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The Future Implications of *Lilly v. Virginia*

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The Future Implications of *Lilly v. Virginia*

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I. INTRODUCTION

John participated in a crime with several accomplices. One of his accomplices, Harry, made statements to his girlfriend and to the police that implicate John. Another accomplice, Bob, made statements to a bartender that implicated John. Imagine that John is on trial. The prosecution moves to enter Harry's confession to the police, Harry's statements to his girlfriend, and Bob's statements to the bartender. For the sake of argument, assume both witnesses are unavailable. The defense objects that the admission of these statements violates the Confrontation Clause of the Sixth Amendment because neither Harry nor Bob is available to testify under oath, before the jury, subject to cross-examination. The prosecution counters that Harry's and Bob's statements are reliable and should be admitted under the hearsay exception for statements of an unavailable declarant made against the declarant's penal interest.¹

Federal Rule of Evidence 804(b)(3) states that the following is not excluded by the hearsay rule if the declarant is unavailable:

A statement which at the time of its making is 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.²

Statements against interest "are admissible because it is presumed that

1. See FED. R. EVID. 804(b)(3).

2. *Id.*

one will not make a statement damaging to one's self unless it is true."³ The analysis of declarations against interest, however, "may vary with the interest at issue, whether pecuniary, penal, or otherwise. It may also vary with the type of proceeding, whether civil or criminal, and with the party against whom the statement is offered."⁴ Additionally, the analysis of a declaration against interest may vary depending upon whether the court is analyzing the statement under Federal Rule of Evidence 804(b)(3) or a state evidentiary rule.

One could argue that the court should admit Harry's confession against John as a statement against Harry's penal interest because the confession as a narrative as a whole is against Harry's penal interest, even though the specific statements that implicate John may not be against Harry's personal penal interest. The prosecutor could also argue that Harry's statement to his girlfriend and Bob's statement to the bartender are more reliable than Harry's statement to the police because the statements were made to friends and therefore were not made in order to curry the favor of the police.

The admissibility of an unavailable codefendant's confession inculcating a defendant has posed significant problems for the courts. While codefendant confessions may be persuasive evidence of the declarant's guilt, the reliability of these statements in determining a codefendant's guilt is more questionable because the declarant may have incentives to shift blame and implicate a codefendant.⁵ This is especially true when a confession is made to the police or other state agents. For this reason, the Supreme Court has been hesitant to admit an unavailable accomplice's confession made to the police that inculcates a defendant.⁶

The Court recently addressed the problem of codefendant confessions being admitted as statements against penal interest in *Lilly v. Virginia*.⁷ The Court in a plurality opinion held that "statements against penal interest do not qualify as a firmly rooted hearsay exception as a class."⁸ The Court's holding has been heralded by the defense bar as offering "another important weapon to the defense arsenal."⁹

Unfortunately, however, *Lilly* may not offer as much protection as

3. 5 JOHN M. McLAUGHLIN ET. AL., WEINSTEIN'S FEDERAL EVIDENCE § 804.06(1) (2d ed. 2000).

4. *Id.*

5. See generally *Lilly v. Virginia*, 527 U.S. 116 (1999); *Williamson v. United States*, 512 U.S. 594 (1994).

6. See generally *Lee v. Illinois*, 476 U.S. 530 (1986); *Williamson v. United States*, 512 U.S. 594 (1994).

7. 527 U.S. 116 (1999).

8. *United States v. Taylor*, No. 98-4517, 98-4518, 1999 U.S. App. LEXIS 19239, *29 (4th Cir. Aug. 16, 1999).

9. David S. Rudolf & Gordon Widenhouse, *New Limitation on Prosecution by Hearsay*, THE

predicted. *Lilly* may not be a prosecutor's dream, but it is not a prosecutor's nightmare either. The mandates of the opinion are ambiguous because *Lilly* is a plurality opinion. These ambiguities present opportunities for prosecutors. This Comment will examine the impact of *Lilly* in state and federal criminal trials and will show that, when interpreted broadly, *Lilly* could potentially allow for the liberal admission of accomplice confessions and may undermine protections for defendants historically located in *Bruton*.¹⁰

Part II will place *Lilly* within the context of prior case law regarding the Confrontation Clause. Part III examines the impact of *Lilly* in jurisdictions bound by *Williamson*.¹¹ Part IV explores the impact of *Lilly* on the admissibility of custodial confessions. Part V looks at *Lilly's* impact on the admissibility of confessions to family and friends. Part VI concludes that a broad interpretation of *Lilly* in state and federal courts could potentially allow for liberal admission of confessions and may undermine protections located in *Bruton*.

II. BACKGROUND

The Confrontation Clause of the Sixth Amendment guarantees the accused the right "to be confronted with the witnesses against him."¹² Its purpose 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."¹³ Rigorous testing usually includes three factors: (1) the oath that a witness takes prior to testifying which is deemed to reflect upon the veracity of the declarant's statements; (2) the opportunity for the jury or judge to observe the witnesses demeanor in order to assess his or her reliability; and (3) the defense's right to cross-examine the witness. Cross-examination, "the greatest legal engine ever invented for the discovery of truth,"¹⁴ allows the accused to test the credibility of the declarant's testimony.

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."¹⁵ Hearsay is inadmissible. Historically, however, there have been exceptions to the rule that hearsay is inadmissible in cases where the court finds that a statement is so reliable

CHAMPION, Dec. 1999, at 43-44; see also Benjamin E. Rosenberg, *The Future of Codefendant Confessions*, 30 SETON HALL L. REV. 516 (2000).

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

11. *Williamson v. United States*, 512 U.S. 594 (1994).

12. U.S. CONST. amend. VI.

13. *Maryland v. Craig*, 497 U.S. 836, 845 (1990).

14. *California v. Green*, 399 U.S. 149, 158 (1970).

15. FED. R. EVID. 801(c)(3).

that cross-examination is expected to add little if any benefit.¹⁶ Thus, there is an inherent tension between the Confrontation Clause and evidentiary hearsay exceptions.

In *Mattox v. United States*¹⁷ the Supreme Court recognized this tension between the Confrontation Clause and hearsay. *Mattox* held "that the Confrontation Clause's primary purpose was to prevent depositions and ex parte affidavits from being used against the accused in place of in person cross examination."¹⁸ The Court, however, also noted that the "Framers 'obviously intended to . . . respect' exceptions to this right."¹⁹ The Court held that the hearsay exception for dying declarations did not violate the Confrontation Clause because dying declarations "from time immemorial have been treated as competent testimony."²⁰ The Court later extended the protections of the Confrontation Clause to the states through the Fourteenth Amendment in *Pointer v. Texas*.²¹

In *Ohio v. Roberts*,²² the Supreme Court created a general framework in which to analyze the relationship between evidentiary hearsay exceptions and the Confrontation Clause. The Court held that:

the veracity of hearsay statements is sufficiently dependable to allow the untested admission of such statements against an accused when (1) "the evidence falls within a firmly rooted hearsay exception" or (2) it contains "particularized guarantees of trustworthiness" such that adversarial testing would be expected to add little, if anything, to the statements reliability.²³

A hearsay exception is firmly rooted if it is based on "long standing judicial and legislative experience"²⁴ that the exception is so well founded that the admission of evidence within the exception "comports with the 'substance of the constitutional protection.'"²⁵ Prior to *Lilly*, the Court had not decided whether the hearsay exception for a declarant's statement against penal interest was firmly rooted.

16. See *Mattox v. United States*, 156 U.S. 237 (1895) (holding that hearsay exception for dying declarations did not violate the Confrontation Clause); *White v. Illinois*, 502 U.S. 346 (1992) (holding that hearsay exception for spontaneous utterances did not violate the Confrontation Clause); *Ohio v. Roberts*, 448 U.S. 56 (1980).

17. 156 U.S. 237 (1895).

18. See Kim M. Minix, *Lilly v. Virginia: Answering the Williamson Question—Is the Statement Against Penal Interest Exception "Firmly Rooted" Under Confrontation Clause Analysis?*, 51 MERCER L. REV. 1343, 1345 (2000) (summarizing *Mattox*).

19. *Id.* at 1345 (quoting *Lilly v. Virginia*, 527 U.S. 116, 125 (1999)).

20. *Muttoni v. State*, 25 S.W.3d 300, 305 (Tex. App. 2000).

21. Minix, *supra* note 18, at 1345; *Pointer v. Texas*, 380 U.S. 400 (1965).

22. 448 U.S. 56 (1980).

23. *Lilly*, 527 U.S. at 124-25 (1999) (quoting *Roberts*, 448 U.S. at 66).

24. *Idaho v. Wright*, 497 U.S. 805, 817 (1990).

25. *Roberts*, 448 U.S. at 66 (quoting *Mattox v. United States*, 156 U.S. 237, 244 (1895)) (citations omitted).

In *Illinois v. Lee*, the Court noted that over the years “the Court has spoken with one voice in declaring presumptively unreliable accomplices’ confessions that incriminate defendants.”²⁶ The Supreme Court held that “when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculcating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination.”²⁷

In *Lee*, the Court found that the confession of an accomplice was inadmissible against a defendant because the presumption of unreliability could not be rebutted.²⁸ The Court, however, eschewed addressing the case under the hearsay exception for a declarant’s statement against penal interest. The Supreme Court rejected the “categorization of the hearsay involved in this case as a simple ‘declaration against penal interest.’ That concept defines too large a class for meaningful Confrontation Clause analysis. We decide this case as involving a confession by an accomplice which incriminates a defendant.”²⁹ Since *Lee*, “whether statements against penal interest qualify as a firmly rooted hearsay exception as a class or whether each statement must qualify through its particularized guarantee of trustworthiness has divided the Circuit Court of Appeals.”³⁰ Furthermore, state courts were also free to conclude that state evidentiary exceptions for statements against penal interest were firmly rooted for Confrontation Clause purposes.

In *Williamson v. United States*,³¹ the United States Supreme Court provided federal courts with more direction in analyzing confessions of an accomplice that inculcate a defendant under Rule 804(b)(3). The opinion attempted to define the term “statement” as it is used in the hearsay exception for statements against interest. Prior to *Williamson*, there was “a long-running debate among commentators over the admissibility of collateral statements.”³² Collateral statements are statements of a declarant within the narrative of a confession that are collateral to

26. 476 U.S. 530, 541 (1986).

27. *Id.*

28. *Id.* at 546.

29. *Id.* at 544 n.5.

30. *United States v. Taylor*, No. 98-4517, 98-4518, 1999 U.S. App. LEXIS 19239, *29 (4th Cir. Aug. 16, 1999). Several Circuits found or suggested that the exception was firmly rooted. *See United States v. Keltner*, 147 F.3d 662, 671 (8th Cir. 1988); *LaGrand v. Stewart*, 133 F.3d 1253, 1268-69 (9th Cir. 1988); *Neuman v. Rivers*, 125 F.3d 315, 319 (6th Cir. 1997); *United States v. York*, 933 F.2d 1343, 1363 (7th Cir. 1991); *States v. Trenkler*, 61 F.3d 45, 62 (1st Cir. 1995). Other Circuits, however, found that the exception was not firmly rooted. *See State v. Flores*, 985 F.2d 770, 775-76 (5th Cir. 1995); *Earnest v. Dorsey*, 87 F.3d 1123, 1131 (10th Cir. 1996). Several Circuits declined to decide the issue. *See United States v. Matthews*, 20 F.3d 538, 544-46 (2d Cir. 1994); *United States v. Moses*, 148 F.3d 277, 281 (3rd Cir. 1998).

31. 512 U.S. 594 (1994).

32. *Williamson*, 512 U.S. at 611.

the declarant's admission of guilt and inculcate someone else. Wigmore "took the strongest position in favor of admissibility arguing that the statement may be accepted not merely as to the specific fact against interest, but also as to every fact contained in the statement."³³ Wigmore argued that the entire statement should be admitted because the "statement is made in circumstances fairly indicating the declarant's sincerity and accuracy."³⁴ McCormick, however, "argued for the admissibility of collateral statements of a neutral character, and for the exclusion of collateral statements of a self serving character."³⁵ Professor Jefferson took the narrowest approach asserting that "neither collateral neutral or collateral self-serving statements" should be admissible.³⁶

In *Williamson*, a federal district court allowed the prosecution to enter into evidence a confession of an accomplice made to the police implicating the defendant after the accomplice refused to testify.³⁷ The district court reasoned that the confession was admissible under the hearsay exception for statements against penal interest³⁸ because the accomplice implicated himself and therefore the accomplice's confession was against his penal interest.³⁹

The Supreme Court reversed the district court concluding that:

Nothing in the text of Rule 804(b)(3) or the general theory of the hearsay rules suggests that admissibility should turn on whether a statement is collateral to a self-inculpatory statement. The fact that a statement is self-inculpatory 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.⁴⁰

The Court held that "the 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."⁴¹ The Court noted that "[o]ne of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature."⁴²

The Court further held that:

The question under Rule 804(b)(3) is always whether the statement

33. *Id.* at 611-12 (quoting 5 WIGMORE, EVIDENCE § 1465, at 271 (3d ed. 1940)).

34. *Id.* at 612 (quoting WIGMORE *supra* note 33, § 1465, at 217).

35. *Id.* (quoting MCCORMICK, LAW OF EVIDENCE §256, at 552-53 (1954)).

36. *Id.* (quoting Bernard S. Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 HARV. L. REV. 1, 62-63 (1944)).

37. *Id.* at 597.

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

39. *Williamson*, 512 U.S. at 597.

40. *Id.* at 600.

41. *Id.* at 600-01.

42. *Id.* at 599-600.

was sufficiently against the declarant's penal interest "that a reasonable person in the declarant's position would not have made the statement unless believing it to be true," and this question can only be answered in light of all the surrounding circumstances.⁴³

Moreover, the Court stated that "whether a statement is self-inculpatory or not can only be determined by viewing it in context. Even statements that are on their face neutral may actually be against the declarant's interest."⁴⁴

This statement left the lower courts with some room to admit the truly self-inculpatory portions of an accomplice's confession that indirectly implicate a defendant.⁴⁵ For example, if an accomplice states "I hid the gun in [the defendant's] apartment," the Court noted that, although this is not a confession to a crime, the statement is self-inculpatory because it "is likely to help the police find the murder weapon."⁴⁶ Furthermore, the *Williamson* Court argued that even though collateral statements are inadmissible, a co-conspirator's self-inculpatory statements which are admissible can implicate a defendant indirectly when combined with corroborating evidence.⁴⁷

Some federal courts have interpreted *Williamson* broadly by construing the "surrounding circumstances" of a statement liberally in order to admit statements of an accomplice that inculcate a defendant.⁴⁸ Other courts, however, have construed *Williamson* narrowly to require the suppression of collateral neutral statements as well as self-serving collateral statements.⁴⁹

The Supreme Court, however, did not address "Williamson's claim

43. *Id.* at 603-04.

44. *Id.* at 603.

45. *Id.*

46. *Id.*

47. *Id.*

48. See 3 STEPHEN A. SALTZBURG ET. AL., *FEDERAL RULES OF EVIDENCE MANUAL* 419 (7th ed. Supp. 2000). This manual catalogs the following examples: *United States v. Vernor*, 902 F.2d 1182, 1188 (5th Cir. 1990) (finding statements of an accomplice that inculpated defendant were admissible as a statement against penal interest where accomplice did not attempt to shift blame, no evidence that accomplice was promised leniency, the statements were made after *Miranda* warnings were given, the events were recent, and the statements were voluntarily given); *United States v. Keltner*, 147 F.3d 662, 670 (8th Cir. 1998) (admitting statements of accomplice that inculpated the defendant under *Williamson* because the statement was self-inculpatory as the declarant implicated himself in a conspiracy, there was corroborating evidence, and no promise of immunity); *Earnest v. Dorsey*, 87 F.3d 1123, 1134 (10th Cir. 1996) (holding that accomplice statement that inculpated a defendant was admissible under *Williamson* because the statement as a whole was self-inculpatory as the entire statement equally inculpated both accomplice and the defendant, the accomplice did not try to shift blame, no promise of leniency, voluntarily given, and declarant had knowledge of details).

49. See Richard Sahuc, Comment, *The Exception that Swallows the Rule: The Disparate Treatment of Federal Rule of Evidence 804(b)(3) as Interpreted in United States v. Williams*, 55 U. MIAMI L. REV. 867 (2001).

that the statements were also made inadmissible by the Confrontation Clause.”⁵⁰ The Court declined to decide whether the “hearsay exception for declarations against interest [is] ‘firmly rooted’ for Confrontation Clause purposes.”⁵¹ Additionally, since the decision was based solely upon the Court’s interpretation of the Federal Rules of Evidence, it did not bind state court decisions interpreting *state* rules of evidence. As a result, some state courts adopted the doctrine outlined in *Williamson* while other state courts adopted a more liberal approach, allowing the entire confession as a narrative, including the accomplice’s collateral statements implicating a defendant, to be entered against a defendant as a statement against the accomplice’s penal interest.⁵²

In *Lilly*, the Court addressed this conflict by addressing the limits imposed by the Confrontation Clause, which are equally applicable in state and federal courts. The Court held that “statements against penal interest do not qualify as a firmly rooted hearsay exception as a class.”⁵³ The case revolved around various crimes committed by Benjamin Lee Lilly, his brother Mark Lilly, and Mark’s roommate Gary Barker. The men went on a crime spree robbing stores and eventually abducting and murdering Alex DeFilippis.⁵⁴ While being interrogated by the police, Mark confessed to participating in the crime spree, but stated that Benja-

50. *Williamson*, 512 U.S. at 605.

51. *Id.*

52. An excellent summary is available in Leslie Morsek’s article *Lilly v. Virginia: Silencing the “Firmly Rooted” Hearsay Exception with Regard To An Accomplices Testimony And Its Rejuvenation Of The Confrontation Clause*, 33 AKRON L. R. 523, 539-40 n.68 (1999). As noted in her article: (1) several states allowed the admission of the entire narrative as a confession including collateral statements. See *Taylor v. Commonwealth*, 821 S.W.2d 72, 75 (Ky. 1990); *State v. Gilliam* 635 N.E.2d 1242, 1246 (Ohio 1994), *overruled in part by State v. Madrigal*, 721 N.E.2d 52 (Ohio 2000); *State v. Nielsen*, 853 P.2d 256, 268 (Or. 1993); *State v. Wilson*, 367 S.E.2d 589, 598 (N.C. 1988); *State v. Kiewart*, 605 A.2d 1031, 1037 (N.H. 1992); *Chandler v. Commonwealth*, 455 S.E.2d 219 (Va. 1995). (2) other states bared the admission of collateral statements under the hearsay exception for statements against penal interest. 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). (3) many states have adopted the Court’s doctrine in *Williamson*, excluding collateral statements and only allowing truly self-inculpatory statements. 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 1296, 1275 (N.M. 1998); *Miles v. State*, 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). (4) finally some states excluded collateral statements within the language of the hearsay exception, itself. See ARK. R. EVID. 804(b)(3); IND. R. EVID. 804(b)(3); ME. R. EVID. 804(b)(3); NEV. REV. STAT. § 51.345(2)(1) (1997); N.J. R. EVID. 803(25); N.D. CENT. CODE 804(b)(3); VT. R. EVID. 804(b)(3).

53. *United States v. Taylor*, No. 98-4517, 98-4518, 1999 U.S. App. 19239, at *29 (4th Cir. Aug. 16, 1999).

54. *Lilly v. Virginia*, 527 U.S. 116, 120 (1999).

min shot DeFilipis and masterminded the robberies.⁵⁵ Prior to making his statement, however, prosecutors told Mark that unless he broke with his family ties and implicated his brother, he could face serious criminal penalties.⁵⁶ Furthermore, Mark mentioned that he had been drunk during most of the crime spree.⁵⁷

Benjamin was tried separately from Mark and Gary.⁵⁸ Mark invoked the Fifth Amendment and refused to testify against Benjamin at trial.⁵⁹ The Virginia state court then allowed the prosecution to introduce Mark's entire confession to the police under the state evidentiary hearsay exception for statements against penal interest.⁶⁰ The Supreme Court of Virginia affirmed the lower court, holding that "admissibility into evidence of the statement against penal interest of an unavailable witness is a 'firmly rooted' exception to the hearsay rule in Virginia."⁶¹ The United States Supreme Court granted certiorari⁶² and reversed the Virginia Supreme Court on the grounds that the admission of Mark's statement to police violated Benjamin's right to confront Mark under the Sixth Amendment of the United States Constitution.⁶³

The Court's decision, however, was a plurality opinion and therefore the Court did not offer one cohesive rationale. Justice Stevens wrote an opinion joined by Justice Souter, Justice Ginsburg, and Justice Breyer. Justice Stevens divided the hearsay exception for statements against penal interest into three categories: (1) voluntary admissions against the declarant; (2) exculpatory evidence offered by a defendant who claims that the declarant committed the offense; and (3) evidence offered by the prosecution to establish the guilt a defendant based upon the confession of an accomplice.⁶⁴ He concluded that the third category composed of "accomplices confessions that inculcate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence."⁶⁵ Justice Stevens based his decision on the fact that:

the "against penal interest" exception to the hearsay rule—unlike other previously recognized firmly rooted exceptions—is not generally based on the maxim that statements made without a motive to

55. *Id.* at 121.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 122.

61. *Lilly v. Commonwealth*, 499 S.E.2d 522, 534 (Va. 1998).

62. *Lilly v. Virginia*, 525 U.S. 981 (1998).

63. *Lilly*, 527 U.S. at 139.

64. *Id.* at 127.

65. *Id.* at 134.

reflect on the legal consequences of one's statement, and in situations that are exceptionally conducive to veracity, lack the dangers of inaccuracy that typically accompany hearsay. The exception, rather, is founded on the broad assumption "that a person is unlikely to fabricate a statement against his own interest at the time it is made."⁶⁶

Relying on past precedent, Justice Stevens concluded that accomplice confessions that implicate a defendant are untrustworthy because the statements implicating the defendant are not "unambiguously adverse to the penal interest of the declarant."⁶⁷ Justice Stevens further argued that the "practice of admitting statements in [the third] category under an exception to the hearsay rule—to the extent that such a practice exists in certain jurisdictions—is, unlike the first category or even the second, of quite recent vintage."⁶⁸

Justice Stevens asserted that his conclusion that accomplice confessions do not fall under a firmly rooted hearsay exception is not a complete ban on the government's use of a non-testifying accomplice's statements. He argued that "it simply means the Government must satisfy the second prong of the *Ohio v. Roberts* test in order to introduce such statements."⁶⁹ He stated that "courts should independently review whether the government's proffered guarantees of trustworthiness satisfy the demands of the [Confrontation] Clause."⁷⁰

Justice Stevens held that it is "highly unlikely that the presumptive unreliability that attaches to accomplices' confessions" when "the government is involved in the statements' production, and when the statement describes past events and have not been subjected to adversarial testing" can be rebutted.⁷¹ He asserted that "hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial."⁷² Stevens argued that the fact an accomplice's confession was voluntary or made after being informed of their *Miranda* rights is also not indicative of trustworthiness.⁷³

Additionally, Justice Stevens observed that the absence of an express promise of leniency "does not enhance [a statement's] reliability to the level necessary for their untested admission."⁷⁴

66. *Id.* at 126 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 299 (1973)).

67. *Id.* at 132 (quoting *Lee v. Illinois*, 476 U.S. 530, 552-53 (1986)).

68. *Id.* at 130.

69. *Id.* at 134-35 n.5 (citation omitted).

70. *Id.* at 137.

71. *Id.*

72. *Id.* at 138 (quoting *Idaho v. Wright*, 497 U.S. 805, 822 (1990)).

73. *Id.*

74. *Id.* at 139.

Justice Scalia concurred in the result, but asserted that the admission of Mark's statements was a "paradigmatic Confrontation violation," and "since the violation is clear, the case need be remanded only for a harmless error determination." Thus, Justice Scalia does not comment on Justice Stevens's reliability analysis under the second prong of *Roberts*. Justice Thomas wrote a concurring opinion that restated his view that the Confrontation Clause "is implicated by extrajudicial statements only insofar as they are contained in formalized, testimonial materials," but he also agreed with the Chief Justice "that the Clause does not impose a blanket ban on the government's use of accomplice statements that incriminate a defendant."⁷⁵ Justice Scalia and Thomas wrote opinions concurring in the judgment in *Lilly*, however:

they espouse a different view of the Confrontation Clause. . . that view focuses on the reason that the confrontation right was included in the Bill of Rights in the first place. The danger addressed by the Framers was the pernicious practice of the government engineering a conviction by preparing and admitting formalized affidavits" of declarants that would never be subject to cross-examination.⁷⁶

Chief Justice Rehnquist, joined by Justice O'Connor and Justice Kennedy, concurred in the result but disagreed with Justice Stevens's conclusions that "all accomplice confessions that inculcate a criminal defendant are not within a firmly rooted hearsay exception to the hearsay rule under *Ohio v. Roberts*" and "that appellate courts should independently review the governments proffered guarantees of trustworthiness under the second half of the *Roberts* inquiry."⁷⁷

"The Chief Justice argued that Mark's confession, insofar as it implicated [Benjamin] was not a declaration against penal interest in the first place, since it simply shifted blame to [Benjamin] and did not implicate Mark in the murder."⁷⁸ Justice Rehnquist argued that the case "therefore does not raise the question whether the Confrontation Clause permits the admission of a genuinely self-inculpatory statement that also inculcates a codefendant, and our precedent does not compel the broad holding suggested by the plurality."⁷⁹

Justice Rehnquist disagreed with Justice Stevens's analysis because it "results in a complete ban on the government's use of accomplice confessions that inculcate a codefendant."⁸⁰ Justice Rehnquist argued that "confessions to family members or friends, bear sufficient indicia of

75. *Id.* at 143 (citations omitted).

76. SALTZBURG, *supra* note 48, at 419.

77. *Lilly*, 527 U.S. at 144.

78. SALTZBURG, *supra* note 48, at 419.

79. *Id.* (quoting *Lilly*, 527 U.S. at 146).

80. *Lilly*, 527 U.S. at 145.

reliability to be placed before the jury without confrontation of the declarant.”⁸¹ Justice Rehnquist also noted “with approval” lower court decisions that “found the declaration against penal interest exception to be firmly rooted, as applied to. . . statements made in custody that truly implicate the declarant in criminal activity and do not attempt to shift blame to the defendant.”⁸² Justice Rehnquist would also give more “deference to trial judges who undertake the second prong of the *Roberts* inquiry” because “they are better able to evaluate whether a particular statement given in a particular setting is sufficiently reliable that cross-examination would add little to its trustworthiness.”⁸³

III. THE IMPACT OF *LILLY* IN JURISDICTIONS BOUND BY *WILLIAMSON*

Lilly clearly impacts state courts that did not adopt the approach of *Williamson* by adding additional constitutional requirements, although the substance of these limits will be discussed later in Sections IV and V. The impact of *Lilly* in federal and state courts bound by *Williamson*, however, is unclear. Broadly interpreted, *Lilly* can be seen as requiring an analysis of all out-of-court accomplice confessions for indicia of reliability, regardless of whether the statements are truly self-inculpatory under *Williamson*. A more narrow view of *Lilly*, as Chief Justice Rehnquist advocated, suggests that the statements addressed in *Lilly* (an accomplice’s confession to police that shifts blame to a defendant) generally would not survive analysis under *Williamson* and therefore *Lilly* “does not raise the question whether the Confrontation Clause permits the admission of a genuinely self-inculpatory statement that also inculpatates a codefendant.”⁸⁴ Thus, according to a narrow view, *Lilly* may not require any additional analysis of an accomplice’s truly self-inculpatory statements that inculcate a defendant as defined in *Williamson* because either: (1) truly self-inculpatory statements could be firmly rooted; or (2) because the *Williamson* test itself requires that the statements be reliable.

For example, some scholars argue that “the impact of the [*Lilly*] decision on Federal Rule 804(b)(3) is negligible, however, because there was no majority opinion in the case, and a close reading indicates that a statement falling within Rule 804(b)(3), as construed by the Court in *Williamson v. United States*, would in fact satisfy the defendant’s right to confront.”⁸⁵ These scholars argue that “even under the pluralities approach, a truly self-inculpatory declaration would satisfy the Confrontation Clause.”

81. *Id.* at 147.

82. SALTZBURG, *supra* note 48, at 419.

83. *Lilly*, 527 U.S. at 149.

84. SALTZBURG, *supra* note 48, at 419 (quoting *Lilly*, 527 U.S. at 146).

85. *Id.*

tation Clause because it would carry sufficient circumstantial guarantees of trustworthiness.”⁸⁶ Furthermore, in *Williamson*, the Court noted that “the very fact that a statement is generally self-inculpatory—which our reading of Rule 804(b)(3) requires—is itself one of the particularized guarantees of trustworthiness that makes a statement admissible under the Confrontation Clause.”⁸⁷

Thus, it would appear that *Lilly* might actually have little impact in jurisdictions bound by *Williamson*. However, even if *Lilly* requires additional analysis of truly self-inculpatory accomplice confessions, the opinion may not be the “important weapon”⁸⁸ that the defense bar predicts because, as discussed below, the additional analysis required under *Lilly* is unclear.

A. *The Impact of Lilly in Federal Courts*

Prior to *Lilly*, most federal courts interpreted *Williamson* to require three elements in order to establish that a statement is admissible under Rule 804(b)(3): (1) that the declarant is unavailable; (2) that the statement is against the declarant’s penal interest; and (3) that corroborating circumstances exist indicating that the statement is trustworthy.⁸⁹ Therefore, as noted above, some scholars have argued that the impact of *Lilly* is “negligible” because “a close reading indicates that a statement falling within Rule 804(b)(3), as construed by the Court in *Williamson v. United States*, would in fact satisfy the defendant’s right to confront because the *Williamson* test includes an analysis of a statement’s trustworthiness.”⁹⁰

In *United States v. Gomez*,⁹¹ the prosecution took this argument a step further and asserted that in *Williamson* the Court defined “the class of statements against penal interest very narrowly to include only those parts of statements that are truly self-inculpatory. It argues the *Williamson* Court implied that as long as a statement fits within this narrower rule it satisfies Confrontation Clause analysis.”⁹²

The Court of Appeals for the Tenth Circuit rejected the prosecution’s argument in *Gomez* and concluded that “following the most recent guidance of the Supreme Court, however, we decline to adopt that conclusion” because in *Lilly* “the Supreme Court explicitly considered the use of statements against penal interest offered by the prosecution in the

86. *Id.* at 420.

87. *Id.* (quoting *Williamson v. United States*, 512 U.S. 594, 605 (1994)).

88. Rudolf & Widenhouse, *supra* note 9, at 44; *see also* Rosenberg, *supra* note 9.

89. *United States v. Robbins*, 197 F.3d 829, 838 (7th Cir. 1999).

90. SALTZBURG, *supra* note 48, at 417.

91. 191 F.3d 1214 (10th Cir. 1999).

92. *Id.* at 1221.

absence of the declarant to incriminate a criminal defendant. Five members of the Court held that such statements do not categorically satisfy Confrontation Clause concerns.”⁹³ The circuit court noted that the Chief Justice’s opinion reserved “the possibility that ‘a genuinely self-inculpatory statement that also inculcates a codefendant’ might nevertheless satisfy a firmly rooted hearsay exception.”⁹⁴ The court argued that Justice Rehnquist’s opinion “appeared to distinguish between ‘genuinely self-inculpatory statements’ and statements given as ‘part of a custodial confession’ of the sort that this Court has viewed with ‘special suspicion’ given a codefendant’s strong motivation to implicate the defendant and to exonerate himself.”⁹⁵

In *United States v. Lopez-Garcia*,⁹⁶ the Court of Appeals for the Tenth Circuit found that even if a statement is admissible under Rule 804(b)(3), it must be subjected to analysis under the second prong of *Roberts*.⁹⁷ The court noted that it addressed “the Confrontation Clause issue separately from [its] discussion of admissibility under Rule 804(b)(3) because the two standards are not coterminous.”⁹⁸ *United States v. Castelan*,⁹⁹ which was decided by the Court of Appeals for the Seventh Circuit, held that even if a statement was properly admitted under Rule 804(b)(3), “in *Lilly*, a plurality of the Supreme Court concluded that under the Confrontation Clause post-arrest statements made by a non-testifying accomplice that inculcate a defendant cannot be admitted against the defendant unless the government demonstrates that the statements bear ‘particularized guarantees of trustworthiness.’”¹⁰⁰

Some circuits have declined to decide whether statements that qualify under Rule 804(b)(3) are per se reliable for Confrontation Clause purposes. In *United States v. Tocco*, the Court of Appeals for the Sixth Circuit found that an accomplice’s statement implicating himself and the defendant in a conspiracy qualified under *Williamson* as a statement against interest pursuant to Rule 804(b)(3).¹⁰¹ The court asserted that, despite the fact that the defendant did not argue that the admission of the accomplice’s statements violated the Confrontation Clause, “we find that the circumstances surrounding [the accomplice’s] statements in this

93. *Id.*

94. *Id.* (quoting *Lilly v. Virginia*, 512 U.S. 116, 190 (1999)).

95. *Id.* The Court went on to analyze the statements under *Lilly* and the second prong of *Ohio v. Roberts*, concluding that the accomplice confession did not contain sufficient indicia of reliability. *Id.* at 1222-23.

96. No. 98-2252, 1999 U.S. App. LEXIS 22369 (10th Cir. Aug. 18, 1999).

97. *Id.* at *15.

98. *Id.* at *11 n.4.

99. 219 F.3d 690 (7th Cir. 2000).

100. *Id.* at 695.

101. 200 F.3d 401, 415 (6th Cir. 2000).

case indicate that the statements were trustworthy, particularly in light of the fact that [the accomplice's] statements were made to his son" and not the police.¹⁰² Thus, the court did not decide whether truly self-inculpatory statements qualifying as statements against interest under Rule 804(b)(3) according to *Williamson* must be subjected to analysis under *Lilly* because the court found the statements were reliable based on the fact they were made to a family member.

Other circuits, however, appear to be more skeptical about what type of additional analysis is required under *Lilly*. In *United States v. Shea*,¹⁰³ the Court of Appeals for the First Circuit concluded that an accomplice's statement was admissible under Rule 804(b)(3). The court noted that "the important question is whether anything is altered by the Supreme Court's subsequent decision" in *Lilly*.¹⁰⁴ The court held that:

while *Lilly*'s full reach may be unclear—there was no single majority opinion—it does not in our view affect the admissibility of the statements at issue here: all those identified in this case were made to friends or companions, not to police, and were not of the "blame shifting variety". . . even if *Lilly* is more far reaching than we think likely, it would not affect the outcome here.¹⁰⁵

Thus, it appears that federal courts have interpreted *Lilly* as either (1) requiring additional analysis of truly self-inculpatory statements under the *Williamson* test, or (2) encompassing (and possibly enhancing) the reliability analysis already required under *Williamson*. Federal courts do not appear to embrace Justice Rehnquist's assertion that truly self-inculpatory statements may be a firmly rooted hearsay exception. In time, as *Lilly* is interpreted, some courts may conclude, as discussed below, that additional analysis is not required because truly self-inculpatory statements, as defined in *Williamson*, are inherently reliable.

B. *The Impact of Lilly in State Courts That Have Adopted Williamson*

For the same reasons discussed above, *Lilly* may have little impact in state courts that have adopted the *Williamson* approach for their domestic hearsay exception for statements against penal interest. In fact, in *State v. Gonzalez*¹⁰⁶ a state court that adopted *Williamson* for their state hearsay exception argued that *Lilly* "does not alter the result or the analysis" in cases of an accomplice's truly self-inculpatory confession

102. *Id.* at 416.

103. 211 F.3d 658 (1st Cir. 2000).

104. *Id.* at 669.

105. *Id.* (quoting *United States v. Barone*, 114 F.3d 1284, 1302 (1st Cir. 1997)).

106. 989 P.2d 419 (N.M. 1999).

that inculpatates a defendant because "the 'particularized guarantees of trustworthiness' imposed by the federal Confrontation Clause are inherently and necessarily a part of the statement-against-interest analysis under our [state's hearsay] rule."¹⁰⁷

In *Gonzalez*, the New Mexico Supreme Court held that a state trial court did not err in admitting against the defendant the statements that an unavailable accomplice made to a friend stating that the accomplice murdered the victim and that defendant paid him \$300 dollars to do so. The state court admitted these statements under the state hearsay exception for statements against penal interest. In *State v. Torres*, the New Mexico Supreme Court adopted the approach in *Williamson*.¹⁰⁸ The court reasoned that the accomplice's statements were truly self-inculpatory and therefore were admissible as statements against interest. The New Mexico Supreme Court found that the Confrontation Clause was not violated because the statements contained sufficient guarantees of reliability.

The New Mexico Supreme Court affirmed the trial court because the accomplice's declaration passed the *Williamson* test as the accomplice's:

declaration that Defendant paid him for the killings qualifies as a statement against penal interest on two grounds. First, the assertion implicates [the accomplice] for the crime of first degree murder and exposes him to liability for other crimes . . . [s]econd in context, the assertion provides motive and supports an inference that [the accomplice] deliberately and willfully killed the victims.¹⁰⁹

The court held that the statements did not violate the federal Confrontation Clause because: (1) the statements were made to a friend¹¹⁰ and (2) the "against-interest element of [the accomplice's] declaration necessarily satisfied the 'trustworthiness' burden imposed by the federal Confrontation Clause."¹¹¹

Gonzales demonstrates that when interpreted broadly, the *Williamson* test can be quite permissive and could lead to the admission of collaterally neutral statements. Although the court in *Gonzales* found that the accomplice's statements were truly self-inculpatory, others might argue that the accomplices statement that the defendant paid him to kill the victim shifted blame from the accomplice or were, at least, neutral because the statements equally inculpatated both the accomplice and the

107. *Id.* at 428.

108. *Id.* at 421.

109. *Id.* at 422 (citations omitted).

110. *Id.* at 423.

111. *Id.* at 424.

defendant.¹¹²

Therefore, if statements that pass the *Williamson* test are considered to be per se reliable for Confrontation Clause purposes, then it is possible that state and federal courts interpreting *Williamson* broadly could admit collaterally neutral as well as truly self-inculpatory statements under *Williamson* and *Lilly*. Thus, prosecutors in states that have adopted *Williamson* may not be affected by *Lilly* if state courts find that statements passing *Williamson* are for all practical matters per se reliable. Furthermore, prosecutors that are able to admit collaterally neutral statements under a broad interpretation of *Williamson* in state courts, may be able to admit collaterally neutral statements and still avoid *Lilly*'s requirement that accomplice confessions be subjected to more searching analysis. The same would be true in federal courts that interpret *Williamson* broadly.

Although *Lilly* appears to have a neutral, if any, effect in jurisdictions bound by *Williamson*, *Lilly* may actually help prosecutors because it can be interpreted as legitimizing statements admitted under a broad interpretation of *Williamson*. *Williamson* left the Confrontation Clause issue open. Prosecutors can now argue that *Lilly* fills this gap. Furthermore, prosecutors can point to Justice Rehnquist's opinion and assert that *Lilly* "does not raise the question whether the Confrontation Clause permits the admission of a genuinely self-inculpatory statement that also inculcates a codefendant"¹¹³ and argue that statements that pass *Williamson* are inherently reliable and therefore should not be subject to more searching analysis.

Furthermore, Justice Rehnquist's approach is not limited to jurisdictions bound by *Williamson*. In *State v. Kimble*,¹¹⁴ a North Carolina court of appeals held that, under *Lilly*, truly self-inculpatory statements are firmly rooted.¹¹⁵ The North Carolina Supreme Court, which has not adopted the approach of *Williamson*,¹¹⁶ only requires that a trial court find that: (1) a statement is against the declarant's penal interest; and (2) "corroborating circumstances clearly indicate the trustworthiness of the statement if it exposes the declarant to criminal liability."¹¹⁷ The North Carolina Court of Appeals, in *Kimble*, nevertheless, made a distinction

112. See *id.* at 422. The defendant argued that the accomplices confession was not against the accomplices interests because (1) the accomplice may have thought that he was decreasing his culpability or (2) the accomplice, as a gang member, may have been "bragging." *Id.*

113. SALTZBURG, *supra* note 48, at 419 (quoting *Lilly v. Virginia* 527 U.S. 116, 146 (1999)).

114. 535 S.E.2d 882 (N.C. Ct. App. 2000).

115. *Id.* at 886.

116. *Id.* at 888 ("our Supreme Court does not require that collateral remarks inculcating the defendant be redacted from an out-of-court statement that also contains self-inculcating remarks in order to admit the statement under Rule 804(b)(3)").

117. *Id.* at 885 (citing *State v. Wilson*, 367 S.E.2d 589, 599 (N.C. 1988)).

between “dual-inculpatory” statements that inculcate both the declarant and the defendant, and “purely self-inculpatory” statements that only inculcate the declarant. The court held that “purely self-inculpatory statements, unlike the dual-inculpatory statements in *Lilly*, are classic ‘statements against interest’ and thus fall within a firmly rooted hearsay exception.”¹¹⁸

In the future as more state courts consider the issue, some may choose not to adopt Justice Rehnquist’s argument. Even if courts do not consider statements admissible under *Williamson* to be firmly rooted for Confrontation Clause purposes, the additional analysis required under *Lilly* may not be a real barrier because “a close reading indicates that a statement falling within Rule 804(b)(3), as construed by the court in *Williamson v. United States*, would in fact satisfy the declarant’s right to confront.”¹¹⁹ Furthermore, even if *Lilly* is interpreted as requiring additional analysis beyond that required in *Williamson*, the substance of the additional analysis required was left open by the plurality opinion, as discussed in Sections IV and V.

IV. THE IMPACT OF *LILLY* ON THE ADMISSIBILITY OF CUSTODIAL STATEMENTS

Once a court has concluded that *Lilly* requires additional analysis of an accomplice’s statement for particularized guarantees of reliability, the question then becomes what criteria the court should consider. Custodial confessions, i.e. confessions to the police, have traditionally been of particular concern to the courts. *Lilly* reiterates the historical concern that custodial confessions to the police are unreliable because the accomplice has a motive to shift blame to the defendant in order to curry favor. Although Justice Stevens’s opinion creates an almost irrefutable presumption that an accomplice’s statement that implicates a defendant is inadmissible, *Lilly* is a plurality opinion and therefore Justice Stevens’s criteria are not binding. Thus, courts have the leeway to: (1) limit *Lilly* to its facts; (2) engage in a discretionary case-by-case analysis; or (3) attempt to divine criteria from the plurality opinion.

A. *The Admissibility of Custodial Confessions in Federal Court*

Federal courts have flexibility in deciding what criteria to consider when analyzing whether a statement is reliable under the second prong of *Roberts*. For example, in *Lopez-Garcia*, the Court of Appeals for the Tenth Circuit admitted the statements of two accomplices to the police

118. *Id.* at 886 (citing *Lilly*, 527 U.S. 131-32).

119. SALTZBURG, *supra* note 48, at 417.

that inculcated the defendant as statements against the non-testifying accomplice's penal interest.¹²⁰ The circuit court, relying on *Lilly*, held that the statements did not fall under a firmly rooted hearsay exception, but that their admission would not violate the Confrontation Clause because the statements had independent indicia of reliability.¹²¹

Francisco Lopez-Garcia was accused of conspiring to harbor illegal aliens and harboring illegal aliens.¹²² Lopez-Garcia had a safe house in Mexico that he used to smuggle workers across the border.¹²³ The prosecution submitted statements made by alien to border patrol agents admitting their illegal status.¹²⁴ The district court found that the workers statements were admissible against Lopez-Garcia as statements against their penal interests because the workers had returned to Mexico and thus were unavailable, their admission of their status subjected them to criminal liability, and the statements contained "particularized guarantees of trustworthiness."¹²⁵

The circuit court asserted that according to *Lilly* there was no Confrontation Clause violation because the statements had "particularized guarantees of trustworthiness."¹²⁶ The circuit court relied upon the four factors discussed in *Dutton v. Evans*¹²⁷ in order to determine that the workers' statements were trustworthy. *Dutton* outlines the following factors: "(1) whether the statement contains an 'express assertion' of past fact; (2) whether the declarant has personal knowledge of the facts asserted; (3) whether there was a possibility of faulty recollection; and (4) whether the circumstances suggest the declarant had a reason to misrepresent the facts asserted."¹²⁸ After considering these factors, the circuit held that the workers had personal knowledge of their immigration status, there was little risk of faulty recollection, and it was unlikely that the workers would lie about their illegal status.¹²⁹ Therefore, the circuit court chose to use past precedent, rather than relying solely upon the criteria outlined in Justice Stevens's and Chief Justice Rehnquist's opinions.

United States v. Gomez suggests that courts could also consider the

120. *United States v. Lopez-Garcia*, No. 98-2252, 1999 U.S. App. LEXIS 22369 at *11-15 (10th Cir. Aug. 18, 1999).

121. *Id.*

122. *Id.* at *3.

123. *Id.* at *9.

124. *Id.*

125. *Id.* at *10.

126. *Id.* at *12-13.

127. 400 U.S. 74 (1970).

128. *Lopez-Garcia*, 1999 U.S. App. Lexis 22369 at *13 (quoting *Dutton*, 400 U.S. at 88-89).

129. *Id.* at *13-14.

following factors when trying to determine if a statement is reliable whether:

(1) the statements were sufficiently detailed that they would have been difficult to fabricate; (2) there is no evidence the statements were coerced; (3) both [accomplices] were in a position to have had personal knowledge of the disputed events; (4) the statements were made soon after the events occurred, so it is unlikely their recollection would have been faulty; and (5) there was no evidence presented as to a reason for retaliation against the [defendant].¹³⁰

*United States v. Castelan*¹³¹ is an example how *Lilly* can provide the flexibility of a case-by-case approach. Although the Court of Appeals for the Seventh Circuit did not find that an accomplice's statement to the police that inculcated the defendant was admissible, the approach of the court could potentially lead to liberal admission of accomplice confessions. The court noted that "[s]ince *Lilly* was decided, no circuit has yet determined if—and under what circumstances—an accomplice's custodial confession implicating a defendant can ever be deemed to possess sufficient inherent indicia of trustworthiness to satisfy the Confrontation Clause."¹³² As a result, the court proceeded to analyze the facts of the case using a case-by-case approach. The court did not appear to find that the criteria outlined by Justice Stevens were binding, yet the court held that the statements lacked indicia of reliability "[b]ecause [the accomplice's] post-arrest statements were made in custodial interviews with law enforcement officials in which [the accomplice] specifically inquired as to the benefits of his cooperation with authorities."¹³³ Thus, the court declined to adopt any specific criteria instead appearing to rely on a case-by-case fact sensitive analysis. Thus, the *Lilly* opinion still provides opportunities for federal courts to admit codefendant confessions.

B. *The Admissibility of Custodial Confessions in State Courts*

Some state courts have admitted an unavailable accomplice's out-of-court statement against a defendant under hearsay exceptions for statements against penal interest because the statements contained sufficient indicia of reliability. State courts have done this by: (1) limiting *Lilly* to its facts; (2) refusing to find the criteria outlined in the opinion of Justice Stevens binding; or (3) attempting to derive criteria from the

130. *United States v. Gomez*, 191 F.3d 1214, 1224 (10th Cir. 1999).

131. 219 F.3d 690 (7th Cir. 2000).

132. *Id.* at 695.

133. *Id.*

plurality in *Lilly* to use in determining whether an accomplice's statement is reliable.

Some state courts have limited *Lilly* to its facts. In *People v. Campbell*,¹³⁴ a state trial court admitted under Illinois's residual hearsay exception a written declaration of an unavailable accomplice given to the police implicating the defendant.¹³⁵ Although the lower court did not admit the confession under the state's hearsay exception for statements against the declarant's penal interest, the appellate court noted that "[i]n *Lilly*, the Court held that accomplices confessions that inculcate a criminal defendant are not within a firmly rooted exception to the hearsay rule . . . thus, it is apparent that [the accomplice's] statement must contain particularized guarantees of trustworthiness to satisfy the confrontation clause. (sic)"¹³⁶

The court then distinguished the facts in *Campbell* from the facts in *Lilly*. The *Campbell* court held:

that the statement in *Lilly* failed to contain sufficient guarantees of trustworthiness, the Court was persuaded by the fact that the declarant made statements solely in the presence of governmental authorities, the declarant was responding to leading questions, and the declarant was under the influence of alcohol. Here, in contrast, [the declarant] was accompanied by his attorney, he was not responding to leading questions, and no evidence indicated that he was under the influence of alcohol or any other substance.¹³⁷

The *Campbell* court also noted that the declarant's testimony was not exchanged for the dismissal of charges and the declarant's lawyer reviewed the statement with him and encouraged him to be truthful.¹³⁸

Some courts have also found that the criteria outlined in *Lilly* are not binding. In *People v. Schutte*,¹³⁹ the Michigan Court of Appeals held that it was not bound by the criteria outlined in *Lilly* to assist courts in determining if a statement contains particularized guarantees of reliability under the second prong of *Roberts* because, as the Michigan Supreme Court opinion *People v. Beasley*¹⁴⁰ points out, *Lilly* was a plurality opinion.¹⁴¹ Instead of using the criteria discussed in *Lilly*, the Michigan Court of Appeals relied upon the criteria described by the Michigan Supreme Court in *Beasley*. These factors include:

134. 721 N.E.2d 1225 (Ill. App. Ct. 1999).

135. *Id.* at 1227.

136. *Id.* at 1230.

137. *Id.*

138. *Id.*

139. 613 N.W.2d 370 (Mich. Ct. App. 2000).

140. 609 N.W.2d 581 (Mich. 2000).

141. *Schutte*, 613 N.W.2d at 376.

whether the statement was (1) voluntarily given, (2) made to family, friends, colleagues, or confederates—that is someone who would speak the truth, and (4) uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener. On the other hand, the presence of the following factors would favor a finding of inadmissibility: whether the statement (1) was made to law enforcement or at the promoting of the listener, (2) minimizes the role of responsibility of the declarant or shifts blame to the accomplice, (3) was made to avenge the declarant or to curry favor, and (4) whether the declarant had a motive to lie or distort the truth.¹⁴²

The appellate court concluded that the facts in *Schutte* indicate “the [custodial] statement possessed sufficient indicia of reliability to be admitted against the defendant despite his inability to cross-examine.”¹⁴³ The court points to the fact that the declarant: (1) voluntarily appeared at the station; (2) made the statement after the defendant “urged [him] to tell the truth;” (3) was informed that he was free to go because he was not in custody; (4) made the statement in a narrative form; and (5) did not shift blame.¹⁴⁴

In *State v. Jones*¹⁴⁵ the Oregon Court of Appeals also held that the criteria in *Lilly* were not “binding as precedent” and instead followed Oregon Supreme Court cases construing the Confrontation Clause because the “holding in *Lilly* does not contradict” the Oregon Supreme Court’s prior precedent.¹⁴⁶ The Oregon appellate court used the following criteria:

(1) whether the declarant had been read his *Miranda* rights; (2) whether the statement was given in response to police interrogation—and, if so, the duration and intensity of that interrogation; (3) whether the statements were made pursuant to an offer of leniency; (4) whether the statements exposed the declarant to the same level of criminal liability as the defendant; (5) whether the declarant either was unaware of the consequences or erroneously believed that the story would help him; (6) whether the statements contained a detailed account of the incident; and (7) whether the declarant’s demeanor was either evasive or defensive.¹⁴⁷

Some of these criteria, such as considering whether a declarant had received a *Miranda* warning, are specifically prohibited in Justice Stevens’s *Lilly* opinion. Thus, state courts have some flexibility in deciding

142. *Id.*

143. *Id.*

144. *Id.* at 377.

145. 15 P.3d 616 (Or. Ct. App. 2000).

146. *Id.* at 625; see generally *State v. Franco*, 950 P.2d 348 (Or. Ct. App. 1997); *State v. Wilson*, 918 P.2d 826 (Or. 1996); *State v. Nielsen*, 853 P.2d 256 (Or. 1993).

147. *Jones*, 15 P.3d at 621 (citing *Franco*, 950 P.2d at 352).

how to integrate *Lilly* with prior state court precedent regarding the Confrontation Clause. The effect of *Lilly* in state courts may depend upon existing precedent as well as the state court's approach towards the plurality opinion.

Unlike the Michigan Supreme Court or the Oregon Court of Appeals, other states have tried to derive a holding from the *Lilly* opinion that provides criteria to analyze a custodial statement under the second prong of *Roberts*. Because *Lilly* is a plurality opinion, state courts have some flexibility in determining what criteria to look at when deciding whether an accomplice's statement is reliable.

For example, in *Commonwealth v. Young*,¹⁴⁸ the Pennsylvania Supreme Court held that although "the Court did not speak with one voice. . . [t]he multiplicity of opinions, however, does not necessarily mandate that no holding may be gleaned from *Lilly*."¹⁴⁹ The court concluded that:

a majority of the [Supreme] Court would agree that statements made to the authorities by a non-testifying accomplice which inculcate the defendant more than the accomplice are not admissible pursuant to a firmly rooted exception to the hearsay doctrine and thus do not satisfy the first prong of the *Roberts* test. Furthermore, although Chief Justice Rehnquist specifically states in his concurring opinion in *Lilly* that he would not reach the second prong of the *Roberts* test . . . Justice Stevens was indisputably correct when he stated that in examining this second prong, a court may not resolve the issue of a statement's reliability by reference to other, corroborative evidence introduced at trial.¹⁵⁰

Thus, the criteria identified by the Pennsylvania Supreme Court are considerably broader than the criteria outlined in Justice Stevens's opinion. The Pennsylvania Supreme Court left the question of what criteria should be considered open, concluding that "the proper method of conducting such an inquiry is to focus on the circumstances surrounding the giving of the statement."¹⁵¹ Although the court concluded that the statements in *Young* did not contain "particularized guarantees of reliability" based upon an examination of the surrounding circumstances,¹⁵² the case-by-case approach adopted by Pennsylvania could potentially be flexible and may not be "the important weapon"¹⁵³ that the defense bar anticipates.

148. 748 A.2d 166 (Pa. 2000).

149. *Id.* at 189.

150. *Id.* at 191.

151. *Id.* at 192.

152. *Id.* at 193.

153. Rudolf & Widenhouse, *supra* note 9, at 44.

In *People v. Farrell*, the Colorado Court of Appeals took a similar approach, concluding that under *Lilly* the court should consider “where and when the statement was made, what prompted the statement, how the statement was made, and what the statement contained,” but should not “rely on other independent evidence that also implicates the defendant.”¹⁵⁴ In fact, the Colorado Court of Appeals in this case merely followed the pre-existing precedent and found that it comported with the requirements of *Lilly*.¹⁵⁵

Thus, state courts appear to be more willing to interpret the *Lilly* opinion broadly in order to continue admitting codefendant confessions. This may be particularly significant in jurisdictions that are not bound by the approach in *Williamson* because state courts may continue to liberally admit codefendant custodial confessions by broadly interpreting the limits imposed by the plurality opinion.

V. THE IMPACT OF *LILLY* ON THE ADMISSIBILITY OF STATEMENTS MADE TO FAMILY AND FRIENDS

The Supreme Court in *Lilly* appears to be more ambivalent about out-of-court accomplice’s statements made to family or friends. Justice Rehnquist suggested that confessions to a family member or friend “bear sufficient indicia of reliability to be placed before the jury without confrontation of the declarant.”¹⁵⁶ Justice Rehnquist cited *Dutton v. Evans* to support this argument. In *Dutton*, the Supreme Court in a plurality opinion held that the admission of an unavailable codefendant’s confession to a cellmate against a defendant did not violate the Confrontation Clause where the codefendant spontaneously confessed to his cellmate and there was no indication that the confession was unreliable.¹⁵⁷ Justice Rehnquist argued, “[t]he Court in *Dutton* recognized that statements to fellow prisoners, like confessions to family members or friends, bear sufficient indicia of reliability to be placed before a jury without confrontation of the declarant.”¹⁵⁸ Contrary to Justice Stevens’s assertion that *Dutton* is an exception, Justice Rehnquist stated that *Dutton* is “a case wholly outside the ‘unbroken line’ of cases, in which custodial confessions laying blame on a codefendant have been found to violate the Confrontation Clause.”¹⁵⁹ Therefore, Justice Rehnquist saw “no reason to foreclose the possibility that such statements [to family and friends], even those that inculcate a codefendant, may fall under a firmly rooted

154. 10 P.3d 672, 676 (Colo. Ct. App. 2000).

155. *Id.*

156. *Lilly v. Virginia*, 527 U.S. 116, 147 (1999).

157. 400 U.S. 74, 88-89 (1970).

158. *Lilly*, 527 U.S. at 147.

159. *Id.*

hearsay exception.”¹⁶⁰

Justice Stevens’s opinion argued that Justice Rehnquist’s interpretation of *Dutton* is in error because:

While Justice Stewart’s lead opinion observed that the declarant’s statement was against his penal interest, the Court’s judgment did not rest on that point, and in no way purported to hold that statements with such an attribute were presumptively admissible. Rather, the five Justices in the majority emphasized the unique aspects of the case and emphasized that the coconspirator spontaneously made the statement and “had no apparent reason to lie.”¹⁶¹

The Supreme Court appears to be split on this issue. Three Justices joined Justice Stevens’s point of view that confessions made to friends and family should not be presumptively placed before the jury without confrontation. Although only two Justices joined Justice Rehnquist’s opinion, Justice Thomas notes in his concurrence that he agrees with “the Chief Justice that the Clause does not impose a blanket ban on the government’s use of accomplice statements that incriminate a defendant.”¹⁶² This was not a direct endorsement of Justice Rehnquist’s arguments, however, Justice Thomas’s statements appear to lend support to Justice Rehnquist’s assertions. Justice Scalia, however, was silent, leaving the issue open. Therefore, it is possible to interpret *Lilly* as providing a categorical rule that statements to family are inherently reliable because there is no motive to shift blame. It is also possible, however, to interpret *Lilly* as requiring a more substantial analysis for particularized guarantees of reliability for all accomplice confessions implicating a defendant, including confessions made to family or friends.

The argument that a statement to family or friends is more reliable than a statement to police appears to be the most successful argument that prosecutors have advanced under *Lilly*. The argument may draw its strength from earlier lower court decisions applying *Williamson*, which held that statements to family had independent indicia of reliability because there was no incentive to shift blame.¹⁶³

A. *Statements to Family and Friends in Federal Courts*

*United States v. Robbins*¹⁶⁴ exemplifies a broad interpretation of *Lilly*. In *Robbins*, the district court concluded that the statements of an

160. *Id.*

161. *Id.* at 133 n.2 (quoting *Dutton*, 400 U.S. at 88-89).

162. *Id.* at 143 (internal quotation and citation omitted).

163. See generally *United States v. Moses*, 148 F.3d 277 (3d Cir. 1998); *United States v. Barone*, 114 F.3d 1284 (1st Cir. 1997); *United States v. Mathews*, 20 F.3d 538 (2d Cir. 1994); *United States v. Costa*, 31 F.3d 1073 (11th Cir. 1994).

164. 197 F.3d 829 (7th Cir. 1999).

accomplice to his girlfriend implicating a defendant were admissible against both the accomplice and the defendant.¹⁶⁵ The Court of Appeals for the Seventh Circuit affirmed on grounds that the statement satisfied *Lilly* because the codefendant's statements to his girlfriend about the defendant "equally inculpated them both" and "the statement was made voluntarily in a conversation with Roberts, the declarant's fiancée and confidant. The circumstances in which the statement was made provide no reason to suspect any coercion, any ulterior motive, any desire to curry favor with authorities, any reason not to tell the truth."¹⁶⁶

In *United States v Tocco*,¹⁶⁷ the Court of Appeals for the Sixth Circuit affirmed a lower court's admission under *Williamson* of an accomplice's out-of-court statement implicating the defendant. The court found that the admission of these statements did not violate the Confrontation Clause under *Lilly* because the statements were reliable. The court held "that the circumstances surrounding [the accomplice's] statements in this case indicate that the statements were trustworthy, particularly in light of the fact that [the accomplice's] statements were made to his son in confidence, rather than to the police or to any other authority for the purpose of shifting the blame to [the defendant]."¹⁶⁸

In *United States v Shea*,¹⁶⁹ the Court of Appeals for the First Circuit appears to indicate that statements made to family and friends are per se reliable. In *Shea*, the district court admitted an accomplice's statement under *Williamson* and the circuit was asked to reconsider the finding in light of *Lilly*. The court held that the statement was admissible under *Lilly* because "all [statements] identified in this case were made to friends or companions, not to police, and were not of the 'blame shifting variety.'"¹⁷⁰ The court's approach indicates a view that statements to family or friends are distinguishable from statements to police because the underlying relationship is qualitatively different. Thus, some courts have adopted an almost unspoken rule that statements to family and friends are inherently reliable and therefore admissible.

Other courts, however, have subjected statements made to family or friends to more searching scrutiny. In *United States v. Gibson*,¹⁷¹ federal prosecutors attempted to introduce "hearsay statements made by Browning [an unavailable accomplice] to his sister," that inculpated the

165. *Id.* at 840.

166. *Id.*

167. 200 F.3d 401 (6th Cir. 2000).

168. *Id.* at 416.

169. 211 F.3d 658 (1st Cir. 2000).

170. *Id.* at 669.

171. 84 F. Supp. 2d 784 (S.D. W.Va. 2000).

defendant as a statement against Browning's interest.¹⁷² The district court noted that some other courts have found that statements made to friends and family are more reliable because typically "the declarant had no ulterior motive or other reason not to tell the truth."¹⁷³ The district court, however, disagreed and concluded:

although Browning's statements were made to his sister rather than to law enforcement officers and do not appear to shift blame to Mr. Gibson, this court does not find that such factors are sufficient to demonstrate that Browning's statements are incontestably probative, competent, and reliable. This court disagrees with the view held by the Seventh Circuit and by commentators that *Lilly* does not apply to non-custodial confessions or to confessions that do not spread blame to co-criminals.¹⁷⁴

B. *Statements to Family and Friends in State Courts*

There are several examples of cases in which state courts have allowed accomplice confessions made to friends or family implicating a defendant as statements against a non-testifying accomplice's penal interest against a defendant under *Lilly*.¹⁷⁵ In *State v. Gonzales*, the New Mexico Supreme Court distinguished between custodial statements to police and statements to family or friends because in statements to friends there is no incentive to shift blame or curry favor.¹⁷⁶

In *Bruton v. Phillips*,¹⁷⁷ a federal district court denied a habeas corpus appeal of Paul Bruton. Bruton was convicted of murdering Alan Kahn and Valenta Hurst.¹⁷⁸ An accomplice to the crime, named Perry Davis, made several statements to friends confessing to the murder and implicating Bruton.¹⁷⁹ Davis's statements, including the portions that inculpated Bruton, were admitted against Bruton at trial under a state hearsay exception for statements against penal interest.¹⁸⁰ Susan Coward, a friend of Davis, testified that Davis told her "that [Bruton] had shot Hurst in the face and he had strangled and slit Kahn's throat."¹⁸¹

172. *Id.* at 785.

173. *Id.* at 789.

174. *Id.* at 788 (referring to *United States v. Robbins*, 197 F.3d 829 (7th Cir. 1999)); *Leading Cases*, 113 HARV. L. REV. 233, 241 (1999).

175. See *United States v. Shea*, 211 F.3d 658 (1st Cir. 2000); *United States v. Tocco*, 200 F.3d 401 (6th Cir. 2000); *United States v. Robbins*, 197 F.3d 829 (7th Cir. 1999); *Bruton v. Phillips*, 64 F. Supp. 2d 669 (E.D. Mich. 1999); *People v. Beasley*, 609 N.W.2d 581 (Mich. 2000); *State v. Gonzales*, 989 P.2d 419 (N.M. 1999).

176. 989 P.2d 419, 427 (N.M. 1999).

177. 64 F. Supp. 2d 669 (E.D. Mich. 1999).

178. *Id.* at 673.

179. *Id.* at 674.

180. *Id.*

181. *Id.* at 675.

Coward also admitted that "she had altered earlier statements that she had made to the police, after being threatened with prosecution for perjury. Coward also received one-thousand (\$1,000) dollars from law enforcement authorities to relocate to another state after the trial ended."¹⁸² Marcia McLean-Davis, Davis's friend, testified that Davis "told her that he had killed Alan (Kahn) by choking him and that [Bruton] had shot Hurst in the face" and that Davis showed her Kahn's wallet.¹⁸³ McLean-Davis had "previously been held in contempt of court for committing perjury in front of the grand jury. She admitted that she changed her story after being threatened with prosecution for perjury."¹⁸⁴ She was also given immunity to testify again in front of the grand jury and \$350 to relocate after the trial.¹⁸⁵ The statements of Coward and McLean-Davis were also admitted under the state hearsay exception for statements of a non-testifying declarant against the declarant's interest.¹⁸⁶ The Michigan Court of Appeals affirmed the conviction and the Michigan Supreme Court denied leave to appeal.¹⁸⁷

The district court in *Bruton v. Phillips* agreed with the Michigan Court of Appeals and held that the lower court did not err in admitting the statements because Davis was unavailable, his statements were against his penal interest, and the inculpatory portions of the confessions did not violate the Confrontation Clause because they were reliable since they were made to friends.¹⁸⁸ The district court denied Bruton's habeas corpus appeal on the grounds that "the statements are admissible under the second prong of the test set forth in *Roberts* and reiterated in *Lilly*; that is, the statements bear 'particularized guarantees of trustworthiness' that renders them admissible under the totality of the circumstances."¹⁸⁹

The district court agreed with the state court holding that the "inculpatory portions" of Davis's statements were reliable because: (1) the statements were made to friends; (2) they were spontaneous and voluntary; and (3) Davis made no attempt to diminish his role in the murders.¹⁹⁰ The court cited Justice Rehnquist's concurring opinion in *Lilly* for support of its ruling.¹⁹¹ The district court, however, noted that:

[this court] has serious misgivings with respect to the distinction between inculpatory hearsay statements made to acquaintances and

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 676.

187. *Id.*

188. *Id.* at 678.

189. *Id.* at 679-80.

190. *Id.* at 681-82.

191. *Id.* at 680.

those made to law enforcement officers. Often there are incentives to misrepresent the truth in conversation with acquaintances, family and friends that are as powerful as the incentives to misrepresent the truth in conversations with the authorities.¹⁹²

The court does not address the state's role in securing the testimony of Coward and McLean-Davis by threatening them with prosecution, giving them money to relocate, or providing immunity before the grand jury. Here the friends the declarant confessed to may have had motives to characterize the accomplice's statements. Thus, in *Bruton v. Philips*, it appears that the state was able to accomplish indirectly what it could not do directly. So long as it is obtained through a private actor and not a state actor the prosecution may use a confession potentially including a declarant's non-self-inculpatory statements as a statement against an unavailable declarant's penal interest.

The distinction between confessions to family or friends versus confessions to the police is supported by the rational that the motive to shift blame in order to curry favor or receive a better sentence is not present when an accomplice confesses to a family member or friend. This rational, however, ignores the incentive that an accomplice may have in minimizing or aggrandizing his involvement in nefarious activity when confessing their sins to a loved one or friend. In our hypothetical, Harry may not have been forthright with his girlfriend; he may have minimized his involvement in order to placate his girlfriend or aggrandized his involvement in order to impress her. An accomplice may have emotional incentives to minimize her involvement when confessing to family. For example, an accomplice may be ashamed or feel guilty telling his mother or sibling about his actions, giving the accomplice an incentive to shift blame or minimize his involvement. Given the prejudicial effect of codefendant confessions, the Court should not abdicate its role as gatekeeper by relying on the underlying relationship between the accomplice and their family member or friend.

The rationale behind an assumption that accomplice confessions to family and friends are admissible also ignores the incentive family members or friends may have in characterizing their loved ones statements. To understand this, one only need conjure up the image of the jilted lover. Harry was found dead, shot with a quarter on both eyes, suppose that his accomplices may have had a hand in his murder. Harry's girlfriend is probably going to have an emotional response to the circumstances surrounding his death. How might this affect her decision to come forward to the police? Will her feelings toward those who she perceives to be responsible for Harry's death influence how she charac-

192. *Id.* at 681.

terizes Harry's confession to her while talking to the police? Although bias can be addressed by cross-examination, a confession is such powerful testimony that it will likely have a prejudicial effect. Furthermore, recording or documenting custodial confessions is standard police practice. There is always a risk that the police could inaccurately report to the jury the unavailable accomplice's custodial confession inculcating a defendant, but at least there is likely to be a paper trail. The risk when a friend or relative testifies as to the unavailable accomplice's confession, however, is greater because a friend or relative is less likely to document or record the confession. Thus, the Court is justified in acting as a gatekeeper in order to prevent the prejudicial effect of unreliable confessions being presented to the jury.

The case of *State v. Sheets*¹⁹³ raises some of these very issues. In *Sheets*, a seventeen-year-old high school girl was raped and murdered on September 23, 1992. On September 17, 1996, the Omaha police received a report from a woman, Barb Olson, claiming that a young man named Adam Barnett told her son-in-law Jason LaNoue that he and Jeremy Sheets were involved in the murder.¹⁹⁴ The police took the statements of Jason and Barb. The police, however, also had Barb's daughter Rachell La Noue "wear a concealed radio wire in order to secretly tape a conversation between herself and Barnett regarding the murder."¹⁹⁵ During Barnett's conversation with Rachell LaNoue, Barnett confessed to driving the get away car, but Barnett claimed that Sheets committed the murder.¹⁹⁶ Barnett also revealed that his friendship with Sheets had recently deteriorated because Sheets "had sex with my lady."¹⁹⁷

Barnett was arrested and taken into custody. While in custody, Barnett confessed to police that he was present during the murder, but he maintained that Sheets raped and killed the girl.¹⁹⁸ Barnett later recanted his confession, claiming that he made up the story "to impress people at a party."¹⁹⁹ On November 13, 1996, Barnett committed suicide in his jail cell.²⁰⁰ Sheets was charged with the murder of the young girl. At Sheets's trial, the prosecution admitted the full text of Barnett's confession to the police under the Nebraska state hearsay exception for

193. 618 N.W.2d 117 (Neb. 2000).

194. *Id.* at 123.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 123-25.

199. *Id.* at 126. Barnett also allegedly recanted his confession to family members and friends while in jail. *Id.* at 125.

200. *Id.*

statements against the penal interest.²⁰¹ It does not appear that Barnett's statement made to Rachell LaNoue while under surveillance was entered into evidence.²⁰² Sheets was convicted of murder. The Nebraska Supreme Court reversed Sheets's conviction because under *Lilly* Barnett's confession to the police did not fall under a firmly rooted hearsay exception or contain independent indicia of reliability.²⁰³ The Nebraska Supreme Court remanded the case for a new trial.²⁰⁴

Sheets presents several interesting issues. First, it raises questions as to whether Barnett's statements to his friends were more reliable than his statements to police. He later recanted his confession to police, claiming that he made the statements in order to impress friends at a party. This indicates that the reliability of the confession to his "friends" may be no more reliable than his statement to the police. Is the relationship an accomplice established with someone they just met at a party or a bartender sacred or reliable? Must the court examine the quality of the relationship between the accomplice and the family member or friend to whom the accomplice confesses, or are these types of relationships inherently reliable?

Secondly, one wonders if Barnett's statements to Rachell LaNoue while under surveillance could be admissible against Sheets under the hearsay exception for statements against penal interest. According to Justice Rehnquist's opinion, Barnett's statements were made to a friend and therefore they "bear sufficient indicia of reliability to be placed before the jury without confrontation of the declarant."²⁰⁵ If this is true, should it matter that the friend was acting in concert with the police? Should it matter if the confession is spontaneously made to a friend? A friend or loved one may ask leading questions or elicit a confession, whether at the direction of the police or not. Any parent of an adolescent can tell you that that leading questions and interrogation are useful tools. Is there any less incentive to lie or shift blame when it is your mother instead of the police asking the questions?

For example, in *United States v. Boone*,²⁰⁶ at the FBI's request, Tarchanda Cunningham was surreptitiously taping conversations with her boyfriend, Lamar Williams, because the FBI suspected Williams of

201. *Id.* at 125-26. See NEB. REV. STAT. § 27-804(2)(c).

202. See *id.* at 127.

203. *Id.* at 137. The Nebraska Supreme Court only addressed the Confrontation Clause issue and did not examine whether the statements were properly admitted under the state hearsay exception because the issue was not raised by Sheets on appeal. *Id.* at 127.

204. *Id.* at 137.

205. *Lilly v. Virginia*, 527 U.S. 116, 147 (1999).

206. 229 F.3d 1231 (9th Cir. 2000).

several crimes.²⁰⁷ During his conversations with his girlfriend, Williams inculpated himself as well as Boone in a robbery. The two men were tried separately. A federal district court allowed the recorded statements of Williams to be admitted against Boone under a hearsay exception for statements against interest.²⁰⁸ Boone was found guilty and appealed to the United States Court of Appeals for the Ninth Circuit on the grounds that the use of the recorded statements at his trial violated the Confrontation Clause.²⁰⁹ The Ninth Circuit affirmed the district court and held that:

the taped conversation between Williams and his girlfriend occurred in what appeared to Williams to be a private setting and in which, as far as *he* knew, there was no police involvement. He simply was confiding to his girlfriend, unabashedly inculpating himself while making no effort to mitigate his own conduct. The circumstances and setting of Williams's statements distinguish this case from *Lilly*, as does the *content* of Williams's statements. It was unselfconsciously self-incriminating and not an effort to shift blame.²¹⁰

The *Boone* opinion cites Justice Rehnquist's concurring opinion in *Lilly* for support²¹¹ and offers support for a prosecutors that chose to argue that admission of statements similar to Barnett's statements to Rachell La Noue in the *Sheets* case would not violate the Confrontation Clause (assuming they are admissible under the state hearsay exception for statements against interest). The Nebraska Supreme Court did not directly address whether Barnett's statement to Rachell La Noue would be admissible because that issue was not before the court. The court, however, noted that "some courts, prior to *Lilly*, have determined that statements made under circumstances not present in this case, such as statements made to people unconnected with law enforcement, were genuinely self-inculpatory and, thus fell under a firmly rooted hearsay exception."²¹² The Nebraska Supreme Court also noted that "[o]ther courts have specifically addressed the difference between statements made outside of police custody and statements made while in custody, noting that the latter is presumed to be unreliable."²¹³ The court concluded that "[c]ourts that have considered the issue after *Lilly v. Virginia*, have overwhelmingly found that confessions of an accomplice that inculpate a criminal defendant are not within a firmly rooted hear-

207. *Id.* at 1232.

208. *Id.*

209. *Id.* at 1233.

210. *Id.* at 1234 (emphasis in original).

211. *Id.* (citing *Lilly v. Virginia* 527 U.S. 116, 147 (1999)).

212. *State v. Sheets*, 618 N.W.2d 117, 129 (Neb. 2000).

213. *Id.*

say exception, especially when such statements are made to law enforcement authorities.”²¹⁴

*C. Interpreted Broadly Lilly May Undermine Protections
Historically Located in Bruton*

Lilly was decided in the context of a state court’s interpretation of a state hearsay rule where the defendant was tried separately from any codefendants. *Lilly*’s impact in cases where two codefendants are tried jointly, however, is unclear. Professor James B. Haddad has explored the interrelationship between the *Bruton* Doctrine and the admissibility of accomplice confessions under hearsay exceptions for statements against interest.²¹⁵ *Lilly* raises many of the issues Professor Haddad has explored, and may add a new twist. Federal courts have traditionally analyzed accomplice confessions in joint trials under *Bruton v. United States*²¹⁶ and accomplice confessions in individual trials under *Williamson v. United States*.²¹⁷ *Bruton* held that in a joint trial a prosecutor may not admit the confession of an unavailable (or nontestifying) codefendant that inculpatates another defendant because the admission of the confession would violate the defendant’s rights under the Confrontation Clause. “A common misconception is that *Bruton* interpreted the Confrontation Clause so as to prohibit the use of a codefendant’s confession or admission as evidence against a defendant.”²¹⁸

In fact, *Bruton* “rested upon the explicit assumption that under domestic law, the confession of codefendant Evans was inadmissible against defendant Bruton.”²¹⁹ In subsequent cases:

the Supreme Court suggested each jurisdiction can shape its own rules of evidence to admit some codefendant confessions as evidence against a defendant, under an exception to the hearsay rule, and still not be deemed guilty of a Confrontation Clause violation, even where the defendant has no opportunity to cross-examine the confessing

214. *Id.* (citations omitted).

215. See generally James B. Haddad, *The Future of Confrontation Clause Developments: What will emerge when the Supreme Court Synthesizes the Diverse Lines of Confrontation Decisions?*, 81 J. CRIM. L. & CRIMINOLOGY 77 (1990) [hereinafter “Haddad I”]; James B. Haddad & Richard G. Agin, *A Potential Revolution in Bruton Doctrin: Is Bruton Applicable Where Domestic Evidence Rules Prohibit Use of a Codefendant’s Confession as Evidence Against a Defendant Although the Confrontation Clause Would Allow Such Use*, 81 J. CRIM. L. & CRIMINOLOGY 235, 239 (1990) [hereinafter Haddad & Agin]; James B. Haddad, *Post Bruton Developments: A Reconsideration of the Confrontation Rational, and a Proposal for A Due Process Evaluation of Limiting Instructions*, 18 AM. CRIM. L. REV. 1 (1980) [hereinafter Haddad II].

216. 391 U.S. 123 (1968).

217. 512 U.S. 594 (1994).

218. Haddad I, *supra* note 215, at 239.

219. *Id.*; see *Bruton v. United States*, 391 U.S. 123, 128 n.3 (1968).

codefendant.²²⁰

Of course, this is provided the confession contains indicia of reliability.²²¹ Thus, *Lilly* could dilute protections under *Bruton* in two ways either: (1) by allowing jurisdictions that permit codefendant confessions under a hearsay exception for statements against penal interest to liberally admit codefendant confessions; or (2) "in those jurisdictions whose evidentiary rules would prohibit use of the codefendant's confession as evidence against the defendant, even though the Confrontation Clause would not mandate such exclusion, the question remains whether *Bruton* requires severance lest juries improperly consider against a defendant a statement of a codefendant."²²²

Prior to the Court's ruling in *Lilly*, Professor Haddad observed that "[t]he degree to which a declaration against interest theory could erode *Bruton* depends upon the frequency of the prosecution's success in convincing courts that declarations against interest are reliable enough to satisfy the Confrontation Clause."²²³ For example, in *United States v. Wilson*,²²⁴ a case decided prior to *Lilly*, three defendants were tried together. The prosecution admitted the statements of one codefendant made to a friend, shortly after the witness's murder, that the codefendant spotted the witness and told the other defendants that the witness was in the area.²²⁵ The codefendant's statements were admitted against all of the defendants in the joint trial. The defendants objected that the statements were hearsay and violated the Confrontation Clause citing *Bruton*.

On appeal, the Court of Appeals for the District of Columbia held that the statements were admissible under *Williamson* as statements against penal interest because the statements were self-inculpatory, they implicated the declarant in a conspiracy, and they were reliable because they were made to a friend.²²⁶ The court held that the Confrontation Clause was not a barrier because according to *Cruz v. New York*, "a court may, in a joint trial, admit an out-of-court confession or statement against penal interest by one defendant that inculcates a codefendant if the statement is 'directly admissible' against the other defendant."²²⁷ A statement is "directly admissible if it is reliable, as defined in *Lee* and in *Ohio v. Roberts*, and if the declarant is unavailable to testify."²²⁸ The

220. Haddad I, *supra* note 215, at 236; see also *Lee v. Illinois*, 476 U.S. 530 (1986); *New Mexico v. Earnest*, 477 U.S. 648 (1986).

221. *Id.*

222. Haddad I, *supra* note 215, at 251.

223. *Id.*

224. 160 F.3d 732 (D.C. Cir. 1998).

225. *Id.* at 736.

226. *Id.* at 739.

227. *Id.* at 740 (citing *Cruz v. New York* 481 U.S. 186 (1987)).

228. *Id.*

Wilson court found that the codefendant was unavailable because he refused to testify and that the statements contained “particularized guarantees of trustworthiness” because the statements were made to a friend.²²⁹ The court did not decide whether statements against penal interest hearsay exception was firmly rooted because, “after *Lee* the question remains whether statements against penal interest can qualify as a firmly rooted hearsay exception as a class or whether each statement must qualify through its particular guarantees of trustworthiness.”²³⁰

After *Wilson*, the Court decided *Lilly*. Although *Lilly* answers the question the *Wilson* court left open, the fractured Court did not speak with one voice. Therefore, the liberal interpretations of *Lilly* discussed in this Comment could undermine defendants’ rights under *Bruton* as well as in individual trials. The Court of Appeals for the Seventh Circuit case *United States v. Robbins* raises some of these issues.²³¹ *Robbins* was a joint trial in which two codefendants were accused of selling and transporting drugs.²³² One defendant told his girlfriend that he and his codefendant sold drugs together.²³³ The district court admitted the statement against the alleged declarant with a limiting jury instruction that the statement was not to be considered against the other codefendant.²³⁴

On appeal, the codefendant that was implicated by the declarant’s statement argued that admission of the statements violated his rights under the Confrontation Clause.²³⁵ The court of appeals concluded that although the statement was clearly against the declarant’s penal interest, Rule 804(b)(3) “does not allow admission of non-self-inculpatory statements, even if they are made within a ‘broader narrative that is generally self-inculpatory,’ except in certain circumstances.”²³⁶ The Seventh Circuit proceeded to analyze the issue under *Lilly*.

The court observed that in *Lilly*, the United States Supreme Court stated that ever since *Bruton* it “has consistently either stated or assumed that the mere fact that one accomplice’s confession qualified as a statement against his penal interest did not justify its use as evidence against another person” in a joint trial.²³⁷ Thus, under *Lilly*, the Seventh Circuit concluded that accomplice “confessions are not within a firmly rooted exception to the hearsay rule” and the court moved to analyze whether

229. *Id.*

230. *Id.*

231. 197 F.3d 829 (7th Cir. 1999).

232. *Id.*

233. *Id.*

234. *Id.* at 838.

235. *Id.*

236. *Id.*

237. *Id.* at 839 (quoting *Lilly v. Virginia*, 527 U.S. at 116, 128 (1999)).

the statement had "sufficient indicia of reliability."²³⁸ The court of appeals held that the statement "had sufficient indicia of reliability present at the time the statement was made to make it trustworthy. The statement was made voluntarily in a conversation with Roberts, the declarant's fiancée and confidante. "The circumstances in which the statement was made provide no reason to suspect any coercion, any ulterior motive, any desire to curry favor with authorities, any reason to suspect any coercion."²³⁹ The appeals court argued that "because the statement would have been admissible against [the codefendant] under the Rules of Evidence, the narrow rule of *Bruton* is not implicated."²⁴⁰ The court also concluded that the limiting instruction cured any effect Robert's testimony may have had on the jury.

In *United States v. York*, a case decided prior to *Lilly*, the Court of Appeals for the Seventh Circuit observed that in *Bruton* "the Court's ruling, however, was predicated upon the *inadmissibility* of the statement against the defendant under the rules of evidence."²⁴¹ The circuit court argued that:

[T]he Court thus created an anomaly that continues to this day, *Bruton* only prohibits the use of an inculpatory hearsay statement against an accused when the jurisdiction's rules of evidence do not permit that statement to be introduced into evidence against the accused. Where the rules so permit, *Bruton* is inapplicable. Thus, under *Bruton* and subsequent cases, whether an inculpatory hearsay statement violates the Confrontation Clause turns on the rule of evidence.²⁴²

Therefore, if statements to a friend are interpreted as per se reliable under *Lilly*, protections historically located in *Bruton* may be undermined if courts do not feel obligated to analyze statements individually for particularized guarantees of reliability. Furthermore, if courts either find that truly-self-inculpatory statements are firmly rooted or frequently find them to be reliable for Confrontation Clause purposes, the same result could occur depending upon how broadly lower courts interpret *Williamson*.

The impact of *Lilly* in jurisdictions whose evidentiary rules do not permit codefendant confessions at all is also unclear. Professor Haddad suggests that a conflict may arise where a state evidentiary rule is more restrictive than what is required under the Confrontation Clause. He notes that the prosecution could argue that severance is not required or

238. *Id.*

239. *Id.* at 840 (citing *United States v. Hamilton*, 19 F.3d 350, 355-57 (7th Cir. 1993).

240. *Id.*

241. *United States v. York*, 933 F.2d 1343, 1362 (7th Cir. 1991).

242. *Id.* at 1362 n.3.

that “where domestic evidence rules exclude the confession as evidence against a defendant, but where the Confrontation Clause would not mandate exclusion, a limiting instruction is adequate and does not violate the Confrontation Clause.”²⁴³

Lilly does not directly address this issue, however, the opinion does hold that the use of confessions in the trial of an individual defendant does not violate the Confrontation Clause if the confession is reliable. Additionally, the opinion makes no mention of whether the confession must be admissible under domestic evidentiary rules in order to pass constitutional muster. Therefore, the issue remains unresolved and could pose potential problems for defendants in jurisdictions whose evidentiary rules do not permit codefendant confessions. Professor James Haddad has suggested that in this situation, “*Bruton*, if it is to survive at all, must come to be read as resting on due process considerations relating to the adequacy of limiting instructions rather than on the confrontation clause.”²⁴⁴

VI. CONCLUSION

At first glance, *Lilly* appears to provide defendants with a new and powerful shield. Upon closer examination, however, the strength of the protections offered by *Lilly* depends upon how lower courts interpret and apply the opinion, and it remains to be seen how the precedents established by *Lilly* will develop over time. A categorical ban on accomplice confessions might result in the suppression of reliable and probative evidence, while a categorical acceptance of accomplice confession creates a risk of unreliable and prejudicial evidence influencing the jury. Although a case-by-case approach balances these interests, the approach also places substantial discretion in the hands of the judge.

Some courts appear to interpret *Lilly* as providing a presumption that accomplice confessions made to family or friends are admissible, but a presumption that accomplice confessions to the police are not admissible unless case-by-case analysis reveals the confession is reliable. This interpretation creates both a risk that unreliable and prejudicial evidence may reach the jury, and a risk that a case-by-case analysis will lead to the variable and unpredictable admission of accomplice custodial confessions. The distinction between confessions made to family or friends and custodial confessions is inconsistent and the courts would do better to treat all confessions as the same and uniformly apply a presumption based upon *Lilly* that accomplice confessions are unreliable.

243. Haddad & Agin, *supra* note 215, at 252.

244. *York*, 933 F.2d at 1362 n.3 (citing to Haddad & Agin, *supra* note 215).

Furthermore, in jurisdictions that are bound by *Williamson*, *Lilly* can also be interpreted as creating a categorical distinction between “truly self-inculpatory” accomplice statements and “non-self-inculpatory” accomplice statements. This can be accomplished where a court adopts Justice Rehnquist’s argument that truly self-inculpatory statements are firmly rooted. The same result can also be achieved if court concludes either explicitly or indirectly that the *Williamson* analysis includes a search for particularized guarantees of reliability sufficient to satisfy the second rung of *Roberts*. If one adopts the position that *Lilly* does not subject truly self-inculpatory statements to in depth analysis beyond what is required under *Williamson*, this leaves open the possibility that a collaterally neutral statement could be categorically admissible under a broad interpretation of *Williams*. Therefore, a “truly self-inculpatory” accomplice’s confession implicating a defendant could potentially be categorically admissible, while “non-self-inculpatory” statements are categorically inadmissible, or at least subject to more searching analysis under *Lilly*. Although this categorical approach appears to be more predictable than case-by-case analysis, the determination of whether a statement is “truly self-inculpatory” under *Williamson* is actually a fact-based decision that requires case-by-case analysis.

Thus, the Court seems to struggle to find a balance that can accommodate the Court’s historical suspicion of custodial confessions and the Court’s desire to present the jury with all of the reliable and relevant evidence. The Court has addressed these concerns in *Lee*, *Williamson*, *Lilly*, and *Bruton*, however, these opinions have not been fully integrated. This tension has created an inexact doctrine that leaves open issues as to whether: (1) truly self-inculpatory accomplice confessions that inculcate a defendant are inherently reliable and thus admissible (either under a firmly rooted hearsay exception or under the second prong of *Roberts*); (2) accomplice confessions to family and friends are inherently reliable; and (3) what criteria courts should consider when evaluating under the second prong of *Roberts* whether an accomplice confession that inculcates a defendant is reliable. These issues present opportunities for *both* the prosecution and the defendant to craft arguments.

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