.*
253. 475 U.S. 387 (1986).
254. *White*, 502 U.S. at 353.
255. *Id.* at 354 (citation omitted).
256. *Id.* (citation omitted).
257. *Id.* (citation omitted).
258. *Id.*

ments would still be admissible.[259]

Justice Rehnquist then extended the *Inadi* rule to all cases where a hearsay statement carried sufficient guarantees of reliability.[260] Relying on the reasoning in Inadi, he stated that "spontaneous declarations and statements made in the course of receiving medical care . . . are made in contexts that provide substantial guarantees of their trustworthiness. But those same factors that contribute to the statements' reliability cannot be recaptured even by later in-court testimony."[261] Requiring unavailability would add nothing to the *Roberts* test and would, in some cases, result in injustice.[262]

Applying the *Roberts* test to the child's statements, Rehnquist categorized them as spontaneous declarations and statements made for the purpose of medical diagnosis, both firmly rooted exceptions.[263] Rehnquist stated that these types of statements were so inherently reliable that the hearsay statements are usually more effective than live testimony.[264] The contexts in which the two types of hearsay statements are made "provide substantial guarantees of trustworthiness."[265]

Justice Thomas, concurred in part and concurred in the judgment.[266] Justice Scalia joined him.[267] Justice Thomas encouraged the Court to return to a more historical reading of the Confrontation Clause, an interpretation that he reasoned would eliminate much of the confusion surrounding the relationship between the Confrontation Clause and the hearsay doctrine.[268]

First, Thomas noted that "the Court has assumed that all hearsay declarants are 'witnesses against' a defendant within the meaning of the Clause, . . . an assumption that is neither warranted nor supported by the history or text of the Confrontation Clause."[269] The strictest reading would limit the right of confrontation "only to witnesses who actually appear and testify at trial."[270] Thomas rejected that interpretation as incompatible with the common law right of confrontation and the Court's precedent.[271]

The common law confrontation right developed "'to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, [from] being used against the prisoner in lieu of a personal examination and cross-examination of the witness . . . .'"[272] Evidentiary concerns appeared to play little role in the development or application of the common law right of confrontation.[273] The Court's present test, set forth in *Roberts*, Thomas reasoned, implied that only unreliable hearsay statements violated the Confrontation Clause.[274] "Reliability

259. *Id.* at 354-55.
260. *Id.* at 355-56.
261. *Id.*
262. *Id.* at 356-57.
263. *Id.* at 355.
264. *Id.* at 356.
265. *Id.*
266. *Id.* at 358.
267. *Id.*
268. *Id.* at 358-59.
269. *Id.* at 359 (citations omitted).
270. *Id.*
271. *Id.* at 360.
272. *Id.* at 362 (citation omitted).
273. *Id.*
274. *Id.* at 363.

is more properly a due process concern."[275] Analyzing the reliability of hearsay statements under the Confrontation Clause "strain[ed] the text of the Confrontation Clause to provide criminal defendants with a protection that due process already provides them."[276]

Thomas then chose a semi-historical reading of the Confrontation Clause: "The federal constitutional right of confrontation extends to any witness who actually testifies at trial, but the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."[277] Thomas stated that "[s]uch an approach would be consistent with the vast majority of [the Court's] cases, since virtually all of them decided before *Ohio v. Roberts* involved prior testimony or confessions, exactly the type of formalized testimonial evidence that lies at the core of the Confrontation Clause's concerns."[278] This interpretation, Thomas suggested, simplified the conflict between hearsay and the Confrontation Clause.[279]

The majority opinion greatly expanded the admissibility of hearsay statements under the Confrontation Clause by eliminating the threshold requirement of unavailability. The Court continued to apply the *Roberts* test, but it focused its reasoning on reliability and trustworthiness. The reliability of a hearsay statement contributed to both its status as a firmly rooted exception and a particularly trustworthy statement. Two hearsay exceptions, spontaneous declarations and statements made for the purpose of medical diagnosis, were also explicitly categorized as firmly rooted exceptions.

Thomas' concurrence, however, focused on the Court's continued move to combine hearsay analysis with the Confrontation Clause.[280] Thomas agreed with the majority's result, but he found their reasoning complicated and unnecessary.[281] By concentrating on the type of hearsay statement being offered, the Court could more easily protect the right to confrontation.

White v. Illinois was the last case that the Court decided on Confrontation Clause grounds before *Lilly v. Virginia*. Between *White* and *Lilly*, however, the Court was confronted with another hearsay doctrine/Confrontation Clause dilemma. The Court made its decision without resolving the Confrontation Clause issue; however, in analyzing the hearsay statements in question, the Court did take a step backwards from its controlled reading of the Confrontation Clause.

8. Williamson v. United States[282]

A deputy sheriff arrested Harris during a traffic stop after the deputy discov-

275. *Id.* at 363-64.
276. *Id.* at 364.
277. *Id.* at 365.
278. *Id.*
279. *Id.* at 365-66.
280. *Id.* at 358.
281. *Id.*
282. 512 U.S. 594 (1994).

ered nineteen kilograms of cocaine in the trunk.[283] During his police interrogation, Harris implicated Williamson as a leading member of the conspiracy.[284] At Williamson's trial, Harris was called to testify but he refused.[285] Harris' confession, implicating Williamson, was read into the record under the against-penal-interest hearsay exception.[286] Williamson was convicted of possession of cocaine with intent to distribute, conspiracy to possess cocaine with intent to distribute, and travelling interstate to promote the distribution of cocaine.[287] The Court of Appeals for the Eleventh Circuit affirmed his conviction, and the Supreme Court granted certiorari.[288] Williamson asserted that the admission of Harris' confession violated his Confrontation Clause rights and Federal Rule of Evidence 804(b)(3).[289]

The Supreme Court vacated the judgment and remanded the case.[290] Justice O'Connor delivered the Court's opinion, except for Part II-C.[291] Justice O'Connor first explored two readings of the against-penal-interest exception, codified in Federal Rule of Evidence 804(b)(3): 1) any non-inculpatory statements render the entire statement inadmissible; and 2) any self-serving statements are inadmissible, but all neutral statements, as well as self-inculpatory statements, are admissible.[292] The Court adopted the stricter reading of the rule:

> [T]he most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory. The district court may not just assume for the purposes of Rule 804(b)(3) that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else.[293]

Justice O'Connor also noted that the stricter reading also comported with the Court's earlier declarations that codefendant statements were inherently unreliable.[294] Harris' statement was a prime example: his statement was nothing more than an attempt to "curry favor" with the authorities.[295]

By adopting this reading of Rule 804(b)(3), the Court declined to decide the Rule's admissibility under the Confrontation Clause.[296] The Court also declined to

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283. *Id.* at 596.
284. *Id.* at 597.
285. *Id.*
286. *Id.* at 597-98.
287. *Id.* at 597.
288. *Id.* at 598.
289. *Id.*
290. *Id.* at 605.
291. *Id.* at 596. Although Justice O'Connor authored Part II-C, only Justice Scalia joined.
292. *Id.* at 600-02. The Court rejected Justice Kennedy's argument that admissibility under the exception depended on "whether a statement is collateral to a self-inculpatory statement." *Id.* at 600. Justice O'Connor reasoned that while a self-inculpatory statement is inherently more reliable than a collateral statement, the reliability of a self-inculpatory statement has no bearing on the reliability of collateral statements. *Id.* Making statements admissible because of their proximity to self-inculpatory statements read too much into the Rule's ambiguous language and undermined the theory behind the Rule-that persons do not make statements that will harm them unless those statements are true. *Id.*
293. *Id.* at 600-01.
294. *Id.* at 601 (citations omitted).
295. *Id.* at 603-04.
296. *Id.* at 605.

rule on the admissibility of the exception under the particularized guarantees of trustworthiness test articulated in *Roberts*.[297] Justice O'Connor did articulate, however, that the strict reading of Rule 804(b)(3)-the requirement of a completely self-inculpatory statement-was itself a particularized guarantee of trustworthiness.[298]

Justice Scalia concurred.[299] He emphasized application of the stricter reading of the against-penal-interest exception, defining the "relevant inquiry" to be whether the statement "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 unless believing it to be true."[300] Following the language of the Rule necessarily excluded any collateral statements because those statements, by definition, were not against penal interest.[301]

Justice Ginsburg also filed a concurring opinion, in which Justices Blackmun, Stevens, and Souter joined.[302] She agreed with Justice O'Connor that Harris' statements were not against his penal interest, as defined by Federal Rule of Evidence 804(b)(3).[303] However, Harris' statements, even those that inculpated him, were so self-serving as to be excluded from consideration under the against-penal-interest exception.[304]

Justice Kennedy filed a concurring opinion as well, and Chief Justice Rehnquist and Justice Thomas joined him.[305] Justice Kennedy rejected the "extreme position that no collateral statements are admissible under Rule 804(b)(3)."[306] He argued first that the Advisory Committee Notes provided for the admission of some collateral statements: "[O]rdinarily the third-party confession is thought of in terms of exculpating the accused, but . . . it may include statements implicating him, and under the general theory of declarations against interest they would be admissible as related statements."[307] Second, operating under the assumption that Congress intended for courts to apply the principles of the Rules as they were applied at common law, collateral statements would be

297. *Id.*
298. *Id.*
299. *Id.*
300. *Id.* at 605-06 (citation omitted).
301. *Id.* at 606.
302. *Id.* at 607.
303. *Id.*
304. *Id.* at 608-09.
305. *Id.* at 611.
306. *Id.* at 613.
307. *Id.* at 614 (citation omitted).

admissible.[308] Third, the exception would be eviscerated if collateral statements were excluded; "the exclusion of collateral statements would cause the exclusion of almost all inculpatory statements."[309]

Although *Williamson* did not reach the Confrontation Clause issue, the opinions filed by the Court reflect a division in thinking. Justices O'Connor and Scalia suggested that custodial confessions that also inculpated an accomplice would fail the *Roberts* test. If such statements were not reliable enough to meet the requirements of the hearsay rule, those statements certainly could not pass the higher constitutional barrier raised by the Confrontation Clause. Justice Ginsburg's concurring opinion reads the against-penal-interest exception even more closely. Justice Kennedy's concurring opinion reflected a more practical approach to a reading of the against-penal-interest exception. By dividing a confession into self-inculpatory, neutral, and self-serving statements, courts could determine which statements were reliable enough under the exception's definition to be admissible.

The division in the Court over the reliability of the against-penal-interest exception was the issue in *Lilly v. Virginia*. In *Lilly*, however, the Court resolved the Confrontation Clause question it declined to address in *Williamson*. The division of the Court was even stronger in *Lilly* than it was in *Williamson*, raising questions about the direction that the Court would take in future Confrontation Clause/hearsay doctrine cases.

III. INSTANT CASE

A. Facts

On December 4, 1995, Benjamin Lilly ("Lilly"), his roommate, Gary Wayne Barker ("Barker"), and Lilly's brother, Mark Lilly ("Lilly's brother"), embarked on a two-day crime spree.[310] The three men met at Lilly's house, where they consumed alcohol and smoked marijuana.[311] Some time later, the three men drove to a friend's house.[312] When they discovered that the friend was not at home, they broke into his home, stealing liquor, a safe, and several guns.[313] After an unsuccessful attempt to trade the stolen guns for more marijuana, the men drove to Blackburg, where they spent the night with a friend.[314] They drank alcohol and smoked marijuana all night.[315]

The next morning, the three men tried twice more to trade the stolen guns for marijuana.[316] Their car eventually broke down near a convenience store.[317] After

308. *Id.* at 615.
309. *Id.* at 616.
310. Lilly v. Commonwealth, 499 S.E.2d 522, 528 (Va. 1998). All of the evidence reviewed by the Virginia Supreme Court was taken from Barker's testimony at trial and the statements that both Barker and Lilly's brother made to the police after they were apprehended.
311. *Id.* The review of Barker's testimony begins here.
312. *Id.*
313. *Id.*
314. *Id.*
315. *Id.*
316. *Id.*
317. *Id.*

removing the stolen guns and liquor from the car, they approached a man inspecting his tires in the convenience store parking lot.[318] Lilly confronted the man, Alex DeFillipis, with a gun.[319] Lilly forced DeFillipis into his own car.[320] Lilly's brother and Barker also got into the car, and the three men drove DeFillipis to an isolated area near a river.[321] After taking DeFillipis' wallet, the three men ordered him to get out of the car, strip down, and walk away.[322] At this point, Lilly's brother had possession of the stolen pistol.[323] The other guns were also in the car.[324] The three men threw DeFillipis' clothes into the river and began to leave in DeFillipis' car.[325] Lilly grabbed the pistol from Lilly's brother, ran over to DeFillipis, and shot him four times at point-blank range - three times in the head and once in the arm.[326] Lilly explained to Barker that DeFillipis might have identified him, and he did not want to go back to the penitentiary.[327] The three men drove away, leaving the body in the middle of the road.[328]

They took the money from DeFillipis' wallet and bought beer.[329] The three men drove on, throwing "anything that might have our prints on it" into another local river; however, they kept all of the guns, including the murder weapon.[330] Shortly thereafter, they robbed a small convenience store, taking some cash and some merchandise.[331] They proceeded on to attempt to rob another store.[332] Lilly's brother and Barker went inside while Lilly waited in the car.[333] The store's owner interrupted the robbery and pursued the men in his car until Barker fired one of the guns.[334]

The stolen car broke down a few miles down the road.[335] While the men unloaded the guns and merchandise from the car, the police arrived.[336] All three men fled on foot, but the police soon apprehended them.[337] The three men were taken into custody and questioned separately.[338]

During the questioning, Lilly did not mention that DeFillipis had been murdered.[339] He only told the police that he had been forced to participate in the rob-

318. *Id.*
319. *Id.*
320. *Id.*
321. *Id.*
322. *Id.*
323. *Id.*
324. *Id.*
325. *Id.*
326. *Id.*
327. *Id.*
328. *Id.*
329. *Id.*
330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.*
334. *Id.* at 528-29. This ends the testimony given by Barker at Lilly's trial.
335. *Id.* at 529.
336. *Id.*
337. *Id.*
338. Lilly v. Virginia, 119 S. Ct. 1887 (1999).
339. *Id.*

beries.[340] Barker and Lilly's brother, however, told the police about the murder.[341] Although their stories differed somewhat, both men pointed to Lilly as the "mastermind" behind both the robberies and the murder.[342]

Lilly was brought to trial in October 1996.[343] Barker testified against Lilly during the trial; Lilly's brother was also called as a witness, but he invoked his Fifth Amendment right against self-incrimination.[344] The court, however, admitted Lilly's brother's statements to the police into evidence.[345] Lilly's brother told police in two interviews on December 6, 1995, that he had only stolen liquor in the first robbery.[346] He also admitted that he had stolen a 12-pack during one of the later robberies and that he had handled a gun at one point during the crime spree.[347] Additionally, he admitted to being present during all of the crimes, including DeFillipis' murder.[348] Lilly's brother maintained, however, that Barker and Lilly stole the guns, that Barker had used one of the guns to hold up one of the stores, that Lilly had "instigated" the carjacking and kidnapping of DeFillipis, and that Lilly had shot DeFillipis without any help from Lilly's brother.[349]

After a five-day trial, the jury convicted Lilly of capital murder and sentenced him to death.[350] Lilly appealed to the Virginia Supreme Court, citing numerous errors, including the admission of Lilly's brother's statements to the police.[351] The Virginia Supreme Court found no error and upheld both the capital murder conviction and the death sentence.[352] Lilly appealed this decision to the United States Supreme Court. The Court granted certiorari[353] to consider whether the Sixth Amendment's Confrontation Clause "was violated by admitting into evi-

340. *Id.*
341. *Id.*
342. *Id.*
343. *Lilly*, 499 S.E.2d at 528.
344. *Id.* at 528, 533.
345. *Id.* at 533.
346. *Lilly*, 119 S. Ct. at 1892. Mark was interrogated from 1:35 AM to 2:12 AM, and from 2:32 AM to 2:53 AM on the morning of December 6, 1995.
347. *Id.*
348. *Id.*
349. *Id.*
350. 499 S.E.2d at 527-28. He was also convicted of several lesser included offenses and several firearms violations. For these lesser offense convictions, Lilly received two life sentences plus 27 years. *Id.* at 528.
351. *Id.* at 529. Among the issues that Lilly cited as error were 1) the trial court's failure to allow Lilly to exceed the scope of pre-approved voir dire issues with the potential jurors, 2) the trial court's failure to allow Lilly to educate the jurors on parole and life sentences in capital murder cases, 3) the trial court's dismissal for cause of six jurors, 4) the trial court's failure to dismiss three more jurors for cause, 5) the trial court's denial of Lilly's motion for change of venue, 6) the trial court's denial of Lilly's motion for mistrial after the Commonwealth showed graphic photographs and video tape of the murder scene, 7) the trial court's failure to exclude Lilly's incriminating pre-custodial statements to one of the arresting police officers, 8) the trial court's admission of police testimony that Lilly refused to take a gunpowder residue test and that Lilly rubbed his hands together to destroy any evidence of gunpowder residue, 9) the trial court's admission of forensic evidence that Lilly asserted was inconsistent with the Commonwealth's theory, 10) the trial court's admission of a medical examiner's report that contained tests and test results not performed by the doctor who performed the autopsy, 11) the trial court's failure to sequester witnesses, particularly Barker, 12) the trial court's failure to allow jury instruction on voluntary intoxication, and 13) the trial court's failure to declare a mistrial for prosecutorial misconduct. *Id.* at 529-37. The United States Supreme Court did not address any of these issues in its hearing of the case.
352. *Id.* at 537.
353. Lilly v. Virginia, 119 S. Ct. 1887 (1999).

dence 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."[354]

B. The Supreme Court's Opinion

The Supreme Court unanimously voted to reverse the decision of the Virginia Supreme Court.[355] The Court held that the admission of Lilly's brother's statements to the police violated Lilly's Sixth Amendment right to confrontation.[356] The Supreme Court remanded the case to the Virginia Supreme Court for a determination of harmless error.[357]

The precise reasoning behind the Court's decision, however, was not unanimous. Justice Stevens delivered the opinion of the Court, a plurality opinion, in which Justices Souter, Ginsburg, and Breyer joined him.[358] Justice Breyer also filed a concurring opinion.[359] Justices Scalia and Thomas both filed opinions, concurring in part and concurring in the judgment.[360] Chief Justice Rehnquist filed an opinion concurring in the judgment; Justices O'Connor and Kennedy joined him.[361]

1. Justice Stevens' Opinion

In Part I of his opinion, Justice Stevens reviewed the pertinent facts of the case, including the procedural history.[362] He also discussed the reasoning of the Virginia Supreme Court in upholding Lilly's conviction.[363] The Virginia Supreme Court found that under *White v. Illinois*,[364] the Virginia hearsay exception that allows statements against penal interest had "sufficient guarantees of reliability to come within a firmly rooted exception" and satisfied the Confrontation Clause.[365] Certiorari was granted to review the Confrontation Clause.[366]

In Part II, Justice Stevens established the Court's jurisdiction.[367] The Commonwealth argued that Lilly had not preserved his Sixth Amendment argument, because he had not presented it to the Virginia Supreme Court.[368] The Court found jurisdiction for three reasons: 1) in his opening statement to the Virginia Supreme Court, Lilly expressed that admission of Lilly's brother's state-

354. *Id.* at 1892.
355. *Id.*
356. *Id.* at 1901.
357. *Id.* at 1900.
358. *Id.* at 1892. Specifically, Justice Stevens' six-part opinion was joined as follows: Justices Souter, Ginsburg, Breyer, Scalia, and Thomas joined Parts I and VI. Justices Souter, Ginsburg, Breyer, and Scalia joined part II. Justices Souter, Ginsburg, and Breyer only (the plurality) join parts III, IV, and V (the majority of the analysis).
359. *Id.*
360. *Id.*
361. *Id.*
362. *Id.*
363. *Id.*
364. 502 U.S. 346 (1992).
365. *Lilly*, 119 S. Ct. at 1893 (citations omitted).
366. *Id.*
367. *Id.*
368. *Id.*

ments violated his right to confrontation; 2) Lilly cited both *Lee v. Illinois*[369] and *Williamson v. United States*[370] in his reply brief to the Virginia Supreme Court; and 3) the Virginia Supreme Court addressed the issue.[371]

Justice Stevens began the Court's analysis of the Confrontation Clause in Part III.[372] The main purpose of the Confrontation Clause, he stated, is "to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."[373] Without the right to cross-examination, a criminal defendant loses the opportunity to test the declarant's statement for its truth.[374] Stevens referred to the Court's most recent Confrontation Clause case, *White v. Illinois*,[375] and noted that the Confrontation Clause would not be narrowly construed.[376] Instead, the two-part test established in *Ohio v. Roberts*[377] was the proper test to interpret the Confrontation Clause.[378] In *Roberts*, the Court determined that the Confrontation Clause was not violated by admission of a hearsay statement if 1) "'the evidence 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."[379]

Part IV analyzed Lilly's brother's statements under the *Roberts* test.[380] Justice Stevens began this analysis with an examination of the history of both the firmly rooted exception doctrine and the statement against penal interest exception.[381] Firmly rooted exceptions to the hearsay rule have been allowed as evidence since 1895 in *Mattox v. United States*.[382] According to *Mattox*, the Framers must have intended to "'respec[t]' certain unquestionable rules of evidence in drafting the Confrontation Clause."[383] A hearsay statement falls within a firmly rooted exception when "it 'rest[s] [on] such [a] solid foundatio[n] that admission of virtually any evidence within [it] comports with the 'substance of the constitutional protection.'"'[384] This "solid foundation" is established by time.[385]

Turning to the declaration against penal interest exception, Justice Stevens noted that the exception has three different meanings: 1) its use as a voluntary admission against a declarant; 2) its use as exculpatory evidence offered by a

369. 476 U.S. 530 (1986).
370. 512 U.S. 594 (1994).
371. *Lilly*, 119 S. Ct. at 1893.
372. *Id.*
373. *Id.* at 1894 (citation omitted).
374. *Id.*
375. 502 U.S. 346 (1992).
376. *Lilly*, 119 S. Ct. at 1894 (citation omitted).
377. Ohio v. Roberts, 448 U.S. 56 (1980).
378. *Lilly*, S. Ct. at 1894 (citation omitted).
379. *Id.* (citation omitted).
380. *Id.*
381. *Id.*
382. 156 U.S. 237 (1895).
383. *Lilly*, 119 S. Ct. at 1894 (citation omitted).
384. *Id.* at 1895 (citations omitted).
385. *Id.* The Court refers to spontaneous declarations as an example of a "firmly rooted" exception. *Id.* The spontaneous declarations exception is over two centuries old and is currently widely accepted as a trustworthy exception. *Id.*

defendant; and 3) its use as evidence to establish the guilt of an accomplice.[386] He reviewed the admissibility of the first two applications of the exception, relying on the Court's precedent.[387] He determined, however, that the third application of the exception, to prove the guilt of an accomplice, applied to the present case.[388] Stevens discussed the use of the against-penal-interest exception to prove the guilt of an accomplice as one of "recent vintage," similar in function to statements used in the "ancient *ex parte* affidavit system," and "inherently unreliable."[389] He focused his analysis on the "inherently unreliable" nature of the exception under the *Roberts* test.[390]

In *Crawford v. United States*,[391] the Court stated that "even when an alleged accomplice *testifies*, his confession that 'incriminate[s] himself together with defendant . . . ought to be received with suspicion . . . .'"[392] Accordingly, the same reasoning was applied to the Sixth Amendment in *Douglas v. Alabama*, when the Court ruled that "the admission of a *nontestifying* accomplice's confession, which shifted responsibility and implicated the defendant . . . 'plainly denied [the defendant] the right of cross-examination secured by the Confrontation Clause.'"[393] This principle was reaffirmed in *Lee v. Illinois*.[394]

Stevens also emphasized the Court's continuity of reasoning in applying this principle to the Federal Rules of Evidence.[395] *Williamson* reached the same result-the exclusion of an accomplice's statement that shifted blame-without even addressing the Confrontation Clause issue.[396] It followed naturally then, Stevens reasoned, that "accomplices' confessions 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."[397]

Stevens continued his application of the *Roberts* test, holding that the declaration-against-penal-interest exception also violated the particular guarantees of trustworthiness test.[398] He reemphasized the unreliability of accomplice confessions and the low probability that such a heavy presumption of unreliability could be rebutted.[399] He also noted that the *Roberts* test required independent guarantees of trustworthiness.[400] Corroborating evidence, such as the Miranda warnings administered to Lilly's brother, admissibility in state court, and Lilly's brother's knowledge of his own criminal liability, could not be used to increase

386. *Id.*
387. *Id.* at 1895-97. Voluntary admissions were routinely offered into evidence against the person who made the statement. When the statement is admitted in a joint trial, however, great care is taken in admitting the statement. Statements used as exculpatory statements are admissible under the Due Process Clause when the statement is sufficiently reliable. Because the statement is exculpatory rather than inculpatory, however, the Confrontation Clause is not implicated.
388. *Id.*
389. *Id.* at 1897.
390. *Id.*
391. 212 U.S. 183 (1909).
392. *Lilly*, 119 S. Ct. at 1897 (emphasis added).
393. *Id.* (emphasis added)(citation omitted).
394. *Id.* (citation omitted).
395. *Id.* at 1898 (citation omitted).
396. *Id.*
397. *Id.* at 1899.
398. *Id.* at 1900-01.
399. *Id.* at 1900.
400. *Id.*

the trustworthiness of the hearsay statements.[401]

Part VI reversed the conviction.[402] The case was remanded to the trial court.[403] Stevens declared that even though admission of Lilly's brother's confession violated the Confrontation Clause, the trial court could still find the error harmless and uphold the conviction.[404]

2. Justice Breyer's Concurring Opinion

Although Justice Breyer agreed that the accomplice confession should be excluded, he disapproved of the plurality's application of the Confrontation Clause.[405] A hearsay-based approach to the Confrontation Clause, Breyer stated, was a recent application of the defendant's right to confront his accusers.[406] The current reading of the Confrontation Clause, Breyer argued, was "both too narrow and too broad."[407]

Breyer argued that the hearsay-based approach was too narrow, in that it produced inconsistent results.[408] A piece of evidence may fall under more than one hearsay exception.[409] "For example, a deposition or videotaped confession sometimes could fall within the exception for vicarious admissions or, . . . the exception for statements against penal interest."[410] Depending on which exception was argued to the court, the statement would either be admitted under a firmly rooted exception, or it would be excluded as lacking particularized guarantees of trustworthiness.[411]

The Confrontation Clause was defined too broadly, on the other hand, in that it called all hearsay into question.[412] The *Roberts* test required all hearsay to be considered, whether it falls under a hearsay exception or not.[413] Even a hearsay statement that would be excluded under the hearsay doctrine could be admissible as a hearsay statement with particularized guarantees of trustworthiness.[414] Justice Breyer concluded by stating that the Court "need not reexamine the current connection between the Confrontation Clause and the hearsay rule . . . because the statements at issue violate the Clause regardless."[415] The link between the Confrontation Clause and the hearsay doctrine was a "question open for another day."[416]

3. Justice Scalia's Concurring Opinion

Justice Scalia viewed the introduction of Lilly's brother's taped confession

401. *Id.* at 1901. For a discussion of corroborating evidence, see Idaho v. Wright, *supra.* n. 206-12.
402. *Id.*
403. *Id.*
404. *Id.*
405. *Id.* at 1902.
406. *Id.* Justice Breyer notes that confrontation is mentioned in the Bible and Shakespearean works, as well as in the better-known 16th and 17th century British cases. *Id.*
407. *Id.*
408. *Id.*
409. *Id.*
410. *Id.*
411. *Id.*
412. *Id.* at 1902-03.
413. *Id.* at 1903.
414. *Id.*
415. *Id.*
416. *Id.*

without giving Lilly the opportunity to cross-examine Lilly's brother as "a paradigmatic Confrontation Clause violation."[417] He referred to the portion of the *White v. Illinois* concurrence written by Justice Thomas, which advocated a historical reading of the Confrontation Clause.[418] Under a historical view, violations would be limited to that evidence which was "'contained in formalized testimonial material.'"[419] Scalia concluded his concurrence by joining in Parts I, II, and VI of the plurality opinion.[420]

4. Justice Thomas' Concurring Opinion

Justice Thomas joined Parts I and VI of the plurality opinion.[421] He reiterated his view 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.'"[422] He also agreed with Chief Justice Rehnquist that a "blanket ban on the government's use of accomplice statements that incriminate a defendant" did not comport with "an original understanding of the Confrontation Clause."[423] Furthermore, a per se inadmissibility rule prevented judicial review.[424]

5. Justice Rehnquist's Concurring Opinion

Justices O'Connor and Kennedy joined Justice Rehnquist's opinion.[425] Rehnquist strongly opposed the plurality's per se rule that accomplice confessions that inculpated a defendant did not fall within a firmly rooted hearsay exception.[426] Imposing such a rigid rule was unnecessary in this case, because the hearsay statements were not even admissible under the against-penal-interest exception, much less under the heightened standard of the Confrontation Clause.[427]

Furthermore, Rehnquist argued, the plurality misapplied the *Roberts* test.[428] Lilly's brother's statements should be viewed suspiciously because his confession was custodial.[429] In its precedent, the Court consistently viewed custodial confessions with suspicion without ever focusing on what hearsay exceptions applied to these confessions.[430] The Court's blanket ban would now prevent non-

417. *Id.*
418. *Id.*
419. *Id.* (citation omitted)
420. *Id.* Part I reviewed the facts, Part II defined the Court's jurisdiction over the case, and Part VI held that the statements violated the Confrontation Clause, reversed Lilly's conviction, and remanded the case to the trial court for a ruling on harmless error.
421. *Id.*
422. *Id.* (citation omitted).
423. *Id.*
424. *Id.*
425. *Id.*
426. *Id.* at 1904.
427. *Id.*
428. *Id.* at 1905.
429. *Id.*
430. *Id.* (citations omitted).

custodial accomplice statements that inculpated a defendant from ever being admitted, even though such statements carried particularized guarantees of trustworthiness.[431]

Rehnquist also implied that even a custodial confession could carry particularized guarantees of trustworthiness if the confession was considered as more than one statement.[432] The statements that inculpated Lilly and the statements that inculpated Lilly's brother were made at different intervals in the hour-long interview.[433] Rehnquist tentatively suggested that the neutral statements and the inculpatory statements could be separated and those statements with particularized guarantees of trustworthiness could be used at trial without violating the Confrontation Clause.[434]

IV. ANALYSIS

Although the Court reached a unanimous decision in *Lilly v. Virginia*, the Justices reached their respective decisions through three different arguments. Those three arguments apply a hearsay analysis to the Confrontation Clause in varying degrees. First, the *Ohio v. Roberts* analysis focuses entirely on a hearsay-based approach. Second, the Case-by-Case Adjudication approach focuses on a hearsay-based approach, but by emphasizing trustworthiness and reliability outside defined hearsay exceptions, this analysis concentrates on common sense reliability. This practical approach more closely resembles the goal of the Confrontation Clause, to protect the accused from being convicted on unreliable evidence. Third, the Historical Approach nearly abandons a hearsay approach and returns to a more procedural approach to the Confrontation Clause.[435]

A. *THE* OHIO V. ROBERTS *ANALYSIS*

Justice Stevens' plurality opinion, in which he was joined by Justices Ginsburg, Souter, and Breyer, holds strongly to the two-part test set forth in *Ohio v. Roberts*.[436] The plurality opinion firmly rejected the against-penal-interest exception as firmly rooted, stating that "accomplices' confessions 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."[437] The plurality opinion addressed the particularized guarantees of trustworthiness test, but Justice Stevens reasoned that the unreliability of a hearsay statement is

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431. *Id.* Rehnquist briefly discussed Dutton v. Evans, pointing out that a noncustodial accomplice statement that inculpated the defendant was admitted within the confines of the Confrontation Clause because it had indicia of reliability. In *Dutton*, the accomplice made statements incriminating the defendant to his cellmate; the cellmate testified to those statements at the trial. *Id.* Rehnquist also noted several Courts of Appeals cases that admitted noncustodial accomplice statements against a defendant. *Id.* at n.3.

432. *Id.* at 1904.

433. *Id.*

434. *Id.*

435. I have named the three approaches according to their most obvious characteristics. I specifically chose not to name the approaches after their staunchest supporters in case one of the Justices should later alter his reasoning.

436. 448 U.S. 56 (1980).

437. Lilly v. Virginia, 119 S. Ct. 1887, 1899 (1999).

best rebutted by a long history of admitting similar statements.[438] The plurality, then, effectively created a per se inadmissibility rule for accomplice statements that inculpate a defendant.

The *Roberts* test has been applied in every Supreme Court case involving the Confrontation Clause since the test was established in 1980. However, subsequent Supreme Court decisions have altered and clarified the *Roberts* analysis, changing it slightly. These changes represent the first of the three Confrontation Clause interpretations within the Court.

Beginning with *Lee v. Illinois*,[439] two different arguments began to emerge. These arguments include 1) adopting a per se admissibility rule for hearsay exceptions under the *Roberts* test; and 2) adopting a case-by-case analysis without applying per se admissibility rules. Justices who firmly adhered to the *Roberts* test have chosen to adopt per se admissibility rules.

In *White v. Illinois*,[440] for example, the Supreme Court unanimously adopted a per se admissibility rule for both spontaneous declarations and statements made for the purpose of medical diagnosis because these two hearsay exceptions have substantial guarantees of trustworthiness and are firmly rooted exceptions.[441] Conversely, the majority opinion in *Lee v. Illinois*[442] effectively created a per se inadmissible rule for codefendant confessions by establishing a high presumption that such statements were unreliable. Finally, in *Lilly v. Virginia*,[443] the plurality essentially held that accomplice confessions which inculpate a defendant were per se inadmissible.[444]

As a result of these per se rulings, the *Roberts* adherents have shifted their focus to the first part of the *Roberts* test: the firmly rooted exception. In *Lee*, when the majority determined that codefendant confessions did not fall within a firmly rooted exception, they placed an extremely high presumption of unreliability on codefendant confessions.[445] Similarly, in *Idaho v. Wright*,[446] the Court rejected statements that were admitted under the state's residual hearsay exception.[447] The majority adopted a "totality of the circumstances" test to evaluate the statement's particularized guarantees of trustworthiness but limited the circumstances to independent factors; corroborating evidence could not be considered to determine a statement's trustworthiness.[448] Eliminating corroborating evidence raised the presumption of unreliability for hearsay statements even higher.

White v. Illinois[449] created a per se admissibility rule for spontaneous declarations and statements made for the purpose of medical diagnosis under the Confrontation Clause because those exceptions were firmly rooted. In fact, the Court considered those types of statements even more reliable than live testimony because of the contexts in which such statements are made. Again, the Court

438. *Id.* at 1900 (citation omitted).
439. 476 U.S. 530 (1986).
440. 502 U.S. 346 (1992).
441. *Id.* at 355-56.
442. 476 U.S. 530 (1986).
443. 119 S. Ct. 1887 (1999).
444. *Id.* at 1899.
445. *Lee*, 476 U.S. at 543-44.
446. 497 U.S. 805 (1990).
447. *Id.* at 817.
448. *Id.* at 820-21.
449. 512 U.S. 594 (1994).

focused on the firmly rooted exception part of the *Roberts* test.

By adopting per se rules and focusing on the firmly rooted exception prong of the two-part test, the *Roberts* test evaluates Confrontation Clause issues through a hearsay-based approach. Analyses under the *Roberts* test no longer focus on constitutional safeguards; the only question is whether the hearsay is reliable enough to be admitted without cross-examination. If cross-examination cannot increase the reliability of a hearsay statement, it is compatible with the Confrontation Clause, and only firmly rooted exceptions have proven that cross-examination cannot increase their reliability. The likelihood of a hearsay statement being admitted because it bears particularized guarantees of trustworthiness is very slight. The exception would have to carry those guarantees independent of any other evidence.[450]

Justices Stevens, Souter, and Ginsburg may be called firm adherents to the *Roberts* approach. Justice Stevens was a member of the Court that established the *Roberts* test, and he participated in both the *Wright* and *Lilly* opinions that adopted per se inadmissibility approaches to hearsay exceptions and focused on the firmly rooted exception prong to the *Roberts* test. Both Justices Stevens and Souter participated in the *White* opinion adopting a per se admissibility standard.

Lilly v. Virginia[451] was the first Confrontation Clause case in which Justice Ginsburg participated. However, she filed a concurrence in *Williamson v. United States*[452] in which Justices Stevens and Souter joined, and which comports with the *Roberts* approach. In *Williamson*, Justice Ginsburg rejected the idea that Harris' statements fell within a hearsay exception.[453] She did, however, approve the majority's close reading of the against-penal-interest exception.[454] Ginsburg adopted both a strict reading and a strict interpretation of the against-penal-interest hearsay exception for admissibility at trial. Because her approach to hearsay exceptions is so strict, requiring great reliability, the *Roberts* approach to Confrontation Clause issues best suits her reasoning. The *Ohio v. Roberts* analysis' focus on firmly rooted exceptions comports with Justice Ginsburg's reasoning in *Williamson*.

Although Justice Breyer joined in the plurality opinion, he cannot be considered an adherent of the *Ohio v. Roberts* approach. His concurring opinion in *Lilly* focuses on the history of the Confrontation Clause, and he appears unsure that the *Roberts* test is appropriate for analyzing Confrontation Clause/hearsay doctrine issues. Although he participated in the plurality opinion, his concurrence appears to follow the historical approach. *Lilly* was his first Confrontation Clause case, however, so his vote cannot be firmly categorized.

Justice O'Connor, however, is most likely an adherent to the *Ohio v. Roberts* approach. In Lilly she joined Justice Rehnquist's concurrence. Justice O'Connor overwhelmingly relies on the firmly rooted exception approach to

450. See Idaho v. Wright, 497 U.S. 805 (1990). n. 229-35, *supra.*
451. 512 U.S. 594 (1994).
452. *Id.* at 608.
453. *Id.* See n. 230-31, supra.
454. *Id.* at 606-07.

Confrontation Clause analysis.

Justice O'Connor joined the majority opinion in *Lee v. Illinois*, which encouraged a per se inadmissibility rule for codefendant confessions.[455] She authored the majority opinion in *Idaho v. Wright*, which adopted a per se inadmissibility rule for residual hearsay exceptions and eliminating corroborating evidence as a factor in determining particularized guarantees of trustworthiness.[456] She also delivered the Court's opinion in *Williamson v. United States*, which adopted a strict reading of the against-penal-interest hearsay exception.[457]

Overall, the *Ohio v. Roberts* approach allows only reliable hearsay statements to comply with the Confrontation Clause. The focus on the firmly rooted exception prong provides a stronger line of reasoning for lower courts to follow, which would create uniformity in Confrontation Clause decisions. However, the great presumption of unreliability that the *Ohio v. Roberts* approach places on hearsay statements that do not fall within a firmly rooted exception could result in guilty defendants being acquitted.

B. Case-by-Case Adjudication

Chief Justice Rehnquist's concurring opinion in *Lilly*, joined by Justices Kennedy and O'Connor rejected the *Roberts* approach. Instead of adopting a per se inadmissibility rule, Rehnquist argued for a case-by-case consideration of the statements' particularized guarantees of trustworthiness. Rehnquist rejected the plurality's statement that all accomplice statements that inculpate a defendant do not fall within a firmly rooted hearsay exception under *Roberts*. He argued that the blanket ban on accomplice statements would eliminate some accomplice statements that did carry particularized guarantees of trustworthiness; the emphasis, he stated, should be placed on the particularized guarantees of trustworthiness, not on the firmly rooted exception test.[458]

Rehnquist has consistently adopted a case-by-case approach to Confrontation Clause/hearsay doctrine issues. In *Lee v. Illinois*, Rehnquist joined Justice Blackmun in dissenting from the majority's holding that the codefendant's confession was unreliable.[459] The dissent classified the confession as against-penal-interest, a "firmly established" hearsay exception.[460] Even as a codefendant confession, though, the totality of the circumstances produced sufficient indicia of reliability.[461] The corroborating evidence carried a great weight in establishing indicia of reliability.[462]

The case-by-case adjudication approach advocates the use of corroborating evidence in finding a hearsay statement reliable. Justice Kennedy, in *Idaho v.*

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455. *Lee*, 476 U.S. 530, 540-42 (1986).
456. *Wright*, 497 U.S. 805, 817, 819-21 (1990).
457. Williamson v. United States, 512 U.S. 594, 600-01 (1994). See also Part II, section 8, *supra*, regarding the discussion of Justice Ginsburg's similar reading of the Rule and its meaning under the Ohio v. Roberts approach.
458. Lilly v. Virginia, 119 S. Ct. 1887, 1904-06 (1999).
459. *Lee*, 476 U.S. 530, 551 (1986).
460. *Id.*
461. *Id.* at 552-54.
462. *Id.*

Wright, dissented from the majority opinion, which required a hearsay statement to be independently reliable.[463] Rehnquist joined his dissenting opinion.[464] Justice Kennedy's dissenting opinion in *Wright* summarized the case-by-case adjudication approach. Kennedy repeatedly emphasized common sense and practicality in determining whether a statement bore particularized guarantees of trustworthiness.[465] Additionally, Kennedy argued that the Court had relied on corroborating evidence in past Confrontation Clause cases.[466]

The Case-by-Case Adjudication approach applies the *Roberts* test, but it applies the test in a practical and realistic manner. This analysis employs a true "totality of the circumstances" test to determine whether a hearsay statement contains particularized guarantees of trustworthiness rather than focusing on the firmly rooted exception prong of the *Roberts* test. The resulting interpretation of the Confrontation Clause is still hearsay-based, in that *Roberts* is still applied. The use of corroborating evidence approved by the Case-by-Case Adjudication approach, however, is both a hearsay-based concern and a constitutional safeguard. Reliability of the evidence necessarily increases with the amount of evidence that corroborates that statement, and the reliability of evidence is a primary goal of both the Confrontation Clause and the hearsay doctrine. Both Chief Justice Rehnquist and Justice Kennedy have consistently followed this approach and can be considered adherents of the Case-by-Case Adjudication approach.

Overall, the focus on particularized guarantees of trustworthiness expands the number of hearsay statements that are compatible with the Confrontation Clause. The Case-by-Case Adjudication approach, however, creates a lack of uniformity for lower court decisions involving those hearsay statements that do not fall within a firmly rooted exception. The ability of lower courts to rely on corroborating evidence, though, would serve to correct part of that lack of uniformity. The use of corroborative evidence would allow the lower courts to make more informed rulings and would simplify judicial review.

C. The Historical Approach

In *Lilly*, Justices Thomas and Scalia suggest in their concurring opinions that the *Roberts* test be abandoned.[467] This can be done by limiting the application of the Confrontation Clause to "any witness who actually testifies at trial"[468] and "extrajudicial statements only insofar as they are contained in formalized testimonial material, such as affidavits, depositions, prior testimony, or confessions."[469] As a result the Confrontation Clause will once again perform as

463. Idaho v. Wright, 497 U.S. 805, 827 (1990).
464. *Id.*
465. *Id.* at 828, 831-34.
466. *Id.* at 831-32 (citations omitted).
467. Lilly v. Virginia, 119 S. Ct. 1887, 1903 (1999).
468. *Id.*
469. *Id.*

the Framers intended.

Thomas introduced this historical approach in *White v. Illinois*.[470] In his concurring opinion, Thomas reanalyzed the connection between hearsay and the Confrontation Clause and concluded that, over time, the Court had unnecessarily confused the two doctrines.[471] The problem, Thomas reasoned, began with the Court's interpretation of the Sixth Amendment's language; the assumption that hearsay declarants constituted witnesses against an accused was unwarranted and unsupported.[472] Thomas suggested that the Sixth Amendment was drafted to avoid the abusive practices of sixteenth and seventeenth-century English courts; defendants were often convicted on the basis of affidavits, letters, depositions, and accomplice confessions.[473] The *Roberts* test, however, "implie[d] that the Confrontation Clause bar[red] only unreliable hearsay."[474] Reliability was not a hearsay issue, but a due process concern.[475]

Justice Breyer also suggests a historical approach to Confrontation Clause analysis in *Lilly*, but he does not explicitly adopt it,[476] as Justices Scalia and Thomas have. Breyer simply suggests that *Roberts'* firmly rooted exception test does not amply protect criminal defendants and that *Roberts'* particularized guarantees of trustworthiness test complicates Confrontation Clause analysis.[477] Breyer questions whether the Confrontation Clause is a question of fact, evaluating "trustworthiness," or a procedural right that helps assure "trustworthiness."[478] Despite all his speculations, however, Breyer "leave[s] the question open for another day."[479]

The Historical Approach, then, gives the defendant the right to cross-examine the witnesses who testify at trial and the right to cross-examine the person who makes any formalized statement to be introduced at the trial. The admissibility of any other hearsay statement will be determined by the current rules of evidence and will not bear on the Confrontation Clause. Ultimately, the Historical Approach has attracted only two Justices: Scalia and Thomas.

D. Interaction Among the Three Approaches

Since the Historical Approach is the newest argument concerning Confrontation Clause/hearsay doctrine issues, a brief look at how prior cases

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470. 502 U.S. 346, 358 (1992).
471. *Id.*
472. *Id.* at 359.
473. *Id.*at 361. Thomas particularly refers to Sir Walter Raleigh's trial for treason. The Crown's best evidence was an alleged co-conspirator's repudiated confession. *Id.*
474. *Id.* at 363-64.
475. *Id.* Both Justice Harlan and Professor Wigmore consistently argued that admission of hearsay statements was a due process concern. *Id.* at 359-60 (citing 5 J Wigmore, Evidence § 1364 (J. Chadbourn rev. 1974) and Dutton v. Evans, 400 U.S. 74, 94-95 (1970)).
476. Lilly v. Virginia, 119 S. Ct. 1887, 1901-03 (1999).
477. *Id.* at 1902-03.
478. *Id.* at 1903 (citations omitted).
479. *Id.*

would have been affected will prove helpful. Of the Court's previous Confrontation Clause cases, only *Idaho v. Wright*[480] would have been decided differently. Under the Historical Approach, the child's statements to her doctor were not formalized testimonial materials. Whether the child's statements were trustworthy would have depended upon the rules of evidence, not the constitutional right to confrontation.

The *Ohio v. Roberts* approach is incompatible with the Case-by-Case Adjudication approach. Rehnquist and Kennedy are constantly fighting per se inadmissibility of hearsay exceptions under the *Ohio v. Roberts* approach. The differences between the two approaches are fundamental and will not likely be resolved as long as *Roberts* is applied to Confrontation Clause cases.

The Case-by-Case Adjudication approach and the Historical Approach are more compatible. Justice Rehnquist has repeatedly focused his arguments on the circumstances surrounding the hearsay statements as determinative of their compatibility with the Confrontation Clause. Specifically, in *Lilly*, Rehnquist pointed out that the unreliability of the statement was due to the fact that it was a custodial confession, not that it was a statement against penal interest.[481] Under the Historical Approach, custodial confessions are formalized testimonial statements, inadmissible under the Confrontation Clause.

The Case-by-Case Adjudication and the Historical Approach conflict because Case-by-Case Adjudication will not always exclude formalized testimonial materials. When such statements bear particularized guarantees of trustworthiness under *Roberts*, the statement is considered compatible with the Confrontation Clause. In *Lee v. Illinois*, Rehnquist argued that the codefendant confession had sufficient indicia of reliability to be admitted under the Confrontation Clause.[482] Under the Case-by-Case Adjudication approach, that particular codefendant confession would have been admitted under the Confrontation Clause. The Historical Approach would have automatically rejected it as incompatible with the Confrontation Clause.

The Historical Approach and the *Ohio v. Roberts* approach are completely incompatible. The Historical Approach's procedural view of the Confrontation Clause directly conflicts with the evidentiary standard approach that the *Roberts* test has introduced. The factual analysis of the *Ohio v. Roberts* approach is irreconcilable with the legal standard analysis of the Historical Approach. The Historical Approach protects criminal defendants to a much higher degree than the Ohio v. Roberts approach.

After the Court's decision in *Lilly*, the three-way split is fairly even. If Justice Breyer adopts the Historical Approach, the outcome of future cases may change. With three adherents to the Historical Approach and two adherents to the Case-by-Case Adjudication approach, the next Confrontation Clause case may not apply the *Ohio v. Roberts* approach. The outcome will depend upon the type of statement at

480. 497 U.S. 805 (1990). For a discussion of the facts in Lilly v. Virginia, *see* Part III, A, *supra.*

481. Lilly v. Virginia, 119 S. Ct. 1887, 1905 (1999). *See also* Idaho v. Wright, 497 U.S. 805 (1990), and White v. Illinois, 502 U.S. 346 (1992).

482. Lee v. Illinois, 476 U.S. 530 (1986).

issue-a noncustodial statement or a nontestimonial statement that does not fall within a firmly rooted hearsay exception could result in that statement's admissibility under the Confrontation Clause. Adherents to the *Ohio v. Roberts* approach are not likely to agree with such a ruling because of the heavy presumption of unreliability the *Ohio v. Roberts* approach places on such statements. If Justice Breyer adopts the *Ohio v. Roberts* approach, however, that approach will remain the majority rule in Confrontation Clause/hearsay doctrine cases. Justices Stevens, Souter, Ginsburg, and O'Connor have fairly strongly adhered to the *Roberts* test.

V. CONCLUSION

The Supreme Court is currently split three ways in analyzing Confrontation Clause/hearsay doctrine issues. Justices Stevens, Souter, and Ginsburg strictly adhere to the *Ohio v. Roberts* approach, which focuses on per se admissibility rules and the firmly rooted exception of the *Roberts* test. Chief Justice Rehnquist and Justice Kennedy prefer a Case-by-Case Adjudication approach, which applies the *Roberts* test in a more practical fashion by relying on the particularized guarantees of trustworthiness. Justices Scalia and Thomas have advocated a Historical Approach, which would abandon the *Roberts* test completely and provide criminal defendants with the right to cross-examine only trial witnesses and declarants of formalized testimonial materials.

Until *Lilly v. Virginia*, Justice O'Connor appeared to be a strict adherent of the *Ohio v. Roberts* approach. Her participation in Rehnquist's concurrence raises a question as to whether she is leaning toward the Case-by-Case Adjudication approach. The overwhelming majority of her votes, however, have followed the *Ohio v. Roberts* approach, and she will most likely continue to follow the *Roberts* test.

Justice Breyer wavers between the *Ohio v. Roberts* approach and the Historical Approach. Although the *Roberts* test appears firmly rooted in the Court's Confrontation Clause analysis, Breyer implies that *Roberts* may not be the best analysis to use. Any future change in the Court's Confrontation Clause decisions, then, depends on Justice Breyer's choosing the Historical Approach.