July 2015

Lilly v. Virginia: Silencing the "Firmly Rooted" Hearsay Exception with Regard to an Accomplice's Testimony and Its Rejuvenation of the Confrontation Clause

Leslie Morsek

LILLY V. VIRGINIA:[1] SILENCING THE "FIRMLY ROOTED" HEARSAY EXCEPTION WITH REGARD TO AN ACCOMPLICE'S TESTIMONY AND ITS REJUVENATION OF THE CONFRONTATION CLAUSE

"It is not the custom of the Romans to deliver any man to destruction before the accused meets the accuser face to face,[2] and has opportunity to answer for himself concerning the charge against him."[3]

I. INTRODUCTION

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

[2] Confronting a witness includes more than a mere "face-to-face" right. Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1011 (1998); *see, e.g.*, Coy v. Iowa, 487 U.S. 1012, 1016 (1988). In *Coy*, the Supreme Court held that placing a one-way screen between two accusing witnesses and the defendant, which prevented the witnesses from seeing the defendant, violated his right to face his accusers. *Id.* at 1019-20. The Court specifically noted the distinction between the right to question and the right to physically confront the witnesses giving evidence against the accused at trial. *Id.* at 1020. The Court acknowledged the inclusion of a right to face one's accusers and concluded,"we have never doubted . . . that the Confrontation Clause guarantees the defendant a face-to-face meeting with a witness appearing before the trier of fact." *Id.* at 1016.

However, the Confrontation Clause does not merely provide for the defendant to meet the witness face-to-face, but it also provides the avenue by which the defendant can subject the witness to cross examination. Friedman, *supra* at 1011; *see also* Maryland v. Craig, 497 U.S. 836, 845 (1990) (stating that "the central concern of the confrontation clause 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"); 5 WIGMORE, EVIDENCE Sec. 1395, at 150 (Chadbourne rev. 1974) (stating the defendant demands confrontation "not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination").

[3] *Acts* 25:16

As the state proceeds with its case-in-chief, its next witness is the defendant's accomplice. After taking the witness stand and following the commencement of the prosecutor's direct examination, the witness invokes his Fifth Amendment[4] right against self incrimination. With this invocation, the prosecutor attempts to introduce the custodial statements[5] made by the accomplice during police interrogation. The defense attorney is quickly on his feet objecting to the admission of this hearsay evidence.[6] Moreover, the defense counsel claims

---

[4]The amendment states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual services in the time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

[5] A custodial statement is a statement made by a person, who is taken into custody or otherwise deprived of his or her freedom in any significant way, to a law enforcement officer. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966).

[6] It is possible for a defendant to waive his right to cross-examination by either failing to make a timely objection to the violation or preventing a witness from testifying. *See* United States v. Alexander, 789 F.2d 1046, 1049 (4th Cir. 1986) (holding that the confrontation right was waived when defendant failed to make timely objection to admission of government's computer study showing defendant defrauded health insurers); United States v. Burton, 937 F.2d 324, 328 (7th Cir. 1991) (ruling that the confrontation right is waived when defendant failed to make appropriate objection to judge's refusal to allow cross-examination of FBI agent concerning criminal record of nontestifying government informant whose voice was heard on audio tapes); United States v. McDaniel, 773 F.2d 242, 245 (8th Cir. 1985) (holding confrontation right waived when defendant failed to make timely objection to improper admission of hearsay statement); United States v. Houlihan, 92 F.3d 1271, 1278 (1st Cir. 1996), *cert. denied*, 519 U.S. 1118 (1997) (holding confrontation right waived when defendant murdered potential government witness to prevent testimony); United States v. Thai, 29 F.3d 785, 814-15 (2d Cir. 1994) (holding confrontation right waived when witness's silence procured by defendant through

actual violence or murder); Rice v. Marshall, 709 F.2d 1100, 1103-04 (6th Cir. 1983) (ruling the confrontation right waived when witness refused to testify at trial after defendant's "functionaries" threatened witness); United States v. Rouco, 765 F.2d 983, 995 (11th Cir. 1985) (holding the confrontation right waived when defendant killed government agent-witness).

In addition to waiving the defendant's right to confrontation, the court may also limit the defenses's cross-examination if the questions are: (1) prejudicial; (2) irrelevant; (3) cumulative; (4) collateral; (5) lacking a sufficient factual basis; (6) confusing to the jury; or (7) detrimental to an ongoing government investigation. *See* United States v. Luciano-Mosquera, 63 F.3d 1142, 1153 (1st Cir. 1995), *cert. denied*, 517 U.S. 1234 (1996) (holding that the confrontation clause not violated by limitation placed on defendant's cross-examination of coconspirator where answer would have led to prejudice by revealing penalty that defendant was facing if found guilty); United States v. Bittner, 728 F.2d 1038, 1042 (8th Cir. 1984) (holding that the confrontation clause not violated when court limited cross-examination of witness about past sexual incidents with boyfriend because testimony more prejudicial than probative); United States v. Jadusingh, 12 F.3d 1162, 1166-67 (1st Cir. 1994) (ruling that the confrontation clause not violated when court sustained government's objection to cross-examination regarding pending traffic violations where nothing in trial record or on appeal demonstrated their relevance); United States v. Sasso, 59 F.3d 341, 347-48 (2d Cir. 1995) (holding that the confrontation clause not violated when court limited cross-examination regarding witness's depression resulting from unrelated truck accident because irrelevant to credibility); United States v. Laboy-Delgado, 84 F.3d 22, 29 (1st Cir. 1996) (holding that the confrontation clause not violated when court directed defendant's counsel to pursue new avenues of examination after defendant had already questioned codefendant three times on the same issue); United States v. Mizell, 88 F.3d 288, 294 (5th Cir. 1996) (ruling that the confrontation clause not violated where court limited defendant's questioning of inconsistencies in witness's testimony when testimony would only be cumulative to impeach witness); United States v. Corgain, 5 F.3d 5, 7-8 (1st Cir. 1993) (holding that the confrontation clause not violated when court prohibited cross-examination of witness regarding facial characteristics of participants in lineup whom she had not identified as robber because judge could reasonably have deemed it collateral); United States v. Lin, 101 F.3d 760, 767 (D.C. Cir. 1997) (ruling that the confrontation clause not violated when court prohibited attempt to impeach government witness by showing witness's involvement in gambling and motive to lie about defendant because no factual basis for witness's involvement in gambling had been shown); United States v. Bodden, 736 F.2d 142, 145 (4th Cir. 1984) (holding that the confrontation clause not violated when court limited cross-examination of officer about excluded portion of testimony in drug seizure because questioning confusing to jury); United States v. Balliviero, 708 F.2d 934, 943 (5th Cir. 1983) (holding that the confrontation clause not violated when court prohibited use of transcript of witness's sentence reduction hearing because use would jeopardize ongoing government investigation); United States v. Hirst, 668 F.2d 1180, 1184 (11th Cir. 1982) (holding that the confrontation clause not violated when court limited inquiry into confidential informant's criminal activities because further responses would impair government investigation).

that the admission of this evidence violates his client's Sixth Amendment[7] right to "be confronted with the witnesses against him."[8] The prosecutor responds that the evidence falls within the "firmly rooted" hearsay exception[9] of a "declaration against penal interest."[10] As such, it does not violate the confrontation clause.[11]

---

[7] The amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

[8] Although the defendant is entitled to confront the "witnesses against him," the noun "witnesses" could have several possible meanings. *See* Maryland v. Craig, 497 U.S. 836, 864-65 (1990) (Scalia, J., dissenting).

> As applied in the Sixth Amendment's context of a prosecution, the noun "witness" -- in 1791 as today -- could mean either (a) one "who knows or sees any thing; one personally present" or (b) "one who gives testimony" or who "testifies," i.e., "[i]n judicial proceedings, [one who] make[s] a solemn declaration under oath, for the purpose of establishing or making proof of some fact to a court." The former meaning would cover hearsay evidence, but is excluded in the Sixth Amendment by the words following the noun: "witnesses against him." The phrase obviously refers to those who give testimony against the defendant at trial.

Id.

Problems exist when hearsay declarants are not read into the definition of "witness." *See* John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 GEO. WASH. L. REV. 191, 272 (1999). Douglass argues that when hearsay declarants are not read into the definition it leaves the hearsay untested and does not subject it to the adversarial challenge. *Id*.

[9] *See infra* note 38 and accompanying text.

[10] A "declaration against penal interest" is defined in the Federal Rules of Evidence as a statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. FED. R. EVID. 804(b)(3); *see* Symposium, *The Supreme Court Rules on Statements Against Interest*, 11 TOURO L. REV. 179 (1994). Traditionally, the common law had applied the declarations against penal interest exception to pecuniary or proprietary interests. *Id*. at 180. An erosion occurred in case law which recognized

After contemplating the arguments of both attorneys and examining the decision of *Lilly v. Virginia*,[12] the judge forbids the introduction of the custodial statements as a violation of the confrontation clause.[13]

This Note examines the impact on the confrontation clause of introducing an accomplice's custodial statements which inculpate a defendant.[14] Part II delves into the background of this issue by examining the confrontation clause's origin,[15] the significance of hearsay with respect to the confrontation clause,[16] and important cases in this area.[17] Part III provides a statement of the facts,[18] the procedural history,[19] and the United States Supreme Court's decision in *Lilly*.[20]

---

criminal liability as an interest worthy of this exception. *Id*.; *see also* Donnelly v. United States, 228 U.S. 243, 278 (1913) (Holmes, J., dissenting) ("no other statement is so much against interest as a confession of murder, it is far more calculated to convince than dying declarations, which would be let in to hang a man").

11 Roberts v. Ohio, 448 U.S. 56, 66 (1980). The Confrontation Clause, which is encapsulated in the Sixth Amendment of the Constitution, is the right of an accused "to be confronted with he witnesses against him." U.S. CONST. amend. VI.; *see e.g.*, Douglass, *supra* note 8, at 197-98. The Confrontation Clause creates a right to an adversarial process. Therefore in order for a defendant to confront the witnesses, the defendant should be present in the courtroom when the witness testifies, the jury should have the ability to see and hear the witness to assess his/ her credibility, and the defendant should have an opportunity to cross examine the witness. *Id.; see also* Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 586 (1992) (stating that the Confrontation Clause was enacted not only to ensure accurate results in criminal trials, but also to prevent the government from acting in a repugnant manner).

12 119 S.Ct. 1887 (1999). In *Lilly*, the Supreme Court of the United States reversed the decision of the Virginia Supreme Court that permitted the use of accomplice's custodial statements. *Id*. at 1901. The Court held that an accomplice's confessions that inculpate a criminal defendant are not within a firmly rooted hearsay exception in regards to the confrontation clause. *Id.* at 1899.

13 During 1997, there were three primary situations in which the right to confrontation was violated: (1) where hearsay statements were offered against the accused; (2) where defendant was not present during a stage of a trial; and (3) where a defendant was denied the right to cross-examination. *See* Woody Anglade, *Criminal Procedure: Defendant's Rights*, 29 RUTGERS L.J. 1221, 1221-22 (1998).

14 *See infra* Parts II-IV.

15 *See infra* notes 22-28 and accompanying text.

16 *See infra* notes 29-38 and accompanying text.

17 *See infra* notes 39-69 and accompanying text.

18 *See infra* notes 70-73 and accompanying text.

19 *See infra* notes 74-83 and accompanying text.

Finally, Part IV analyzes the *Lilly* decision and its rejuvenation of the confrontation clause.[21]

II. BACKGROUND

20 *See infra* notes 84-91 and accompanying text.

21 *See infra* notes 92-111 and accompanying text.

In an effort to understand the importance and applicability of the confrontation clause, it is imperative to examine the confrontation clause's origin.[22] Specifically, the confrontation clause can be labeled as a response to the common sixteenth century English courtroom procedure, the ex parte affidavit.[23] The practice of using ex parte affidavits denied the accused the opportunity to cross-examine the declarant.[24] One particular case which exemplified this practice was the trial of Sir Walter Raleigh.[25] The inability to cross examine the

---

22 *See* White v. Illinois, 502 U.S. 346, 361 (1992) (Thomas, J., concurring) (arguing that the common law right to confrontation arose due to the abuses of the British magistrates); *see also* California v. Green, 399 U.S. 149, 179 (1970) (Harlan, J., concurring) ("from the scant information available it may tentatively by concluded that the Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses"); Dutton v. Evans, 400 U.S. 74, 94 (1970) (Harlan, J., concurring in result) (stating the "paradigmatic evil the Confrontation Clause was aimed at" was "trial by affidavit"). *But see* CHRISTOPHER B. MUELLER AND LAIRD C. KIRKPATRICK, MODERN EVIDENCE - DOCTRINE AND PRACTICE Sec. 8.74, at 1448 (1995) (arguing that the history of the confrontation clause reveals very little about its origin).

23 During the sixteenth century, many British magistrates obtained most of their evidence ex parte from the defendant, accomplices and other witnesses. *See* Elizabeth J.M. Strobel, Note, *Play it Again, Counsel: The Admission of Videotaped Interviews in Prosecutions for Criminal Sexual Assault of a Child*, 30 LOY. U. CHI. L.J. 305, 306 (1999). The magistrates would then merely read the depositions or interrogations aloud before the ct. *Id.* The British courts disregarded the importance of live testimony and rather relied on documented evidence obtained from persons outside the courtroom. *Id*. at 306-07. Due to the practices of the British courts, a common law right to confrontation evolved during the late sixteenth century. *Id.* at 307.

24 *See* Strobel, *supra* note 23, at 306.

25 Sir Walter Raleigh and Lord Cobham conspired to overthrow the King and replace him with Arabella Stuart, who promised to establish peace between England and Spain. Frank M. Tuerkheimer, *Convictions Through Hearsay in Child Sexual Abuses Cases: A Logical Progression Back to Square One*, 72 MARQ. L. REV. 47, 47 (1998). Raleigh was indicted for the alleged conspiracy in 1603. *Id.* During the trial, the Crown's principle evidence was a confession given by Cobham while under interrogation shortly after the alleged conspiracy. *Id*. Raleigh objected to the Crown's failure to call Cobham as a witness. *Id*. at 48. Raleigh's objection rested on two grounds: (1) his inability to cross-examine Cobham; and (2) Cobham was not compelled to look at Raleigh and accuse him. *Id.* at 49.

The Crown argued that Cobham's confession was inherently reliable because Cobham would not implicate himself if it were not true. *Id.* Also, the Crown claimed that if Cobham's out-of-court statement could not be used, and thus the rule changed, that treason would go unpunished. *Id*. The Court agreed and convicted Raleigh. *Id.* The Chief Justice stated "this thing cannot be granted (Raleigh's insistence that Cobham should

witness has further ramifications. It allows the prosecution to admit hearsay[26] statements into evidence, denying the accused the opportunity to question the reliability[27] of the statement.[28]

A. Hearsay

---

be present), for then a number of Treasons should flourish." *Id.* at 48. Raleigh received an extremely severe penalty. *Id.* at 49. Years after Raleigh's conviction, he was executed. *Id.*

This trial has been considered the beginning of the end of such use of hearsay. *Id.* Although this type of hearsay was still admitted during the seventeenth century, numerous objections to its reliability were raised. 5 WIGMORE, EVIDENCE Sec. 1364, at 18 (Chadbourne rev. ed. 1974). Moreover, commentators have noted that Sir Walter Raleigh's trial spurred the demand for a Confrontation Clause in the United States Constitution. Kenneth W. Graham, Jr., *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 100 n.4 (1972).

[26] *See infra* Part II. A.

[27] "Reliability" means "worthy of dependence" or "of proven consistency in producing satisfactory results." WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1917 (3d ed. 1986).

[28] *See* Strobel, *supra* note 23, at 306.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[29] These statements are generally not admissible due to their lack of reliability.[30] In particular, the introduction of these out-of-court statements do not provide the judge or the jury with an opportunity to evaluate the witness' "perception, memory, and narration in the courtroom"[31] because they are

---

29 FED. R. EVID. 801(c); *see, e.g.*, IX SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 214-19 (1936). The development of the hearsay rule was a gradual progression. *Id*. During the 1500's in England, the courts recognized that evidence presented by a witness other than the declarant was inferior; however, objections to this evidence were rarely sustained. *Id*. at 216. The rationale for admitting this evidence was to show consistency amongst the stories. *Id*. at 217. However, during the 1600's, the courts began rejecting all out-of-court statements if the declarant was not called as a witness. *Id*. This spurred the development of the hearsay rule, and by the 1700's, the hearsay rule was a fundamental part of the law. *See* 5 Wigmore, Evidence § 1364 (Chadbourn rev. 1976).

Some historians believe that the Framers intended the confrontation clause to be merely a codification of the rule against hearsay. *Id*. *But see* Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, (1988) (arguing that other historians insist that the Framers wanted to embody in the confrontation clause an ideal which surpassed the hearsay rule and that they believed that the hearsay rule was a fluid concept which failed to protect an individual defendant from the powers of the state).

30 Glen Weissenberger, *Hearsay Puzzles: An Essay on Federal Evidence Rule 803(3)*, 64 TEMP. L. REV. 145, 145 (1991) (stating that hearsay is inherently unreliable and presumptively untrustworthy because the out-of-court declarant can not be cross-examined as to any ambiguity or inaccuracy in his or her statement); *see also* Gordon Van Kessel, *Hearsay Hazards in the American Criminal Trial: An Adversary-Oriented Approach*, 49 HASTINGS L.J. 477, 485 (1998). Hearsay evidence is less reliable than in-court testimony because it is not subject to trial safeguards. *Id*. Moreover, hearsay evidence is second-hand evidence which thereby makes it more susceptible to being manufactured or tainted by the parties or attorneys. *Id*. at 505. This also make it particularly difficult to attack. *Id.*

31 GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 157-58 (1978). In permitting out-of-court statements, four hearsay dangers evolved. *Id*. These dangers can be defined as follows: (1) defects in perception which involve disabilities that arise from a failure or inability to observe or hear accurately; (2) defects in memory which involve inaccurate or incomplete recollection; (3) defects in sincerity or veracity which involve testimonial faults that arise from a reluctance to tell the complete truth, or from a conscious effort to distort or falsify; and (4) defects in transmission which involve mistransmissions that arise because the declarant's statement is ambiguous or incomplete. *Id*. at 159.

not subject to the rigors of cross-examination.[32] Hence, the Anglo-American tradition[33] developed three conditions that would be ideal for a witness' testimony: (1) under oath; (2) in the personal presence of the trier of fact; and (3) subject to cross-examination.[34]

---

[32] The ability to cross examine a witness is the "greatest legal engine for the discovery of the truth" in our adversary system. California v. Green, 399 U.S. 149, 158 (1970); *see also* 6 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIAL AT COMMON LAW Sec. 1766, at 250 (Chadborne rev. 1974) (stating that the fundamental reason for exclusion of hearsay is the lack of opportunity to test the reliability of the declarant by cross-examination); Edmund M. Morgan, *The Jury and the Exclusionary Rules of Evidence*, 4 U. CHI. L. REV. 247, 254 (1937). Although Morgan was less enthusiastic about the exclusion of hearsay evidence because of the lack of cross-examination, he still recognized that there can be no doubt that when properly used, cross-examination is a most effective instrument for the discovery of the facts so far as they are within the ability of the witness to disclose. *Id.* *But see* Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 391 (1992). Mueller argues that the cross-examination of a witness cannot make their statements reliable - it merely provides the opponent with an opportunity to test and challenge their stories so the trier of fact can evaluate them. *Id.*; Perry Wadsworth, Jr., *Constitutional Admissibility of Hearsay Under the Confrontation Clause: Reliability Requirement for Hearsay Admitted Under a Non-"Firmly Rooted" Exception -- Idaho v. Wright*, 14 CAMPBELL L. REV. 347, 359 (1992) (arguing that in some cases, whatever a hearsay declarant might say on cross-examination would be unlikely to have a persuasive impact on the jury).

[33] The Anglo-American tradition described in this sense is the common law precedent that has evolved from English common law to American common law beginning in the 1500's. 5 WIGMORE, EVIDENCE § 1364 (Chadbourn rev. 1976).

> The policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience.

Id. at Sec. 1367.

[34] Robert R. Rugani, Jr., Comment, *The Gradual Decline of a Hearsay Exception: The Misapplication of Federal Rule of Evidence 803(4), the Medical Diagnosis Hearsay Exception*, 39 SANTA CLARA L. REV. 867, 873-74 (1999). *But see* Wadsworth, *supra* note 32, at 359. Cross-examination is not the sole method for challenging the accuracy of a hearsay statement or the credibility of a hearsay declarant. *Id*. Wadsworth introduces

four alternatives to cross-examination: (1) introducing contradictory evidence; (2) utilizing expert witnesses; (3) impeaching the hearsay declarant by using extrinsic evidence; and (4) cross-examining a person other than the declarant. *Id*.

Although the courts prefer that testimony be introduced via the above mentioned conditions, various exceptions to the hearsay rule have been carved.[35]

---

[35] Specifically, there have been twenty-nine exceptions created to justify the use of an out-of-court statement. *See* FED. R. EVID. 803, 804, and 807.

FED. R. EVID. 803 Hearsay Exceptions; Availability of Declarant Immaterial

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness.
>
> (1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
>
> (2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
>
> (3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it related to the execution, revocation, identification, or terms of declarant's will.
>
> (4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
>
> (5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse
> party. . . .
>
> . . . .
>
> (24) [Transferred to Rule 807]

Id.

FED. R. EVID. 804(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

> (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in

In order to justify the use of a hearsay exception, it must be necessary[36] to

---

compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.
(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be his impending death.
(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. . . .
. . . .
(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant witness.

Id.

FED. R. EVID. 807. Residual Exception.

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, 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. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Id.

[36] Necessity occurs if the only alternative is not to use the evidence at all. See Rugani, *supra* note 34, at 876. Necessity usually occurs in two situations: (1) when the declarant is considered unavailable for further cross-examination; and (2) when the hearsay statement was made under a very unique set of circumstances and cross-examination of the declarant

introduce the statements into evidence and the statements must have been made under circumstances which promote trustworthiness.[37] Therefore, the general rule regarding the admittance of a hearsay statement under a hearsay exception is to admit the statement only if it falls within a "firmly rooted" hearsay exception.[38]

B. Influential Cases Prior to the Lilly Decision

---

would add little credibility to the statements. *Id*. at 876-77.

[37] When the hearsay statement is made under trustworthy circumstances, the presence of the "hearsay dangers" is nullified. *Id*. at 877. Therefore, the statements lack the defects of perception, memory, sincerity, veracity, or transmission. *Id.; see also* Olin Guy Wellborn III, *Article VIII: Hearsay*, 30 HOUS. L. REV. 897, 899 (1993). Due to the independent circumstantial guarantees of trustworthiness, the necessity for the oath, presence at trial and cross-examination is lessened. *Id*. Even when the declarant is available many of the exceptions deem the circumstances sufficiently trustworthy and allow their admission without necessitating the production of the declarant. *Id*. Other exceptions show a preference for testimony and require the declarant be unavailable to testify for the hearsay to be admissible. *Id*. at 900. The unavailability requirement illustrates that the circumstances are regarded as inferior to the testimonial conditions and are only sufficient when the choice is posed between total loss of the declarant's evidence and receipt of it in hearsay form. *Id.; cf.*, Judson F. Falknor, *The "Hear-Say" Rule as a "See-Do" Rule: Evidence of Conduct*, 33 ROCKY MTN. L. REV., 133, 136-139 (1961) (stating that non-verbal conduct is not within the classic definition of hearsay and therefore can be admitted because the declarant's sincerity is not in question and the witness is merely portraying his own actions on the correctness of his belief).

[38] "Firmly rooted" has been defined as hearsay exceptions that "rest upon such solid foundations that admission virtually any evidence within them comports with the 'substance of the constitutional protection'" provided by the confrontation clause. Ohio v. Roberts, 448 U.S. 56, 66 (1980); *see also* Chambers v. Mississippi, 410 U.S. 284, 299 (1973) (defining "firmly rooted" hearsay statements as those statements that are made without motive to reflect on the legal consequences of the statements and made in situations conducive to veracity and lack the danger of inaccuracy); Idaho v. Wright, 497 U.S. 805, 816-18 (1990) (stating that "firmly rooted" hearsay statements "satisfy 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"); Ira Mickenberg, *Criminal Cases Made No Huge Waves But Court Issued Major Ruling on the Confrontation Clause, Habeas Corpus, Other Issues*, NAT'L L.J., Aug. 16, 1999, at B11 (declaring that a hearsay rule is "firmly rooted" if it has solid and longstanding history in our jurisprudence that virtually all hearsay falling within that exception is universally recognized as being reliable).

Despite the validity of hearsay exceptions, there must still be a reconciliation with the confrontation clause.[39] In particular, does the hearsay exception satisfy the rights contained within the confrontation clause?[40] This issue was first addressed in *Mattox v. United States*,[41] where the Court determined that certain hearsay exceptions would satisfy the confrontation clause.[42] Next, the Court in *Bruton v. United States*[43] decided that the admission of a codefendant's statement was a violation of the confrontation clause.[44] Thereafter, the Court in *Roberts v. Ohio*[45] created a two-prong analysis to determine the admissibility of hearsay statements.[46]

1. Mattox v. United States

---

39 *See, e.g.*, Carolyn M. Nichols, *The Interpretation of the Confrontation Clause: Desire to Promote Perceived Societal Benefits and Denial of the Resulting Difficulties Produces Dichotomy in the Law*, 26 N.M. L. REV. 393, 396 (1996).

> "On the one hand, the Court did not want to interpret the Clause in a such a way that all exceptions to the rule against hearsay would become unconstitutional. On the other hand, the Court did not want to completely drain the Clause of its power to compel physical and verbal challenge at trial by reducing the confrontation right to the equivalent of an ever-malleable rule of evidence. Seeing no easy way to reconcile the existence of exceptions to the hearsay rule with the guarantee of confrontation provided by the Clause and thus solve the dilemma, the Court instead charted an uneasy path between the two evils, leaving them to trouble future Courts.

Id.

40 *See supra* notes 28-38 and accompanying text.

41 156 U.S. 237 (1895).

42 *See infra* Part II. B. 1.

43 391 U.S. 123 (1968).

44 *See infra* Part II. B. 2.

45 448 U.S. 56 (1980).

46 *See infra* Part II. B. 3.

The Court in *Mattox*[47] was the first to address the interpretation of the constitutional provision concerning the right to confront[48] witnesses[49] and its interplay with hearsay exceptions.[50] Although it is important to adhere to the provisions of the Constitution, there are times when a strict interpretation is not beneficial.[51] This case provided a glimpse of the applicable hearsay exceptions

---

47 Mattox v. United States, 156 U.S. 237, 237 (1895). In 1894, Mattox was convicted of murder. *Id*. He appealed his conviction and it was remanded for a new trial. *Id*. Prior to the second trial, two of the government's witnesses died. *Id*. at 240. At the second trial, the government sought to introduce the transcribed copy of the witnesses' testimony from the first trial. *Id*. Both of these witnesses had been cross examined at the former trial, but the defendant claimed that his inability to cross examine them at the subsequent trial violated his confrontation clause rights. *Id*. The Court held that since the defendant had the opportunity earlier to cross examine the witnesses, he would not endure hardship if their statements were now read in the second trial. *Id*. at 242.

48 "Confront" connotes more of an active participation by the defendant with the witness and thus can reasonably be read as including an opportunity to cross-examine. *See* WEBSTER NEW INTERNATIONAL DICTIONARY 477 (3d ed. 1964).

49 *Mattox*, 156 U.S. at 237*; see also* Hakeem Ishota, Comment, *Of Confrontation: The Right not to be Convicted on the Hearsay Declarations of an Accomplice*, 1990 UTAH L. REV. 855, 864 (1990) ("Mattox suggests that an analysis of Supreme Court precedents on the right to confrontation in cases involving a codefendant's or accomplice's confession must begin with the presumption that a hearsay statement is admissible only if its reliability and trustworthiness are demonstrated.").

50 *See* Ishota, *supra* note 49, at 856-57. The confrontation clause and the hearsay rule both serve essentially the same function, to ensure that the defendant is convicted upon the admission of reliable evidence. *Id*. Additionally, neither the right to confrontation nor the rule against hearsay are absolute. *Id*. at 857. *But see* Strobel, *supra* note 23, at 313 (arguing that there are differences between the hearsay rules and the confrontation clause and it would be incorrect to suggest that the confrontation is a mere codification of the rules of hearsay).

51 *Mattox*, 156 U.S. at 243. The Court also stated that public policy contributed to their determination that the general rules regarding the confrontation clause may need to give in certain situations. *Id*. The Court said that a criminal, after once being convicted, should not go scot-free simply because the witness has died. *Id*. The rights of the public should not be sacrificed in order to preserve an incidental benefit of the accused. *Id*.; *see also* Roberts v. Ohio, 448 U.S. 56, 63 (1980) (confrontation clause not intended to bar admission of "virtually every hearsay exception"); Dutton v. Evans, 400 U.S. 74, 80 (1970) (confrontation clause does not bar all hearsay); California v. Green, 399 U.S. 149, 156 (1970) ("merely because evidence is admitted in violation of a long established hearsay

that may also satisfy the confrontation clause.[52] Particularly, the Court stated that dying declarations[53] are admissible despite the defendant's inability to cross examine the witness.[54] Hence, there may be certain instances in which evidence does not offend the confrontation clause despite the defendant's inability to cross-examine.[55]

---

rule does not lead to the automatic conclusion that confrontation rights have been denied").

[52] *Mattox*, 156 U.S. at 243.*; see also* Douglass, *supra* note 8, at 201 ("It was one thing for the Court to hold that prior cross-examination satisfied the procedural rights guaranteed by the Confrontation Clause. It was quite another for the Court to allow "exceptions" to the right of confrontation altogether and further to equate those exceptions with the hearsay rules.").

[53] Dying declarations are defined as:

> Statements made by a person who believes he is about to die in reference to the manner in which he received the injuries of which he is dying, or other immediate cause of his death, and in reference to the person who inflicted such injuries or the connection with such injuries of a person who is charged or suspected of having committed them.

BLACK'S LAW DICTIONARY 283 (6th ed. 1991).

[54] Mattox v. United States, 156 U.S. 237, 243 (1895). The reasoning behind the Court's determination that dying declarations are an acceptable hearsay exception is that the sense of impending death is presumed to remove all temptation to falsehood. *Id*. Moreover, the Court concluded that the declarations were necessary to prevent injustice. *Id.; see, e.g.*, James W. Jennings, *Preserving the Right to Confrontation - A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. PA. L. REV. 741, 749 (1965). Some courts have relied on the notion that one could not die with a lie on his lips, while other courts have stressed only the element of necessity. *Id*. However, the constitutionality of this exception depends primarily upon the validity of the assumption that the consciousness of impending death compels men to tell the truth. *Id*. *But see* Charles W. Quick, *Some Reflections on Dying Declarations*, 6 HOW. L.J. 109, 112 (1960). It may be true that the good and religious man and woman could not face death with deceit on his or her mind, but the scoundrel or bumbler may seek revenge or may be mistaken. *Id*. Additionally, there is no way to catalogue the moments before death to truly know what goes on in one's mind. *Id*.

[55] Another example of a valid hearsay exception which does not violate the confrontation clause is an excited utterance. *See, e.g.*, Jennings, *supra* note 54, at 751. This exception rests on the assumption that a person in an excited state of mind is incapable of premeditation to serve his own interests. *Id.*; *see* M.C. Slough, *Spontaneous Statements and State of Mind*, 46 IOWA L. REV. 224, 242-43 (1961). Moreover, the statements must be made while nervous excitement dominates and the statements must relate to the startling circumstances. *Id.* at 242. *But see* Robert M. Hutchins and Donald Slesinger, *Some Observations on the Law of Evidence*, 28 COLUM. L. REV. 432, 432-33 (1928). It has been shown through psychological studies that excitement may severely impair the declarant's ability to perceive and communicate. *Id*. at 435-36. Therefore, if the statement is made

under circumstances that raise reasonable doubt as to the declarant's perceptive abilities, the evidence should be excluded. *Id*. at 440.

2. Bruton v. United States

One particular hearsay exception which has created controversy in regards to the confrontation clause is the declaration against penal interest.[56] The controversy stems from the lack of a steadfast determination as to the applicability of labeling a declaration against penal interest a "firmly rooted" hearsay exception.[57] The first step to this determination occurred in *Bruton*.[58] The Court

---

[56] *See* Alfredo Garcia, *The Winding Path of Bruton v. United States: A Case of Doctrinal Inconsistency*, 26 AM. CRIM. L. REV. 401, 402 (1988). In regards to the right to confrontation, the problem is heightened when there is a joint trial. *Id*. Due to the prosecution's introduction of one codefendant's confession, which implicates the other defendant, the defendant is faced with two choices, neither one very appealing. *Id*. at 403. The defendant can either: (1) remain silent and allow the jury to draw its own inferences from the out-of-court statement; or (2) take the stand to rebut the out-of-court statement and thereby waive his privilege against self incrimination. *Id*.

[57] *Compare* Earnest v. Dorsey, 87 F.3d 1123, 1131 (10th Cir. 1996), United States v. Flores, 985 F.2d 770, 776 n.13 (5th Cir. 1993), Morison v. Duckworth, 929 F.2d 1180, 1181 n.2 (7th Cir. 1991) and Olson v. Green, 668 F.2d 421, 427-28 nn. 10,11 (8th Cir. 1982) (holding that the exception for a declaration against penal interest cannot be deemed firmly rooted as applied to custodial statements by an accomplice which inculpate a defendant), *with* United States v. Trenkler, 61 F.3d 45, 62 (1st Cir. 1995), United States v. Katsougrakis, 715 F.2d 769, 776 (2d Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984), and United States v. Taggart, 944 F.2d 837, 840 (11th Cir. 1991) (holding that the declaration against penal interest is a firmly rooted hearsay exception).

[58] Bruton v. United States, 391 U.S. 123, 124 (1968). Bruton and his codefendant Evans were tried jointly by the state on the charge of armed postal robbery. *Id*. At trial, the state called a postal inspector who testified that Evans had confessed to the robbery and had also implicated Bruton. *Id*. The judge instructed the jury that it should consider Evans' confession solely to determine Evans' guilt, not Bruton's guilt. *Id*. Both Evans and Bruton were convicted. *Id*.

The appellate court affirmed Bruton's conviction relying upon the decision in *Delli Paoli v. United States*. *Id*. at 125. In *Delli Paoli v. United States*, 352 U.S. 232 (1957), the state admitted into evidence the confession of a codefendant which implicated the defendant. The court determined that this confession did not violate the defendant's right to confrontation because the jury was given a limiting instruction. *Id*. at 241-42. To justify its decision, the court literally engaged in a "leap of faith" predicated on the belief that the jury will endeavor to follow the court's instructions. *Id*. at 243. *But see* Delli Paoli v. United States, 352 U.S. 232, 247 (1957) (Frankfurter, J., dissenting). Justice Frankfurter claimed that requiring the jury to follow the limiting instructions would be an impossible "psychological feat." *Id*. Moreover, the limiting instruction which requires the jury only to consider the confession against the declarant would be "the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody else's." *Id*. (quoting Hand, J., in Nash v. United States, 54 F.2d 1006, 1007

held that incriminating extrajudicial statements of a codefendant which implicated the defendant violated the defendant's confrontation clause rights.[59] Although the holding of *Bruton* is specific to that case, it illustrates that the Court recognizes the prejudices that may erupt in regards to non-testifying codefendants.[60]

3. Ohio v. Roberts

(2d Cir. 1932), *cert. denied*, 285 U.S. 556 (1932)).

[59] *Bruton*, 391 U.S. at 125.

[60] *See* Garcia, *supra* note 56, at 412. The Supreme Court in *Bruton* determined that Evans' statement was prejudicial to Bruton due to his inability to cross-examine. *Id*. However, there are alternative remedies which may prevent the *Bruton* fiasco from occurring again. *Id*. These remedies include: severance, forgoing the use of a codefendant confession at joint trials, bifurcated trial, multiple juries, or redaction. *Id*. at 412-15. To determine which remedy should be employed, the judge should use the remedy which ensures the defendant's right to confrontation and his right to a fair trial. *Id*. at 412.

A watershed moment in confrontation clause analysis occurred with the decision in *Roberts*.[61] This case alleviated some of the uncertainty in regards to the admissibility of an out-of-court statement and the impact of its admissibility on the confrontation clause.[62] Through the establishment of a two-prong analysis, the Court illustrated when an out-of-court statement would be admissible and not violative of the defendant's confrontation clause rights.[63] The two prongs of the analysis are: (1) the prosecutor must show that the declarant is unavailable to testify;[64] and (2) the statement must bear adequate "indicia of reliability."[65] The

---

61 Ohio v. Roberts, 448 U.S. 56 (1980). In this case, Roberts was charged with forgery of a check in the name of Bernard Isaacs and possession of stolen credit cards belonging to Isaac and his wife. *Id*. at 58. At the preliminary hearing, the defense called Isaac's daughter, Anita, in an attempt to show that she had given Roberts permission to use the checks and credit cards. *Id*. Unfortunately for the defendant, she denied this. *Id*. Despite numerous subpoenas for Anita's presence, she was absent from the trial. *Id*. at 59. At trial, Roberts took the stand and testified that Anita gave him permission to use the checkbook and credit cards. *Id*. In accordance with the Ohio Revised Code, the State offered the transcript of Anita's testimony from the preliminary hearing on rebuttal. *Id*. The defense counsel objected, asserting a violation of the confrontation clause. *Id*. Nonetheless, the trial court convicted Roberts. *Id*. The appellate court reversed, holding that the defendant's confrontation clause rights were violated when the preliminary hearing testimony of a witness who did not appear at trial was admitted into evidence. *Id*. at 60. The Ohio Supreme Court affirmed the appellate court's holding. *Id*. at 61. The United States Supreme Court, however, reversed and remanded because at the preliminary hearing the testimony had been subjected to cross-examination. *Id*. at 76-77.

62 *See* California v. Green, 399 U.S. 149, 162 (1970). The Supreme Court has attempted to accommodate the competing interests of hearsay and the confrontation clause by building on past decisions, drawing on new experiences, and responding to the changing conditions. *Id*. The Court has not attempted to "map out a theory of the confrontation clause that would determine the validity of all . . . hearsay 'exceptions.'" *Id*.

63 *Roberts*, 448 U.S. at 66; *see, e.g.*, David E. Seidelson, *Hearsay Exceptions and the Sixth Amendment*, 40 GEO. WASH. L. REV. 76, 92 (1971) (stating that all hearsay should be excluded except, perhaps, when the prosecution shows an absolute necessity, a high degree of trustworthiness, and a "total absence" of motive to falsify).

64 The unavailability requirement is no longer a necessary element to determine the admissibility of a hearsay statement. White v. Illinois, 502 U.S. 346, 346 (1992) ("The Confrontation Clause does not require that, before a trial court admits testimony . . . either the prosecution must produce the declarant at trial or the trial court must find that the declarant is unavailable").

> FED. R. EVID. 804(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant --
> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

indicia of reliability prong can be satisfied with a showing that the evidence falls within a "firmly rooted" hearsay exception or the evidence has particularized guarantees of trustworthiness.[66]

---

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
(3) testifies to a lack of memory of the subject matter of the declarant's statement; or
(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
(5) is absent from the hearing and the proponent of his statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means. . . . . .

Id.

[65] *Roberts*, 448 U.S. at 66.

[66] *Id.; see also* Idaho v. Wright, 497 U.S. 805, 818 (1990). The Court determined that in order to show "particularized guarantees of trustworthiness" the relevant circumstances include only those that surround the making of the statement which render the declarant worthy of belief. *Id.* The Court stated that if the truthfulness of the statement is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility, then the statement should not be barred from admission. *Id.* at 820. The Court would not permit the state to "bootstrap" trustworthiness to the out-of-court statement by referring to other evidence presented at trial. *Id*. at 822. *But see* Wadsworth, *supra* note 32, at 348 (arguing that by excluding the use of corroborative evidence to determine the trustworthiness of a non-firmly rooted hearsay, the Court enhances Confrontation Clause protection for criminal defendants, but perhaps at the expense of some criminal victims).

The *Roberts* test has prompted many courts to determine whether certain hearsay exceptions can be deemed "firmly rooted."[67] Particularly, many state and federal courts have wrestled with the declaration against penal interest exception.[68]

---

[67] "Firmly rooted" exceptions include: coconspirators statements, excited utterances, dying declarations, agency admissions, business records, statements made for purpose of medical diagnosis or treatment, statements regarding the declarant's state of mind, past recorded recollections, and statements against penal interest. FED. R. EVID. 801(d)(2)(d), 801(d)(2)(E), 803(2)-(6), 804(b)(2)-(3). *But see* S. Douglas Borisky, Note, *Reconciling the Conflict Between the Coconspirator Exemption From the Hearsay Rule and the Confrontation Clause of the Sixth Amendment*, 85 COLUM. L. REV. 1294, 1307 (1985). Unlike other "firmly rooted" hearsay exceptions, the coconspirator exemption did not evolve due to its trustworthiness. *Id*. Instead, this exemption was a result of conspiracy law. *Id*. Courts have held that acts of one conspirator, in furtherance of the conspiracy, are admissible against all coconspirators. *Id*. Hence, a coconspirator's statements are viewed as "verbal acts" in furtherance of the conspiracy. *Id*. Therefore, these statements should only be admitted if it has been shown that they are inherently reliable. *Id*. at 1309. If these statements are admitted without this proof, the essence of the confrontation clause will be diminished. *Id.*.

[68] *See supra* note 57. Nine states that utilize the declaration against penal interest exception exclude those statements made by an accomplice that incriminate a defendant. *See* ARK. R. EVID. 804 (b) (3); IND. R. EVID. 804 (b)(3); ME. R. EVID. 804 (b) (3); NEV. REV. STAT. sec 51.345(2)(1) (1997); N.J. R. EVID. 803(25); N.D. CENT. CODE, 804 (b) (3); VT. R. EVID. 804 (b) (3); State v. Boyd, 570 A.2d 1125, 1128 (Conn. 1990); State v. Myers, 625 P.2d 1111, 1115-16 (Kan. 1981).

Ten states, as well as the District of Columbia, restrict the penal interest exception to those portions of the statements that are truly self-inculpatory and do not admit statements which are collateral to the self-inculpatory portions. *See* Smith v. State, 647 A.2d 1083, 1088 (Del. 1994); United States v. Hammond, 681 A.2d 1140, 1146 (D.C. 1996); State v. Hallum, 585 N.W.2d 249, 256 (Iowa 1998); State v. Smith, 643 So.2d 1221, 1221-22 (La. 1994); State v. Matusky, 682 A.2d 694, 706 (Md. 1996); State v. Ford, 539 N.W.2d 214, 227 (Minn. 1995); State v. Castle, 948 P.2d 688, 694 (Mont. 1997); State v. Torres, 971 P.2d 1267, 1275 (N.M. 1998); Miles v. States, 918 S.W.2d 511, 515 (Tex. Crim. App. 1996); In re Anthony Ray, 489 S.E.2d 289, 298 (W. Va. 1997); Johnson v. State, 930 P.2d 358, 363 (Wyo. 1996).

There are three states that preclude accomplice's custodial statements that minimized the accomplice's responsibility and shifted blame onto others or incriminated others in more serious crimes. *See* State v. Hoak, 692 P.2d 1174, 1179 (Idaho 1984); Williams v. State, 667 So.2d 15, 20 (Miss. 1996); State v. Whelchel, 801 P.2d 948, 954-55 (Wash. 1990).

Contrarily, only a few states allow the admission of an entire custodial statement, portions of which inculpate the declarant's penal interest and portions which only inculpate a defendant. *See* State v. Gilliam, 635 N.E.2d 1242, 1246 (Ohio 1994); State v. Nielsen, 853 P.2d 256, 268 (Or. 1993); State v. Kiewert, 605 A.2d 1031, 1037 (N.H. 1992); Taylor

However, the applicability of this exception was finally determined by the pronouncement in the United States Supreme Court's decision in *Lilly v. Virginia*.[69]

III. STATEMENT OF THE CASE

A. Statement of the Facts

On December 4, 1995, Benjamin Lee Lilly, Mark Lilly and Gary Barker commenced a two day crime spree.[70] During this crime spree, the three men stole liquor, a safe and three guns.[71] The criminal activity continued; when their car broke down the three men abducted Alex DeFilippis, who was subsequently shot and killed.[72] While in police custody, both Mark Lilly and Gary Barker stated that Benjamin Lee Lilly had masterminded the robberies and that he was responsible for DeFilippis' murder.[73]

B. Procedural History

---

v. Commonwealth, 821 S.W.2d 72, 75 (Ky. 1990); State v. Wilson, 367 S.E.2d 589, 598 (N.C. 1988).

69 See *infra* Part III. A. - C.

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

71 *Id*.

72 *Id*.

73 *Id.* at 1904 n.1. Mark identifies Ben as the one who murdered Alex DeFilippis in the following colloquy:

> "M.L. I don't know, you know, dude shoots him.
> "G.P. When you say 'dude shoots him' which one are you calling a dude here?
> "M.L. Well, Ben shoots him.
> "G.P. Talking about your brother, what did he shoot him with? "M.L. Pistol.
> "G.P. How many times did he shoot him?
> "M.L. I heard a couple of shots got off, I don't know how many times he hit him."

Ironically, during questioning Benjamin Lee Lilly failed to mention the murder of Alex DeFilippis. *Id*. at 1892. He also stated that Mark Lilly and Gary Barker forced him to participate in the robberies. *Id*.

The State of Virginia separately charged Benjamin Lee Lilly with numerous crimes, including abduction, robbery and murder.[74] At Benjamin Lee Lilly's trial, the State called Mark Lilly as a witness to testify as to the events which occurred on that horrific crime spree.[75] During questioning, Mark Lilly invoked his Fifth Amendment privilege against self incrimination.[76] Overruling Benjamin Lee Lilly's objections that Mark Lilly's out-of-court statement violated the hearsay rule and the confrontation clause, the trial court admitted the taped statements on the basis that the statements were declarations against penal interest.[77] Benjamin Lee Lilly was convicted of DeFilippis' murder and other crimes.[78]

The Virginia Supreme Court affirmed,[79] holding that the defendant's accomplice's statement to the police was admissible as a declaration against the accomplice's penal interest.[80] In Virginia, an out-of-court statement is admissible only if it is made by an unavailable declarant[81] and an invocation of one's Fifth Amendment right satisfies the Virginia requirement of unavailability.[82] Furthermore, the Virginia Supreme Court also held that the declaration against penal interest was a "firmly rooted" hearsay exception in Virginia. [83]

---

74 *Id.* at 1892.

75 *Id.*

76 Lilly v. Virginia, 119 S.Ct. 1887, 1892-93 (1999).

77 *Id*. at 1893.

78 *Id.*

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

80 *Id*. at 534. The Virginia Supreme Court stated, "admissibility into evidence of the statement against penal interest of an unavailable witness is a 'firmly rooted' exception to the hearsay rule in Virginia." *Id*. The Supreme Court of Virginia also affirmed the holding that the statements were "reliability . . . in the context of the facts and circumstances under which it was given." *Id*. The court cited two facts that illustrate the statements' reliability: (1) Mark Lilly was cognizant that he was implicating himself as a participant in numerous crimes; and (2) elements of his statements were corroborated by other evidence at trial. *Id*.

81 See *supra* note 64 and accompanying text.

82 Boney v. Commonwealth, 432 S.E.2d. 7, 10 (Va. 1993); *see also* Newberry v. Commonwealth, 61 S.E.2d 318, 326 (Va. 1950).

83 *Lilly*, 499 S.E.2d. at 534. "Admissibility into evidence of the statement against penal interest of an unavailable witness is a "firmly rooted" exception to the hearsay rule in Virginia." *Id*. "That Mark Lilly's statements were self-serving, in that they tended to shift principal responsibility to others or to offer claims of mitigating circumstances, goes to the weight the jury could assign to them and not to their admissibility." *Id*.

C. United States Supreme Court Decision

The Supreme Court, in a 9-0 decision, reversed and remanded the decision of the Supreme Court of Virginia.[84] The Court held that the admission of a nontestifying accomplice's confession violated Benjamin Lee Lilly's confrontation clause rights.[85] Although the Court agreed that the confrontation clause was violated, there was not a majority opinion.[86]

The plurality's opinion, written by Justice Stevens, and joined by Justices Souter, Ginsburg, and Breyer, concluded that the "declaration against penal interest" exception is not a "firmly rooted" hearsay exception as defined by the confrontation clause.[87] Additionally, the plurality stated that in this particular case the alternative method to satisfy the indicia of reliability prong was not satisfied.[88]

---

[84] Lilly v. Virginia, 119 S.Ct. 1887, 1901 (1999). The Court stated that the Supreme Court of Virginia did not analyze the confession under the second prong of the *Roberts'* test. *Id*. at 1891. Therefore, the Commonwealth of Virginia must illustrate that Mark Lilly's confession bears "particularized guarantees of trustworthiness." *Id*. at 1891-92. Additionally, the Virginia Supreme Court must determine if there are any errors and if found, they must determine if the errors are harmless. *Id*. at 1892. If the errors are harmless, Benjamin Lee Lilly's conviction and death sentence will stand. *Id*. If it was not harmless, Lilly will receive a new trial. *Id*.

Even though case has been remanded back to the Virginia Supreme Court, "there is no question that we are not going to be seeing Ben Lilly on the streets of Blacksburg . . . ." *See* Warren Richey, *High Court Toughens Standards for Trial Testimony Justices Say Right to Confront Witnesses is Crucial for a Fair Trial*, CHRISTIAN SCIENCE MONITOR, June 14, 1999, at 2 (quoting Mr. Geimer).

[85] *Lilly*, 119 U.S. at 1901.

[86] *Id*.

[87] *Id*. at 1895-1899. The plurality noted three principle situations in which declarations against penal interest are offered into evidence: (1) as voluntary admissions against the declarant; (2) as exculpatory evidence offered by a defendant who claims that the declarant committed, or was involved, in the offense; and (3) as evidence offered by the prosecution to establish the guilt of an alleged accomplice of the declarant. *Id*. In *Lilly*, the declarations fell into the third category. *Id*. at 1897. The plurality declared that those declarations that fell within the third category function similarly to those used in the ex parte system and are inherently unreliable. *Id*.

[88] *Id*. at 1900. The Court examined both Mark Lilly's words and the setting in which he

was questioned and concluded that neither provided any basis for deeming the statement reliable and foregoing cross-examination. *Id*.

The concurring opinion of the Chief Justice, Justice O'Connor and Justice Kennedy strongly disagreed with the plurality's broad analysis and articulated that the plurality's opinion imposed a complete ban on the use of accomplice's statements.[89] Justices Scalia and Thomas concurred based on their "originalist" view of the confrontation clause.[90] Justice Scalia exclaimed that this case is "a paradigmatic confrontation clause violation."[91]

IV. ANALYSIS

The *Lilly* decision has eliminated one hurdle that has plagued the courts regarding the confrontation clause; specifically, the hurdle debating whether a declaration against penal interest is a firmly rooted hearsay exception.[92] The

---

[89] *Id*. at 1903-05. The Chief Justice "would limit our holding here to the case at hand, and decide only that the Mark Lilly's custodial confession laying sole responsibility on petitioner cannot satisfy a firmly rooted hearsay exception." *Id*. at 1905.

[90] Lilly v. Virginia, 119 S.Ct. 1887, 1903 (1999); *see* Daniel J. Capra, *Out of Court Statements and the Confrontation Clause*, N.Y.L.J., July 9, 1999 at 3. The "originalist" view of the confrontation clause focuses on the reason the confrontation right was included in the Bill of Rights - to prevent government engineering of a conviction by preparing affidavits of hearsay declarants who would then not be subject to cross-examination. *Id*.; *see also Lilly*, 119 S.Ct. at 1903. Under the "originalist" view, the confrontation clause only regulates hearsay statements "only insofar as they are contained in formalized testimonial material, such as affidavits, depositions, prior testimony, or confessions." *Id*.

[91] *Id*.

[92] *Id.* at 1899. The Court made explicit that accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted hearsay exception. *Id.* The Court was merely reaffirming the holdings in *Bruton v. U.S.*, 391 U.S. 123 (1968), *Cruz v. New York*, 481 U.S. 186 (1987), *Gray v. Maryland*, 523 U.S. 185 (1998), and *Lee v. Illinois*, 476 U.S. 530 (1986), and making it explicit where it may have been implicit. *Id*. at n.5. All of the cases were premised, explicitly or implicitly, on the principle that accomplice confessions, that inculpate a criminal defendant are not per se admissible (and therefore, necessarily fall outside a firmly rooted hearsay exception) no matter how much these statements also incriminate the accomplice. *Id.*

In addition, the declaration against penal interest exception differs from those exceptions which are deemed "firmly rooted" because of the relatively "recent vintage" of this exception. Bourjaily v. United States, 483 U.S. 171, 183 (1987); *see, e.g.*, United States v. Flores, 985 F.2d 770, 779 (5th Cir. 1993) ("stating that the relatively recent recognition of declarations against penal interest as an exception to the hearsay rule by the Federal Rules of Evidence would seem to counsel against a headlong rush to broadly

plurality's opinion has not eradicated the use of an accomplice's statements, but has merely narrowed their admissibility to situations in which their trustworthiness can be established.[93] The impact of this decision is more than merely eliminating one means to satisfy the indicia of reliability prong; it further solidifies the defendant's necessity to confront the witness in situations where veracity may be questionable.[94]

---

embrace the exception as providing a sufficient substitute for cross-examination and personal confrontation . . .). *But see* White v. Illinois, 502 U.S. 346, 356 n.8 (1992). Hearsay exceptions should be deemed "firmly rooted" due to their widespread acceptance without reference to how long ago the exception was first recognized. *Id.*

93 *See supra* at note 66, 101-106 and accompanying text.

94 Lee v. Illinois, 476 U.S. 530, 540 (1986). The Court in Lee acknowledged that the confrontation clause "contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails." *Id.; see also* Pointer v. Texas, 380 U.S. 400, 404 (1965). Cross-examination is "one of the safeguards essential to a fair trial" in our adversarial system. *Id.* (quoting Alford v. United States, 282 U.S. 687, 692 (1931)). *But see* Richard D. Friedman, *Truth and Its Rivals in the Laws of Hearsay and Confrontation*, 49 HASTINGS L.J. 545, 545 (1998) (arguing that the reliability of hearsay evidence is a poor criterion to determine whether admissibility of the evidence advances the truth-determining process.)

A. Inherent Unreliability

Custodial statements made by accomplices are inherently unreliable and thus do not have the requisite factor to justifiably fall within a "firmly rooted" exception.[95] The unreliability in these statements is substantial, since an accomplice has a tremendous incentive to shift blame which may alleviate some or possibly all of his guilt,[96] thus enabling the accomplice to walk away from the

---

[95] "When a suspect is in custody for his obvious involvement in serious crimes, his knowledge that anything he says may be used against him militates against depending on his veracity." *Lilly*, 119 S.Ct. at 1901; *see* Ishola, *supra* note 49, at 858 (advocating that a declaration against penal interest of an accomplice that implicates the defendant generally is as unreliable as a codefendant's confession and therefore should be excluded absent a confrontation between the declarant and the defendant); Lee v. Illinois, 476 U.S. 530, 544-45 (1986). The presumption that custodial statements of an accomplice implicating a defendant are so strong that the United States Supreme Court has never approved of their admission. *Id*.; *see also* Douglas v. Alabama, 380 U.S. 415, 419 (1965). In *Douglas*, the Court reversed a conviction where the prosecution had read an accomplice's statement when the accomplice invoked his Fifth Amendment right. *Id*. The Court held that the defendant's "inability to cross-examine LDYD (the accomplice) as to the alleged confession plainly denied him the right of cross-examination secured by the confrontation clause." *Id*. The Court premised its holding on the basic understanding "that when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination." *Id*. (quoting Lee v. Illinois, 476 U.S. 530, 541 (1986)); Bruton v. United States 391 U.S. 123, 135-36 (1968) (stating that Lilly, 119 S. Ct. at 1897-98 "the unreliability of such evidence is intolerably compounded when the alleged accomplice . . . does not testify and cannot be tested by cross-examination"); *Lee*, 476 U.S. at 546. In *Lee*, the court believed that "the time-honored teaching that a codefendant's confession inculpating the accused is inherently unreliable and that convictions by such evidence violate the constitutional right of confrontation. *Id*.; 5 WIGMORE, EVIDENCE Sec. 1477, at 358 n.1 (an accomplice often has considerable interest in confessing and betraying his cocriminals).

[96] *Lee*, 476 U.S. at 544. The Court said that once the conspirators realize that the "jig is up," a codefendant's confession is presumptively unreliable because he has a desire to "shift or spread blame, curry favor, avenge himself, or divert attention to another." *Id.* at 544-45. Therefore, this "presumptively suspect" statement must be subjected to cross-examination. *Id*. at 541. The dissent in *Lee* noted one case which exemplified these circumstances: In *Douglas*, "only one shot had been fired, and it obviously was in the accomplice's penal interest to convince the authorities that he was not the one who fired it. By "fingering" the defendant, he minimized his own criminal culpability." *Id*. at 553;

crime unscathed.

---

see also Williamson v. United States, 512 U.S. 594, 607-08 (1994). Justice Ginsburg stated in her concurring opinion:

> The Court recognizes the untrustworthiness of statements implicating another person. A person arrested in incriminating circumstances has a strong incentive to shift blame or downplay his own role in comparison with that of others, in hopes of receiving a shorter sentence and leniency in exchange for cooperation. . . .

Id.

In *Lilly*, Mark Lilly avoided the death penalty sentence by shifting blame to Benjamin Lee Lilly. Petitioner's Brief, 1998 WL 928305, at *30. Even if Mark Lilly's statement was voluntary for Fifth Amendment purposes, it does not alleviate his desire, motive, or impulse to spread blame or to overstate Benjamin Lee Lilly's involvement. Lilly v. Virginia, 119 S.Ct. 1887, 1892 (1999).

Even statements that do not completely exonerate an accomplice further the proposition that the statements are inherently unreliable.[97] Inculpating both one's self and another person makes the statements appear to be more believable.[98] However, "one of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature."[99] Although the accomplice may believe his self-inculpatory statement heightens his reliability, in reality it is merely a shield to the truth. [100]

---

[97] As Justice O'Connor explained:

> The fact that a statement is self-inculpating does make it more reliable; but the fact that a statement is collateral to a self-inculpatory statement says nothing at all about the collateral statement's reliability. We see no reason why collateral statements, even ones that are neutral as to interest . . . should be treated any differently from other hearsay statements that are generally excluded.

Williamson, 512 U.S. at 600; *see, e.g.*, People v. Watkins, 475 N.W.2d 727, 737 (Mich. 1991). The court does not want to impart on a journey of "selective reliability" analysis. *Id*. That is, dissecting an accomplice's statement into presumptively reliable sections (the self-inculpatory portions) and the presumptively unreliable sections (the inculpation of the defendant portions). *Id*. Therefore, the Court held that statements solely implicating a defendant or those implicating both an accomplice and a defendant were not admissible as declarations against penal interest under the confrontation clause. *Id*. at 738, 746-47.

[98] *Lilly*, 119 S.Ct. at 1901 (questioning whether the law really presumes that a man will not accuse himself to accuse another as was stated at the trial of Sir Walter Raleigh). There have been a few cases where the courts have allowed a statement made by an accomplice, which implicated both the declarant and the defendant. *See* Earnest v. Dorsey, 87 F.3d 1123, 1134 (10th Cir. 1996) (entire statement inculpated both defendant and declarant equally and neither attempted to shift blame to his coconspirator nor to curry favor from the police or prosecutor); *see also* Brown v. State, 953 P.2d 1170, 1179-80 (Wyo. 1998) (affirming trial court's admission of only those portions of accomplice's statements that implicated him equally with defendant and noting that trial court had excluded portion of statement identifying defendant as trigger man); State v. Earnest, 744 P.2d 539, 540 (N.M. 1987) (allowing accomplices statement which said that defendant shot victim in the head but first admitted trying to cut victim's throat at a time when the wounds to the throat were thought to have been the cause of death and therefore exposed himself to possible death sentence).

[99] Williamson, 512 U.S. at 599-601.

[100] *Id*.

B. Not a Complete Ban

When dealing with accomplices' statements a presumption of unreliability attaches.[101] This presumption of unreliability is unlikely to be removed from those accomplices' statements that shift or spread blame and are given under conditions which implicate the concerns of the ex parte affidavit practice.[102] Despite the difficulty in rebutting this presumption, it can be rebutted by showing that the statements contain "particularized guarantees of trustworthiness."[103] In this determination, the court must independently review whether the government's proffered guarantees of trustworthiness satisfy the demands of the confrontation clause.[104] If the government's evidence demonstrates the requisite standard of reliability, the court will admit the accomplice's out-of-court statement.[105] However, failure to demonstrate the statement's reliability will foreclose its admittance; and hence, strengthening the *Lilly* proposition that accomplice's statements should not bypass the demands of the confrontation clause via the "firmly rooted" prong.[106]

C. Rejuvenation of the Confrontation Clause

---

101 *See supra* notes 95-100 and accompanying text.

102 Lilly v. Virginia, 119 S.Ct. 1887, 1900 (1999).

103 *See supra* note 66 and accompanying text.; *see also* Bourjaily v. United States, 483 U.S. 171, 182-84 (1987) (holding that any inherent unreliability is per se rebutted by the circumstances giving rise to the long history of admitting such statements).

104 *Lilly*, 119 S.Ct. at 1900. The Court noted that there was no suggestion, in prior opinions, that appellate courts should defer to lower courts' determinations regarding whether a hearsay statement has "particularized guarantees of trustworthiness." *Id.* Contrarily, those opinions indicate that "independent review is . . . necessary . . . to maintain control of and to clarify, the legal principles" governing the factual circumstance necessary to satisfy the protections of the Bill of Rights. *Id*. (quoting Ornelas v. United States, 517 U.S. 690, 697 (1996)).

105 Lilly, S.Ct. at 1900.

106 *Id*.

The *Lilly* decision has created a resurgence in the utility of the confrontation clause.[107] Declaring that the declaration against penal interest is not a "firmly rooted" hearsay exception, the Court may have halted the recent trend of prosecutors' attempts to carve out larger exceptions to the so-called hearsay rule.[108] Additionally, it may have curbed another prosecution trend; admitting the out-of-court statement in lieu of putting the accomplice on the stand and risking a potentially damaging cross-examination.[109] This evinces the Supreme Court's

---

[107] *Id*. at 1896. Throughout the years, the Court has reviewed numerous cases which have addressed the admissibility of a codefendant's confession. *Id*. Although there has been disagreement over topics such as jury instructions and sufficiency of redaction, the court has consistently stated or assumed that qualifying a statement as a declaration against penal interest did not justify the use of the accomplice's statement. *Id.; see, e.g.*, Maryland v. Craig, 497 U.S. 836, 845 (1990). The Court stated that "the central concern of the confrontation clause was 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." *Id*.; *see also* Jennings, *supra* note 54, at 748, and n. 38 (requiring "adequate substitute for confrontation," while recognizing that no substitute can be "fully adequate" because there is always the possibility that under an effective cross-examination, a witness will demonstrate to the jury his unsureness or mendacity); Gray v. Maryland, 523 U.S. 185, 194-95 (1998) (stating that the use of an accomplice's confession "creates a special, and vital, need for cross-examination," . . .); *Gray*, 523 U.S. at 200 (Scalia, J., dissenting) (stating that codefendant's confession "may not be considered for the purpose of determining the defendant's guilt").

[108] *See* Richey, *supra* note 84, at 2 (quoting Christopher Tuck, the defense attorney who represented Benjamin Lee Lilly) ("We've seen the confrontation clause being chipped away at. I think the United States Supreme Court is saying 'Hold on a second.'"); *see also* Mickenberg, *supra* note 38, at 3. The *Lilly* decision has done more than affected the confrontation clause in a prospective sense. *Id*. It has greatly impacted those defendants who are currently making *Bruton* claims. *Id*. If the declaration against penal interest had been deemed "firmly rooted," *Bruton* would have become dead law. *Id*. This would have opened the door to admitting virtually all accomplice's confessions under the *Roberts'* "firmly rooted" prong. *Id*.

[109] Amicus Brief, 1998 WL 887449, at *14. The importance of subjecting an accomplice to cross-examination can vividly be seen in *Commonwealth v. Ceparanos* and *Commonwealth v. Cressell Jr*. *Id*. Ceparano, Cressell, Johnson and two others were drinking together one night and the next morning it was discovered that Johnson had been beheaded and burned. *Id*. The Commonwealth originally thought Ceparano killed Johnson, but later it was decided that Cressell was the triggerman. *Id*. During Cressell's trial, the prosecution called Ceparano and he testified that Cressell was

belief that the confrontation clause is an important right that guarantees reliable evidence and that it will scrutinize the usage of the "firmly rooted" hearsay exception to ensure that the evidence falls within the reliability parameters.[110] Furthermore, the Supreme Court demonstrated that it will not tolerate the admission of unreliable evidence under the guise of "firmly rooted" and hence the Court rejuvenated the confrontation clause.[111]

V. CONCLUSION

In *Lilly v. Virginia*, the United States Supreme Court was confronted with the issue of determining whether the defendant's confrontation clause rights were violated when an accomplice's custodial statements were introduced at trial.[112] The Court correctly determined that Benjamin Lee Lilly's confrontation clause rights were violated due to his inability to confront the witness.[113] Moreover, by declaring that the declaration against penal interest exception is not "firmly rooted," the Court has foreclosed further subversion of those rights encapsulated within the confrontation clause.[114]

Leslie Morsek

---

responsible for Johnson's murder. *Id*. After the defendant subjected Ceparano to a two hour cross-examination, the jury returned a verdict of not guilty to the capital charge, but instead to a lesser crime. *Id*.; *see also* Michael Hemphill, *Appeal: Silent Witness' Words Used to Convict*, ROANOKE TIMES, Feb. 28, 1999, 1999 WL 8126242 (quoting Christopher Tuck) ("Imagine having someone be able to hand over a tape to a police department that says you committed a crime and the tape couldn't be challenged. If that's not frightening, I don't know what is.").

110 The court's unanimous verdict signals to judges, prosecutors, and defense attorneys that the Justices take seriously the Sixth Amendment right to confront witnesses. *See* Richey, *supra* note 84, at 2.

111 *See* Laurie Asseo, *Ruling Curbs Out-of-Court Statements*, ASSOCIATED PRESS, June 10, 1999, *available in* 1999 WL 17812543. Kent Willis, of the American Civil Liberties Union of Virginia, said "The Supreme Court is simply re-embracing one of the fundamental principles of criminal justice, and that is the right to face your accuser." *Id*.

112 *See supra* notes 70-73 and accompanying text.

113 *See supra* notes 84-94 and accompanying text.

114 *See supra* notes 92-111 and accompanying text.