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## The Confrontation Clause: Statements against Penal Interest as a Firmly Rooted Hearsay Exception

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THE CONFRONTATION CLAUSE: STATEMENTS AGAINST  
PENAL INTEREST AS A FIRMLY ROOTED HEARSAY  
EXCEPTION

AMY N. LOTH<sup>1</sup>

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I. INTRODUCTION

Imagine a defendant is charged with bank robbery. A co-defendant, after voluntarily submitting to an informal interview and being subsequently *Mirandized*, waives his right to counsel and confesses to the robbery. Imagine also that this co-defendant confessed not only to committing the robbery, but also to devising the scheme behind the robbery, buying the masks and gloves, and everything else necessary to carry out the robbery. The confession acknowledged a getaway driver, implying it was the defendant, but the co-defendant never expressly named his accomplice. There are no allegations that the co-defendant’s confession was coerced, nor was the statement made in exchange for favorable treatment. The co-defendant has since died, so a joint trial is not a possibility. Now, the government wants to introduce the decedent’s voluntary confession incriminating the defendant against the defendant at trial without giving the defendant a chance to cross-examine him under the Sixth Amendment.

It is in these situations that a court must choose between two competing policies. On the one hand, the Constitution gives accused criminal defendants the right to cross-examine their accusers,<sup>2</sup> because it is through cross-examination that a jury will be able to decipher the truth by judging the credibility of a witness through observation of the witness’ demeanor. On the other hand, if the witness is dead (or unavailable), administering justice may warrant dispensing with confrontation at trial if cross-examination would add little, if anything, to the statements’ reliability. This Article will explore why these types of confessions, called self-inculpatory

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<sup>2</sup>The Sixth Amendment to the United States Constitution provides that in a criminal prosecution, the accused has the right “to be confronted with the witnesses against him.” U.S. CONST. amend. VI.

statements, should be admissible under the Confrontation Clause of the Sixth Amendment.

Out-of-court statements, “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” are called hearsay.<sup>3</sup> Ordinarily, the out-of-court statements of a non-testifying declarant (usually a co-defendant) are excluded as hearsay because they are offered to prove the truth of the matter asserted.<sup>4</sup> The rule against hearsay reflects concern about the trustworthiness of out-of-court statements because such statements are usually not subject to cross-examination and are thus considered unreliable. Exceptions to the hearsay rule permit courts to admit certain hearsay statements without cross-examination if those statements bear indicia of reliability and trustworthiness sufficient to overcome these concerns.

One such exception is Federal Rule of Evidence 804(b)(3), which provides that, if the hearsay declarant is unavailable to testify as an in-court witness, the hearsay rule does not exclude

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, . . . that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true . . .<sup>5</sup>

The same reliability concerns underlie the Confrontation Clause. As noted earlier, the Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment,<sup>6</sup> provides that in a criminal prosecution, the accused has the right “to be confronted with the witnesses against him.”<sup>7</sup> As the Supreme Court has concluded:

[T]he particular vice that gave impetus to the confrontation claim was the practice of trying defendants on ‘evidence’ which consisted solely of *ex parte* affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact.<sup>8</sup>

By eliminating this abusive *ex parte* affidavit practice, the right to confront and cross-examine witnesses “promotes reliability in criminal trials.”<sup>9</sup>

The right of confrontation requires that whenever possible, testimony and cross-examination should occur at trial.<sup>10</sup> The purpose behind the Confrontation Clause is

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<sup>3</sup>FED. R. EVID. 801(c).

<sup>4</sup>*See e.g.*, *United States v. Barone*, 114 F.3d 1284, 1292 (1st Cir. 1997); *United States v. Sepulveda*, 15 F.3d 1161, 1180 (1st Cir. 1993).

<sup>5</sup>FED. R. EVID. 804(b)(3).

<sup>6</sup>*See Pointer v. Texas*, 380 U.S. 400, 403 (1965).

<sup>7</sup>U.S. CONST. amend. VI.

<sup>8</sup>*California v. Green*, 399 U.S. 149, 156 (1970).

<sup>9</sup>*Lee v. Illinois*, 476 U.S. 530, 540 (1986).

two-fold: (1) to allow a criminal defendant the right to confront his or her accusing witness face-to-face in open court for truth-testing cross examinations; and (2) to give the jury an opportunity to judge the credibility of the witness through observation of the witness' demeanor.<sup>11</sup> Thus, "[t]he primary object [of the Clause is] to prevent depositions or ex parte affidavits. . . [from] being used against the prisoner in lieu of a personal examination and cross-examination of the witness[es]" against him<sup>12</sup> when the accuser is available to testify. The purpose of this Article is to suggest that if an *unavailable* accomplice's confession meets the requirements of FRE 804(b)(3), and thus is truly against the declarant's interest, that statement is sufficiently reliable to be admitted against the defendant as a firmly rooted hearsay exception under the Confrontation Clause without the need for cross-examination.

When the prosecution offers hearsay evidence against the accused in a criminal case, the question as to whether admission of that evidence would violate the Confrontation Clause is triggered.<sup>13</sup> If courts enforced the Confrontation Clause literally, they would exclude from evidence *any* hearsay statement made by a declarant who was not present or who did not testify at trial.<sup>14</sup> Thus, if the declarant has died before trial, as in the hypothetical posited at the beginning of this Article, his statement is automatically excluded from evidence simply because the defendant will never be able to face him in court. Accordingly, a literal application of the Confrontation Clause would abrogate any need for the hearsay rule and its exceptions in criminal cases.<sup>15</sup> The Supreme Court has recognized that such a result is "unintended and too extreme."<sup>16</sup> To avoid this result, the Supreme Court established in *Ohio v. Roberts*<sup>17</sup> a general approach for determining when hearsay statements incriminating the defendant are admissible under the Confrontation Clause.

Part IIA of this Article will discuss the two-part test set forth in *Ohio v. Roberts*. Part IIB will address *Lilly v. Virginia*, the Supreme Court's first attempt to resolve whether statements against penal interest are sufficiently reliable to be admissible under the Confrontation Clause. Part IIB will also explore the distinction between self-inculpatory and non-self-inculpatory statements, what constitutes a "firmly rooted" hearsay exception, and also the policy concerns behind creating a "firmly rooted" hearsay exception. Part III will then conclude why statements against penal interest qualify as a firmly rooted hearsay exception under the first prong of the *Roberts* test, and thus warrant dispensing with cross-examination.

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<sup>10</sup>See JOHN L. CONLON & MARK A. DOMBROFF, TRIAL HEARSAY: OBJECTIONS & EXCEPTIONS, § 3.410 (2d ed. 1996).

<sup>11</sup>See *Mattox v. United States*, 156 U.S. 237, 242-43 (1895).

<sup>12</sup>*Id.* at 242.

<sup>13</sup>See *Tennessee v. Street*, 471 U.S. 409, 413-14 (1985).

<sup>14</sup>See *Mattox*, 156 U.S. at 243.

<sup>15</sup>See CONLON & DOMBROFF, *supra* note 10, at § 3.310.

<sup>16</sup>See *Bourjaily v. United States*, 483 U.S. 171, 182 (1987) (quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980)).

<sup>17</sup>448 U.S. 56 (1980).

## II. THE TWO-PART TEST

A. *Ohio v. Roberts*

In *Ohio v. Roberts*, the Supreme Court established the criteria necessary to admit a hearsay statement over a Confrontation Clause objection. An out-of-court statement is admissible under the Confrontation Clause if the statement bears adequate “indicia of reliability” to justify the absence of cross-examination of the declarant.<sup>18</sup>

The Court in *Roberts* created a two-part test to determine if a statement bears adequate indicia of reliability.<sup>19</sup> Under the first prong of the test, a hearsay statement that falls within a “firmly rooted hearsay exception” is sufficiently reliable to be admitted without cross-examination.<sup>20</sup> The phrase “firmly rooted” is a very ambiguous concept in Confrontation Clause jurisprudence as there has been no definitive test for what constitutes a “firmly rooted” hearsay exception. In the alternative, under the second prong of the test, a hearsay statement is admitted under the Confrontation Clause if it has “particularized guarantees of trustworthiness” such that adversarial testing would be expected to add little, if anything, to the statements’ reliability.<sup>21</sup> Therefore, if the statement meets a firmly rooted hearsay exception *or* has “particularized guarantees of trustworthiness,” it bears adequate indicia of reliability and thus admission of the statement is proper without requiring the declarant to testify at trial. This Article will explore why the statements against penal interest hearsay exception is sufficiently reliable as a firmly rooted hearsay exception for purposes of the Confrontation Clause. The first Supreme Court case to address statements against penal interest as a firmly rooted hearsay exception under the first prong of the *Roberts* test was *Lilly v. Virginia*.<sup>22</sup>

B. *Lilly v. Virginia*

In *Lilly v. Virginia*, three men—the defendant Benjamin Lee Lilly, his brother Mark, and another cohort were arrested after a crime spree involving robberies, a carjacking, and a murder.<sup>23</sup> In a custodial confession, Mark admitted stealing alcoholic beverages but expressly stated that it was Lilly who masterminded the robberies, instigated the carjacking, and was the shooter in the murder.<sup>24</sup> Mark acknowledged he was present at the murder, but continually emphasized that he was

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<sup>18</sup>*Id.* at 65-66 (quoting *Monevsi v. Stubbs*, 408 U.S. 204, 213 (1972)).

<sup>19</sup>When the challenged out-of-court statement was made in the course of a prior judicial proceeding, as a preliminary matter, the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the Defendant. *See White v. Illinois*, 502 U.S. 346, 354 (1992); *see also Roberts*, 448 U.S. at 65. In all other circumstances, an unavailability analysis is an unnecessary part of the Confrontation Clause inquiry. *See White*, 502 U.S. at 354.

<sup>20</sup>*See Roberts*, 448 U.S. at 66.

<sup>21</sup>*Id.*

<sup>22</sup>527 U.S. 116 (1999).

<sup>23</sup>*See id.* at 120.

<sup>24</sup>*See id.*

drinking heavily during the entire spree and “didn’t have nothing to do with the shooting.”<sup>25</sup> In addition, “the police told Mark that he would be charged with armed robbery, and, . . . unless he broke ‘family ties,’” he may have to serve a life sentence for his role in the crime.<sup>26</sup>

When the Commonwealth of Virginia called Mark as a witness at Lilly’s criminal trial, Mark invoked his Fifth Amendment privilege against self-incrimination and was unavailable to testify.<sup>27</sup> The Commonwealth offered all of Mark’s statements including the admission of stealing alcoholic beverages, that Lilly was the mastermind and the shooter, and that Mark was drinking heavily and had nothing to do with the shooting.<sup>28</sup> The defense “objected on the ground that the statements were not actually against Mark’s penal interest because they shifted” blame for the crimes to the defendant and thus violated the Confrontation Clause.<sup>29</sup> Since Mark’s confession implicated himself in the crime spree and exposed him to criminal liability and jail, the trial court admitted the entire confession over the Confrontation Clause objection.<sup>30</sup> This confession demonstrates the concept of against penal interest. As a result, the defendant was convicted of murder and other crimes.<sup>31</sup>

The Virginia Supreme Court affirmed the convictions in holding “that Mark’s statements were declarations of an unavailable witness against penal interest;” the reliability of the statements was established by other evidence; and all statements against penal interest, whether they shift blame or not, fall within a “firmly rooted exception” to the Virginia hearsay rule satisfying the requirements of the Confrontation Clause.<sup>32</sup>

The Virginia Supreme Court went on to note that to the extent Mark’s statements were self-serving, in that they shifted blame to the defendant, goes to the weight and not the admissibility of the evidence.<sup>33</sup> Thus, the Virginia hearsay rule at issue in *Lilly* admits all statements that contain some declaration against penal interest. In contrast, Federal Rule 804(b)(3) prohibits the admission of non-self-inculpatory statements.<sup>34</sup> Furthermore, because the Virginia Supreme Court held that Mark’s statements were reliable per a firmly rooted hearsay exception, the statements were admissible under the first prong of the *Roberts* test. Therefore, the court did not need

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<sup>25</sup>*Id.*

<sup>26</sup>*See id.*

<sup>27</sup>*Lilly*, 527 U.S. at 121.

<sup>28</sup>*See id.* 121-22.

<sup>29</sup>*See id.*

<sup>30</sup>*See id.* at 122.

<sup>31</sup>*See id.*

<sup>32</sup>*Lilly*, 527 U.S. at 122.

<sup>33</sup>*See id.*

<sup>34</sup>*See Williamson v. United States*, 512 U.S. 594, 600-01 (1994) (“[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”).

to address whether those statements also possessed particularized guarantees of trustworthiness under the second prong of the *Roberts* test.

The United States Supreme Court reversed, with a 4 - 3 - 1 - 1 plurality noting that “non-self-inculpatory” statements, such as Mark’s, are presumptive unreliable.<sup>35</sup> Further, the plurality concluded that all accomplice confessions that inculcate a criminal defendant (like Mark’s) do not fall within a “firmly rooted” exception to the hearsay rule.<sup>36</sup> To understand what the Supreme Court was trying to accomplish in *Lilly*, it is helpful to look at the opinion in three contexts: the distinction between self-inculpatory and non-self-inculpatory statements; what constitutes a “firmly rooted” hearsay exception; and the policy concerns behind creating a “firmly rooted” hearsay exception such that dispensing with cross-examination is warranted.

### 1. Self-Inculpatory v. Non-Self-Inculpatory Statements

The *Lilly* plurality, consisting of Justices’ Stevens, Souter, Ginsburg, and Breyer, was primarily troubled that the statements against penal interest exception “encompasses statements that are inherently unreliable,” such as the custodial confession in *Lilly* where the accomplice was shifting the blame to the defendant.<sup>37</sup> As a result, statements against penal interest cannot be admitted as a “firmly rooted” hearsay exception according to the plurality.<sup>38</sup>

The Court notes that ‘declaration against penal interest’ “defines too large a class for meaningful Confrontation Clause analysis.”<sup>39</sup> In an attempt to categorize such statements, the plurality offered three situations where statements against penal interest are used in criminal trials: “(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.”<sup>40</sup>

The first category of statements are admissible against the declarant if the declarant himself is on trial. For example, if Mark Lilly himself were on trial for stealing alcoholic beverages, his statements would unquestionably be admissible against him.<sup>41</sup> This is the same as an admission by a party opponent, a statement that is *not* hearsay.<sup>42</sup>

If, however, the declarant was a codefendant in a *joint* trial, then the admission of a statement against penal interest may result in a *Bruton* violation. Where a confession by a non-testifying codefendant is admitted, the defendant inculpated by the statement is denied the opportunity to cross-examine his codefendant, thus leaving the reliability of the statement untested. This is termed a *Bruton* violation

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<sup>35</sup>*Lilly*, 527 U.S. at 133.

<sup>36</sup>*Id.* at 134 n.5.

<sup>37</sup>*Lilly*, 527 U.S. at 131.

<sup>38</sup>*Id.*

<sup>39</sup>*Id.* at 127 (citing *Lee v. Illinois*, 476 U.S. 530, 544 n.5 (1986)).

<sup>40</sup>*See Lilly*, 527 U.S. at 127.

<sup>41</sup>*See id.*

<sup>42</sup>*See* FED. R. EVID. 801(d)(2).

after the case of *Bruton v. United States*.<sup>43</sup> Under *Bruton*, the prosecution cannot offer in a joint trial the nontestifying codefendant's confession naming the accused as a participant in the crime, even if the jury is instructed to consider that confession only against the codefendant.<sup>44</sup>

*Bruton* is problematic only in joint trials. Even in a joint trial, however, a *Bruton* violation only occurs if the codefendant's statement *directly* implicates the defendant.<sup>45</sup> Where the reference to the defendant is only indirect (i.e. merely acknowledging the existence of a getaway driver), and the jury can only complete the inference by relying on other evidence at trial, *Bruton* does not apply.<sup>46</sup>

The second category of statements against penal interest are, by definition, offered by the *accused*, not the prosecution. Thus, the admission of such statements does not involve Confrontation Clause concerns and there is no need to decide if these statements constitute a firmly rooted hearsay exception under *Roberts*.<sup>47</sup>

It is this third category of statements, including statements "by an accomplice which incriminates a criminal defendant,"<sup>48</sup> that have divided the Courts of Appeals and district courts as to whether such statements are reliable enough to constitute a firmly rooted hearsay exception.<sup>49</sup>

The Supreme Court has consistently held that a codefendant's confession is "presumptively unreliable" when it implicates the defendant because those statements "may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another."<sup>50</sup> These types of statements are also known as "non-self-inculpatory statements." A "non-self-inculpatory statement" is a statement where an accomplice minimizes his own criminal responsibility and shifts blame to the defendant.<sup>51</sup> Thus, non-self-inculpatory statements are not statement's against the *declarant's* penal interest.

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<sup>43</sup>391 U.S. 123 (1968).

<sup>44</sup>*See id.*

<sup>45</sup>*See Richardson v. Marsh*, 481 U.S. 200, 209 (1987).

<sup>46</sup>*See United States v. Wilson*, 116 F.3d 1066, 1083 (5th Cir. 1997).

<sup>47</sup>*See Lilly*, 527 U.S. at 130.

<sup>48</sup>*Lee*, 476 U.S. at 544 n.5.

<sup>49</sup>*See e.g.*, *United States v. Barone*, 114 F.3d 1284, 1302 (1st Cir. 1997) ("[Where] it is clear that the statements inculcating both the declarant and the defendant were not made in order to limit the declarant's exposure to liability, the declarations against interest exception is properly treated as firmly rooted for Confrontation Clause purposes"); *Neuman v. Rivers*, 125 F.3d 315, 319-20 (6th Cir. 1997) (declaration against penal interest exception is firmly rooted); *United States v. York*, 933 F.2d 1343, 1363 (7th Cir. 1991) (same); *United States v. Keltner*, 147 F.3d 662, 670 (8th Cir. 1998) (same); *LaGrand v. Stewart*, 133 F.3d 1253, 1268-69 (9th Cir. 1998) (stating in dicta that declaration against penal interest exception is firmly rooted). *But see United States v. Flores*, 985 F.2d 770, 775-76 (5th Cir. 1993) (not firmly rooted); *Earnest v. Dorsey*, 87 F.3d 1123, 1131 (10th Cir. 1996) (same). The rest of the circuits have declined to address the issue.

<sup>50</sup>*Lee*, 476 U.S. at 545.

<sup>51</sup>*See United States v. Gallego*, 191 F.3d 156, 168 (2d Cir. 1999).

Mark Lilly's confession is a non-self-inculpatory statement. Mark's statement completely minimized his own criminal responsibility. In effect, Mark said, "I stole some alcoholic beverages. But Ben Lilly masterminded the robberies. Ben instigated the carjacking. Ben shot [DeFilippis]. I was there, but I was drinking heavily and had nothing to do with these crimes."<sup>52</sup> Nowhere in this statement does Mark accept responsibility for the crimes other than to admit stealing alcoholic beverages. His entire statement directly implicates and shifts all of the blame to Ben.

As a result, Mark's inherently unreliable statement was a violation of Lilly's right to confrontation, and furthermore, did not constitute a firmly rooted hearsay exception under *Roberts*. The resulting violation was unanimous among the nine Justices in *Lilly*. In fact, Justice Scalia even termed the result a "paradigmatic Confrontation Clause violation."<sup>53</sup> However, the reasoning behind the plurality's opinion as to whether such a statement qualifies as a firmly rooted hearsay exception was sharply disagreed with by the five concurring Justices.

The concurrence of Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy, conclude that there was a violation, but found the plurality's attempt at classifying the types of statements against penal interest to be "unwarranted and results[ing] in a complete ban on the government's use of accomplice confessions that inculcate a codefendant."<sup>54</sup> The Chief Justice went on to note that holding all such accomplice confessions inculcating a criminal defendant inadmissible was inappropriate in *Lilly* because part of the accomplice's confession was simply not even a statement against penal interest within the meaning of Rule 804(b)(3).<sup>55</sup> As a result, the plurality was not confronted with the issue of whether an accomplice statement that is genuinely self-inculpatory that also indirectly inculcates a codefendant is admissible under the Confrontation Clause. The Chief Justice did not foreclose on the possibility that such truly self-inculpatory statements are admissible as firmly rooted hearsay exceptions; he even suggested they should be admissible.<sup>56</sup> Justices Thomas and Scalia also were not willing to follow the plurality's approach that the Confrontation Clause imposes a "blanket ban on the government's use of accomplice statements that incriminate a defendant."<sup>57</sup> Justices Thomas and Scalia, although somewhat vague in their respective concurrences in *Lilly*, arguably subscribe to the view that *genuinely* self-inculpatory accomplice statements may be admissible as a firmly rooted hearsay exception.<sup>58</sup>

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<sup>52</sup>*Lilly*, 527 U.S. at 120-21.

<sup>53</sup>*Lilly*, 527 U.S. at 143 (Scalia, J., concurring).

<sup>54</sup>*Id.* at 145 (Rehnquist, J., concurring).

<sup>55</sup>*See id.*

<sup>56</sup>*See id.* at 144-49.

<sup>57</sup>*See id.* at 143.

<sup>58</sup>*See Williamson v. United States*, 512 U.S. 594, 619-20 (1994) (Kennedy, J., concurring, joined by Thomas, J.) (focusing on whether the custodial confession was truly self-inculpatory or motivated by a desire to curry favor with authorities); *see also id.* at 603 (Scalia, J., joining in Part II-A of the majority's or Justice O'Connor's opinion) (which stated "[e]ven the confessions of arrested accomplices may be admissible if they are truly self-inculpatory.")

As the Chief Justice's concurrence suggests, many confessions that inculcate a defendant are, however, genuinely *self*-inculpatory because the declarant may not minimize his role in the crime nor shift blame to the defendant.<sup>59</sup> It is these genuinely self-inculpatory statements that are inherently reliable. Compare Mark's statement with the hypothetical confession given at the beginning of the Article. The hypothetical declarant confessed to the main role in the crime, took responsibility for devising the scheme, and for almost all other actions associated with the crime. He never once mentioned his accomplice. The only thing the declarant said to implicate the defendant was to acknowledge that he had a getaway driver. This only indirectly implicated the defendant. The declarant never attempted to shift the blame for the crime in any way. This is an example of a self-inculpatory statement. This is the type of statement that is trustworthy, and should be admitted against the defendant under the Confrontation Clause as a firmly rooted hearsay exception.

Even the Supreme Court, in *Dutton v. Evans*,<sup>60</sup> noted that the admission of an accomplice's spontaneous comment that *indirectly* inculpated the defendant did not violate the Confrontation Clause. The majority emphasized that the coconspirator spontaneously made the statement and "had no apparent reason to lie."<sup>61</sup> Similarly, accomplices that give self-inculpatory statements have no reason to lie, and thus their statements should qualify as a firmly rooted hearsay exception.

Other courts have followed this view. For example, in *United States v. York*,<sup>62</sup> the Seventh Circuit recognized that the reason why accomplice confessions incriminating a defendant are unreliable "stems largely from the presumption that such statements are self-serving, offered only to shift the blame from the declarant to another. But when . . . the declarant has not attempted to diminish his own role, there is little reason to suspect that portion of an otherwise reliable statement is untrustworthy." Thus, confessing to the main role in the crime, whether it be murdering someone or robbing a bank, demonstrates reliability of the statement. Accordingly, the genuinely self-inculpatory statement in *York* was held to be a firmly rooted exception to hearsay.<sup>63</sup>

Similarly, the Supreme Court recognized in *Williamson v. United States*,<sup>64</sup> that there are many circumstances in which Rule 804(b)(3) does allow the admission of statements that inculcate a criminal defendant. Such statements may be admissible "if they are truly self-inculpatory, rather than merely attempts to shift blame or curry favor."<sup>65</sup> A statement that meets Rule 804(b)(3) is sufficiently against the declarant's penal interest that a reasonable person would not have made the statement unless believing it to be true.<sup>66</sup> This can only be determined from the surrounding

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<sup>59</sup>See *Lilly*, 527 U.S. at 142-49.

<sup>60</sup>400 U.S. 74, 89 (1970).

<sup>61</sup>*Id.* at 86-89.

<sup>62</sup>933 F.2d 1343, 1363 (7th Cir. 1991).

<sup>63</sup>*Id.* at 1362.

<sup>64</sup>512 U.S. 594, 603 (1994).

<sup>65</sup>*Id.*

<sup>66</sup>See FED. R. EVID. 804(b)(3).

circumstances. Non-self-inculpatory statements are simply not against a declarant's penal interest because the declarant is trying to shift the blame, not to inculcate himself.

As demonstrated in the hypothetical confession, self-inculpatory statements are typically voluntary, spontaneous, and not given in exchange for leniency or special treatment. This is because these factors alleviate the dangers that are present with a statement that attempts to shift blame.<sup>67</sup> The *Lilly* plurality failed to make a distinction between self-inculpatory and non-self-inculpatory statements. The Court was not confronted with a genuinely self-inculpatory accomplice statement that also inculcates a codefendant, yet in effect, it imposed a "blanket ban" on the admissibility of "all accomplice statements that incriminate a criminal defendant" as a firmly rooted hearsay exception. The danger in the Court's opinion is clearly that statements that truly are against the declarant's penal interest will not be admissible against the defendant. This surely cannot be what Congress intended when it codified Rule 804(b)(3). Statements that are truly self-inculpatory, those statements that meet FRE 804(b)(3), are not made in an attempt to curry favor or shift blame to the defendant.

The concept of a "statement against one's penal interest" should make intuitive sense. If there is no offer of leniency, and if a person does not shift the blame to another in an attempt to appear less culpable, the person would not make the statement exposing himself to jail unless he believed the statement to be true. There is no reason for people to make statements that could send them to jail unless they are getting a little "something" in return.

As a result, the plurality's opinion in *Lilly* should be limited to cases of *non*-self-inculpatory statements, and it should not apply to cases involving genuinely self-inculpatory statements because such statements do not produce the same dangers and concerns as a blame shifting statement, namely, a motivation to lie.

In contrast to the Virginia state law hearsay exception, Federal Rule 804(b)(3) itself prohibits the admission of such non-self-inculpatory statements that name and shift blame to another.<sup>68</sup> Consequently, if a court was presented with a genuinely self-inculpatory statement (i.e. the hypothetical confession), *Lilly* does not foreclose the possibility that *Rule 804(b)(3)* qualifies as a firmly rooted hearsay exception under the first prong of *Roberts*. So, then, what exactly constitutes a "firmly rooted hearsay exception?" The next section will attempt to address that ambiguous concept.

## 2. What is "Firmly Rooted"?

As previously noted, under the first prong of the *Roberts* test, a hearsay statement that meets a "firmly rooted" hearsay exception is admissible under the Confrontation Clause against the defendant because reliability can be inferred, without more, from such a statement.<sup>69</sup> While there is no definitive test for what constitutes a "firmly rooted" hearsay exception, the *Lilly* plurality emphasized that a hearsay exception is "firmly rooted" if in light of "longstanding judicial and legislative experience," it

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<sup>67</sup>See e.g., *Dutton*, 400 U.S. at 89 (finding that a spontaneous statement against the declarant's penal interest does not create motivation to lie), see also *Lilly*, 527 U.S. at 142-49.

<sup>68</sup>See *Lilly*, 527 U.S. at 121-22.

<sup>69</sup>See *White*, 502 U.S. at 346; *Roberts*, 448 U.S. at 65.

“rest[s] [on] such [a] solid foundatio[n] that admission of virtually any evidence within [it] comports with the ‘substance of the constitutional protection.’”<sup>70</sup> In other words, established practice of the hearsay exception must confirm that statements falling within that exception are inherently credible and are the equivalent of those statements required by the Constitution’s preference for cross-examination.<sup>71</sup>

According to the plurality, the statements against penal interest exception does not meet this standard because the exception is “of quite recent vintage,” and because the statements “function similarly to those used in the ancient *ex parte* affidavit system” when offered in the absence of the declarant.<sup>72</sup>

The danger in the plurality’s opinion, however, is that the opinion is inconsistent with prior majority Court rationale. According to the Supreme Court, a hearsay exception may be firmly rooted when the exception is recognized in the Federal Rules of Evidence and in a significant majority of the States.<sup>73</sup> For example, the exception for spontaneous declarations “is at least two centuries old, . . . is currently recognized under Federal Rule of Evidence 803(2), and [is currently recognized] in nearly four-fifths of the States.”<sup>74</sup>

Similarly, the exception for statements made for purposes of medical diagnosis or treatment is “recognized in Federal Rule of Evidence 803(4), and is equally widely accepted among the States.”<sup>75</sup> The exception for statements made for purposes of medical diagnosis or treatment is, however, “of much more recent vintage, and to a large extent it was created by, rather than merely recognized in, Rule 803(4).”<sup>76</sup> In other words, longstanding judicial and legislative experience suggests that even relatively new exceptions can be firmly rooted if they are codified in the Federal Rules of Evidence and widely accepted in the States.

Unfortunately, the *Lilly* plurality did not explicitly state exactly how many years it takes before a hearsay exception is eligible for “firmly rooted” status. Furthermore, the *Lilly* plurality is misleading to the extent that it holds that the statements against penal interest exception is *not* based on longstanding judicial and legislative experience. The *Lilly* plurality failed to recognize that the concept of ‘statements against interest’ dates back to the common law. Although the interest had to be pecuniary or proprietary, that view has now been fully discredited. Moreover, the statements against penal interest hearsay exception has been codified in the Federal Rules of Evidence as Rule 804(b)(3) since the Rules were enacted in 1975. In addition, almost four-fifths of the States accept a statement against penal interest hearsay exception in their respective State evidence rules.<sup>77</sup> As a result, Rule

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<sup>70</sup>527 U.S. at 126 (citing *Roberts*, 448 U.S. at 66).

<sup>71</sup>527 U.S. at 126; *see also White*, 502 U.S. at 356.

<sup>72</sup>*See Lilly*, 527 U.S. at 131; *see also Mattox*, 156 U.S. at 242.

<sup>73</sup>*See White*, 502 U.S. at 356.

<sup>74</sup>*Id.* at 356 n.8.

<sup>75</sup>*Id.*

<sup>76</sup>Richard D. Friedman, *Confrontation: The Search For Basic Principles*, 86 GEO. L.J. 1011, 1019 (1998).

<sup>77</sup>The presence of the statement against penal interest exception in the Federal Rules of Evidence, as the Rules were originally promulgated, in and of itself indicates widespread

804(b)(3) can also be supported by longstanding judicial and legislative experience. This suggests the Supreme Court should reevaluate *Lilly* with an eye toward acceptance of Rule 804(b)(3) as a “firmly rooted” hearsay exception. The next section will explore why it is good policy to recognize Rule 804(b)(3) as a firmly rooted hearsay exception.

### 3. Policy Concerns Behind Firmly Rooted Hearsay Exceptions

As noted in Part IIA of this Article, if a statement does not qualify as a firmly rooted hearsay exception, the statement is excluded under the Confrontation Clause unless it bears “particularized guarantees of trustworthiness” under the second prong of the *Roberts* test.<sup>78</sup> The second prong of the *Roberts* test requires courts to determine, based on the surrounding circumstances, whether the proffered out-of-court statement bears particularized guarantees of trustworthiness.<sup>79</sup> This is a fact driven issue that the *Lilly* court determined was subject to a *de novo* review.<sup>80</sup> As a result, not only are a trial court’s resources consumed, but also the appellate courts resources are substantially depleted. Judicial economy is not promoted by this “duplicative review”<sup>81</sup> of whether a hearsay statement possesses particularized guarantees of trustworthiness.

By establishing firmly rooted exceptions to hearsay, courts are able to satisfy “the need for certainty in the workaday world of conducting criminal trials” because such exceptions do not require an unnecessary, extensive inquiry into the reliability of the statement.<sup>82</sup> Under a firmly rooted exception, reliability is inferred, and the second prong of the *Roberts* test is avoided.<sup>83</sup>

The *Lilly* plurality voiced genuine concerns about ensuring the reliability of statements admitted under a firmly rooted hearsay exception.<sup>84</sup> As the *Lilly* plurality properly concluded, statements made by an accomplice that directly implicate a defendant and shift blame to the defendant are not inherently reliable.<sup>85</sup> But those statements are not “declarations against penal interest” as referred to in Rule 804(b)(3). As demonstrated above, statements against penal interest that are genuinely self-inculpatory are sufficiently reliable to be firmly rooted. Further, establishing this clear rule will simplify Confrontation Clause analysis in lower courts and will also conserve valuable judicial resources.

Public policy also dictates against imposition of a “blanket ban” on the use of an accomplice’s statement against penal interest inculcating a defendant. As Justice

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acceptance because the Rules have been closely adopted in about forty states. Friedman, *supra* note 76, at 1020.

<sup>78</sup>*Roberts*, 448 U.S. at 66.

<sup>79</sup>*Id.* at 65-66.

<sup>80</sup>527 U.S. at 136.

<sup>81</sup>*See Stone v. I.N.S.*, 514 U.S. 386, 399 (1995).

<sup>82</sup>*Roberts*, 448 U.S. at 66.

<sup>83</sup>*Id.*

<sup>84</sup>*See supra* Part II.B.2.

<sup>85</sup>*Id.*

Scalia opined in his concurrence in *Lilly*, “Such an approach not only departs from an original understanding of the Confrontation Clause but also freezes our jurisprudence by making trial court decisions excluding such statements virtually unreviewable.”<sup>86</sup>

In addition, fundamental fairness dictates that an accomplice’s confession that meets the requirements of Rule 804(b)(3), and is thus genuinely self-inculpatory, should be admissible if the declarant truly is unavailable. For example, in the hypothetical posited at the beginning of the Article, the accomplice was *Mirandized*, waived his right to an attorney, and then voluntarily confessed to the crimes, implicitly implicating the defendant. The accomplice then dies. The authorities did everything right - there was no coercion, no leniency offered, and no violation of any of the accomplice’s constitutional rights. In fact, there was nothing more the authorities could have done to preserve the evidence. There is no question these statements have probative value. To exclude such probative statements flies in the face of the Confrontation Clause, given that the Confrontation Clause has as a basic purpose the promotion of the “integrity of the fact-finding process.”<sup>87</sup>

Usually, a declarant is unavailable to testify against a defendant because invokes his Fifth Amendment right against self-incrimination knowing the statement inculpates himself. But where the declarant has died, the prosecution is offering the confession because there is no other possible way to call the declarant to the stand and testify. The fact-finding process is best promoted by the admission of *truly* self-inculpatory statements against penal interest, which Rule 804(b)(3) requires, as a firmly rooted hearsay exception under the Confrontation Clause.

### III. CONCLUSION

Statements against penal interest that inculcate an accused should be admitted as a firmly rooted hearsay exception under the Confrontation Clause. Federal Rule 804(b)(3) has longstanding judicial and legislative experience. The exception has been around for twenty-five years, is codified in the Federal Rules of Evidence, and has been widely accepted in approximately four-fifths of the States.

Moreover, the core concern of admitting hearsay statements into evidence without cross-examination rests upon the inherent reliability of the statements. Hearsay statements that meet the requirements of Rule 804(b)(3), and thus are truly against the declarant’s penal interest, are reliable. The question is whether the statement was sufficiently against the declarant’s interest when made.<sup>88</sup> Truly self-inculpatory statements will always be against the declarant’s interest. These are the types of statements Congress intended to admit as reliable under Rule 804(b)(3), and thus should be admissible as a firmly rooted hearsay exception under the Confrontation Clause.

In contrast, non-self-inculpatory statements, as in *Lilly*, will never be against the declarant’s interest because they shift blame. As the Court in *Lilly* was correct in finding a Confrontation Clause violation, the plurality did more harm than good

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<sup>86</sup>527 U.S. at 144.

<sup>87</sup>*White*, 502 U.S. at 356-57 (citing *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988) and quoting *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987)).

<sup>88</sup>*Williamson v. United States*, 512 U.S. 594, 603-04 (1994).

when it banned all “confession[s] by an accomplice which incriminat[e] a criminal defendant” from being a firmly rooted hearsay exception.