New Developments in Confrontation: Assessing the Impact of *Lilly v. Virginia*

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Introduction

In *Lilly v. Virginia*,[1] a plurality[2] of the United States Supreme Court concluded that statements against penal interest do not fall within a firmly rooted exception to the hearsay rule. In addition, the plurality held that the statements in question in *Lilly* were not sufficiently reliable to satisfy the Confrontation Clause.[3] The plurality's sweeping language suggested that statements against penal interest might never be admissible against a criminal defendant.[4] This article surveys the military and federal cases decided after *Lilly v. Virginia*. The survey shows that some statements against penal interest are reliable enough to survive constitutional scrutiny.

The appellate courts' application of *Lilly* has been predictable. However, to predict *Lilly's* impact, one had to sort through a very complicated opinion. The Court was unanimous in *Lilly*; however, no single rationale commanded a majority. The first part of this article reviews the facts and analysis of *Lilly.* Once the reader understands the different approaches of the justices, understanding the outcomes of this year's cases is as easy as adding four plus two and three plus two. The second part of this article surveys the military and federal appellate opinions which found statements against penal interest were erroneously admitted at trial, focusing on the Army Court of Criminal Appeals' decision in *United States v. Egan*.[5] The final section reviews several federal cases which found certain types of statements against penal interest were properly admitted. Two important factors emerge from this year's cases that will be very helpful to prosecutors offering statements against penal interest and to defense counsel opposing them. The first factor is to whom the statement was made. The second is whether the declarant attempted to shift the blame for criminality to others.

Lilly v. Virginia

In *Lilly v. Virginia*, a capital murder case, the Supreme Court considered whether the hearsay exception for statements against penal interest[6] is a firmly rooted hearsay exception. In December 1995, Benjamin Lilly, his brother Mark, and Mark's roommate burglarized a home. The next day, they robbed a small country store. When their vehicle broke down, they abducted a man, stole his car, drove him to a deserted area and killed him. The trio were later apprehended by police and questioned separately.[7]

Mark Lilly made several incriminating statements connecting him to the burglary and robbery, but not the murder. He admitted that he stole liquor during the initial burglary and a twelve-pack of beer in a later robbery. Mark admitted he was present during the robberies and the murder. He also made several statements that incriminated his brother in the murder. Mark said that his brother, Benjamin, instigated the carjacking and was the one who shot the victim.[8]

When Benjamin Lilly went to trial, the state attempted to call Mark as a witness, but he invoked his privilege against self-incrimination. The state offered the statements Mark had made to the police as statements against penal interest, and the court admitted the statements over defense objection.[9] The jury convicted Benjamin Lilly and recommended the death penalty, which the trial court imposed.[10]

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1. 527 U.S. 116 (1999).

2. Justice Stevens wrote the plurality opinion. Justices Souter, Ginsburg and Breyer joined Justice Stevens. However, Justice Breyer authored a concurring opinion "to point out that the fact that we do not reevaluate the link [between the Confrontation Clause and the hearsay rule] in this case does not end the matter. It may leave the question open for another day." *Id.* at 142-43 (Breyer, J., concurring).

3. U.S. CONST. amend VI.

4. "Most important, this third category of hearsay [confessions by an accomplice which incriminate a defendant] encompasses statements that are inherently unreliable. . . . [W]e have over the years 'spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants.'" *Lilly*, 527 U.S. at 131 (citation omitted).

5. 53 M.J. 570 (Army Ct. Crim. App. 2000).

6. FED. R. EVID. 804(b)(3); MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 804(b)(3) (2000) [hereinafter MCM].

7. *Lilly*, 527 U.S. at 120.

8. *Id.* at 121.

The United States Supreme Court reviewed the case to determine whether Mark Lilly's statements fell within a firmly rooted hearsay exception for purposes of satisfying the Sixth Amendment's Confrontation Clause.[11] *Lilly* is a complicated opinion. All nine justices agreed that the admission of out-of-court statements by Mark Lilly, the defendant's brother, violated Benjamin Lilly's right to confront witnesses, but they could not agree on a rationale. To determine the impact of *Lilly,* one must understand the differences between the three approaches taken by the justices.

Seven justices reviewed the case using the reliability test from *Ohio v. Roberts.*[12] The Court noted that the Confrontation Clause does not prohibit the introduction of all hearsay statements. However, when a prosecutor offers an out-of-court statement and the declarant does not testify, the Confrontation Clause is implicated. In previous decisions, the Supreme Court has created and refined a methodology for analyzing the constitutionality of hearsay statements.[13] As the Court stated in *Lilly*:

> [T]he 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.[14]

The Plurality Opinion

A plurality of the Court held that Mark Lilly's statements did not fall within a firmly rooted hearsay exception and that the admission of the statements violated Benjamin Lilly's constitutional right to confront the witnesses against him.[15] Justice Stevens, writing for the plurality, found that statements against penal interest offered by a prosecutor to establish the guilt of an alleged accomplice of the declarant do not fall within a firmly rooted hearsay exception. Moreover, the plurality doubted that statements given under conditions that implicate the core concerns of the old ex parte affidavit practice could ever be reliable enough to satisfy the Confrontation Clause without adversarial testing.[16]

The plurality first considered whether statements against penal interest fall within a firmly rooted hearsay exception. Justice Stevens described what makes a hearsay exception firmly rooted.

> We now describe a hearsay exception as "firmly-rooted" if, in light of "longstanding judicial and legislative experience," . . . it "rest[s][on] such [a] solid foundatio[n] that admission of virtually any evidence within [it] comports with the 'substance of the constitutional protection'". . . . This standard is designed to allow the introduction of statements falling within a category of hearsay

9. The defense objected on two grounds. First, the statements were not against Mark's penal interest because they shifted the blame to Benjamin Lilly and Mark's roommate. Second, admission of the statements violated the Confrontation Clause of the Sixth Amendment, which has been incorporated against the states through the Fourteenth Amendment. *Id.* at 121-22.

10. *Id.* at 122.

11. The Supreme Court of Virginia found that the statements fell within the statement against penal interest exception to the Virginia hearsay rule. Moreover, the Supreme Court of Virginia found that this exception to the hearsay rule is firmly rooted. *Id.* The question for the United States Supreme Court was whether the statements satisfied the Confrontation Clause in the Sixth Amendment to the United States Constitution. *Id.* at 125.

12. 448 U.S. 56 (1980).

13. *See* White v. Illinois, 502 U.S. 346 (1992); Idaho v. Wright, 497 U.S. 805 (1990); Bourjaily v. United States, 483 U.S. 171 (1987); United States v. Inadi, 475 U.S. 387 (1986); Ohio v. Roberts, 448 U.S. 56 (1980).

14. *Lilly*, 527 U.S. at 124-25. The second prong of this test is commonly referred to as the residual trustworthiness test. *Id.* at 136.

15. *Id.* at 139-40.

16. "The primary object of the [Confrontation Clause] was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross examination of the witness . . . ." Mattox v. United States, 156 U.S. 237, 242 (1895). The ex parte affidavit practice was an abuse common in England in the 16th and 17th Century.

> In 16th–century England, magistrates interrogated the prisoner, accomplices, and others prior to trial. These interrogations were intended only for the information of the court. The prisoner had no right to be, and probably never was, present . . . . At the trial itself, "proof was usually given by reading depositions, confessions of accomplices, letters, and the like; and this occasioned frequent demands by the prisoner to have his 'accusers,' i.e., the witnesses against him, brought before him face to face . . . ." The infamous trial of Sir Walter Raleigh on charges of treason in 1603 in which the Crown's primary evidence against him was the confession of an alleged co-conspirator (the confession was repudiated before trial and probably had been obtained by torture) is a well-known example of this feature of English criminal procedure.

White, 502 U.S. at 361 (Thomas, J., concurring in part and concurring in the judgment) (citations omitted). Under the ex parte affidavit practice, prosecutors proved their cases by presenting out-of-court statements without giving the accused the opportunity to cross-examine the declarant(s). *See Lilly*, 527 U.S. at 127.

> whose conditions have proven over time "to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath" and cross-examination at trial. . . . Established practice, in short, must confirm that statements falling within a category of hearsay inherently "carr[y] special guarantees of credibility" essentially equivalent to, or greater than, those produced by the Constitution's preference for cross-examined trial testimony.[17]

Justice Stevens pointed out that the "against penal interest" exception to the hearsay rule is not premised on the declarant's inability to reflect before making the statement.[18] He noted that the exception is of "quite recent vintage."[19] As a result of the shallowness of the legislative and judicial experience with this exception, and a long line of cases that declare accomplices' confessions that incriminate others "presumptively unreliable,"[20] the Court held that accomplices' confessions that inculpate others are not within a firmly rooted hearsay exception.[21] The Court also noted that this category of statements included statements that function similarly to those used in the ancient ex parte affidavit system.[22]

Hearsay that does not fall within a firmly rooted hearsay exception can still satisfy the Confrontation Clause if, from the facts and circumstances surrounding the making of the statement, the court is convinced that it is sufficiently reliable. Writing for the plurality, Justice Stevens evaluated Mark Lilly's statements under the residual trustworthiness test.[23] Hearsay that does not fall within a firmly rooted hearsay exception can be reliable enough to satisfy the Confrontation Clause "[w]hen a court can be confident . . . that 'the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility[.]'"[24] Because Mark was in custody, made his statements under police supervision, responded to leading questions, had a motive to exculpate himself, and was under the influence of alcohol, the Court concluded that the statements were not so reliable that adversarial testing would add nothing to their reliability.[25] Since Mark Lilly's statements failed both prongs of the test, the Supreme Court found a violation of the Confrontation Clause.[26]

Justices Scalia and Thomas

Justice Scalia and Justice Thomas concurred in the judgment separately, but shared a similar view of the Confrontation Clause. Neither justice analyzed the issue in terms of firmly rooted hearsay or the residual trustworthiness test. According to these two justices, the Confrontation Clause should be used to prevent the abuse that gave rise to the clause. They would apply the Confrontation Clause only to witnesses who testify at trial and to "extrajudicial statements only insofar as they are contained in formalized testimonial material, such as affidavits, depositions, prior testimony, or confessions."[27] Justice Scalia characterized the admission of Mark Lilly's statements as a "paradigmatic Confrontation Clause violation" because Mark Lilly made the out-of-court statements to the police during a custodial interrogation and the prosecutor did not make Mark available for cross-examination.[28] Such statements resemble the abusive practice of trial by ex parte affidavit.

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17. *Lilly*, 527 U.S. at 126.

18. *Id.*

19. *Id.* at 130.

20. *Id.* at 131.

21. *Id.* at 134.

22. *Id.* at 131. *See supra* note 16 and accompanying text (describing the ex parte affidavit system).

23. *Id.* at 134.

24. *Id.* at 136 (citations omitted).

25. *Id.* at 139.

26. *Id.*

27. *Id.* at 143 (Scalia, J., concurring in part and concurring in the judgment). Justice Thomas doubts the Confrontation Clause was intended to regulate the admission of all hearsay statements. By limiting the reach of the Confrontation Clause to the testimonial materials that were historically abused by prosecutors to deprive defendants of the opportunity for cross-examination, "the Confrontation Clause would not be construed to extend beyond the historical evil to which it was directed." White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring).

28. *Lilly*, 527 U.S. at 143 (Scalia, J., concurring in part and concurring in the judgment).

The Concurring Opinion[29]

Chief Justice Rehnquist, joined by two other justices, agreed that admission of the statements by Mark Lilly violated the Confrontation Clause. However, Chief Justice Rehnquist wrote that it was unnecessary for the Court to decide the issue of whether statements against penal interest fall within a firmly rooted hearsay exception, arguing that the statements at issue were not against the declarant's penal interest.[30] Therefore, the Court did not have to decide if the Confrontation Clause allows the admission of a "genuinely self-inculpatory statement that also inculpates a codefendant[.]"[31] The Chief Justice would leave open the possibility that some genuinely self-inculpatory statements against penal interest are firmly rooted hearsay. Specifically, the Chief Justice identified statements to fellow prisoners[32] and confessions to family members as reliable enough to satisfy the Confrontation Clause.[33]

In *Lilly*, the court made two distinctions that are important to watch when evaluating new cases interpreting the opinion. First, the plurality cited a line of Supreme Court precedents that treat accomplices' confessions that incriminate others as "presumptively unreliable," because the declarant has a motive to shift the blame to others.[34] Second, the plurality in *Lilly* subdivided statements against penal interest into three categories: (1) voluntary admissions against the declarant; (2) exculpatory evidence offered by the defense to show the declarant committed the crime; and (3) statements offered by the prosecution to prove the guilt of an alleged accomplice of the declarant.[35] The statements in *Lilly* fell into the third category. One way to characterize this year's federal cases is that they further divide *Lilly's* third category. The cases treat statements against interest made to the police as unreliable and inadmissible, but treat statements against interest made to people other than the police differently.[36]

Statements against interest made to the police during a custodial interview were at issue in *Lilly.* All nine of the justices found that the admission of these statements violated the Confrontation Clause either because the statements were unreliable or because such statements resemble the practice of trial by ex parte affidavit. The four justices in the plurality labeled confessions by an accomplice to the police as presumptively unreliable. Justices Scalia and Thomas labeled the use of Mark Lilly's statements to the police as a paradigmatic Confrontation Clause violation because use of his uncross-examined statements were exactly the type of abuse the Confrontation Clause was adopted to prevent. Six justices would be very skeptical of using an accomplice's confession to the police as evidence against a criminal defendant.

The concurring opinion by Chief Justice Rehnquist specifically left open the issue of whether statements against penal interest made to someone other than a government official fall within a firmly rooted hearsay exception. The three concurring justices specifically reserved judgment on this issue when a statement is made to a fellow prisoner or to a family member.[37] In addition, the approach of Justices Scalia and Thomas permits admission of statements in the third category when the government is not involved in the making of the statement; Justices Scalia and Thomas would not apply the Confrontation Clause to extrajudicial statements not contained in formalized testimo-

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29. Although there were several concurring opinions, this article refers to the concurring opinion written by Chief Justice Rehnquist as the concurring opinion. Justices O'Connor and Kennedy joined the Chief Justice. *Id.* at 144.

30. In his opinion, Justice Stevens points out:

> When asked about his participation in the string of crimes, Mark admitted that he stole liquor during the initial burglary and that he stole a 12-pack of beer during the robbery of the liquor store. . . . He claimed, however, that while he had primarily been drinking, petitioner [Benjamin Lilly] and Barker [Mark Lilly's roommate] had "got some guns or something" during the initial burglary. . . . Mark said that Barker had pulled a gun in one of the robberies. He further insisted that petitioner had instigated the carjacking and that he (Mark) "didn't have nothing to do with the shooting" of DeFilippis. . . . In a brief portion of one of his statements, Mark stated that [Benjamin Lilly] was the one who shot DeFilippis.

Id. at 121.

31. *Id.* at 146.

32. Looking to previous case law, Justice Rehnquist stated that "[t]he Court in [*Dutton v. Evans*] held that the admission of an accomplice's statement to a fellow inmate did not violate the Confrontation Clause under the facts of that case, . . . and I see no reason to foreclose the possibility that such statements, even those that inculpate a codefendant, may fall under a firmly rooted hearsay exception." *Id.* at 147 (citing Dutton v. Evans, 400 U.S. 74, 86-89 (1970)).

33. *Id.*

34. *Id.* at 131. In two cases, the Second Circuit Court of Appeals approved of the admission of accomplices' confessions as statements against penal interest because they were redacted so that the confessions did not shift the blame to the defendants. *See infra* notes 116-23 and accompanying text.

35. *Lilly*, 527 U.S. at 127-31.

36. *See infra* notes 86-115 and accompanying text.

37. "The 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." *Lilly*, 527 U.S. at 147 (citing Dutton v. Evans, 400 U.S. 74, 89 (1970).

nial material. Therefore, a working majority of justices would likely hold that reliable statements made to someone other than a government official would not violate the Confrontation Clause. Moreover, the plurality opinion does not categorically reject all statements against penal interest. The plurality would subject them to the residual trustworthiness test on a case by case basis. At a minimum, it appears the five concurring justices, and conceivably all nine, would sustain the admission of statements against penal interest in those cases where the statements were made to someone who is not a government official.

Statements Against Interest Made to Police

As recently noted by the Seventh Circuit:

> [T]he full scope of *Lilly* remains undefined, [at] least one treatise has explained that in *Lilly* "all nine justices of the Supreme Court indicated, more or less explicitly, that the admission of custodial statements to law enforcement personnel against penal interest . . . whether or not constituting a confession, that incriminate another person violated the confrontation clause when admitted against such other person in a criminal case."[38]

In all reported military and federal cases since *Lilly*, appellate courts have found error when trial judges admitted statements to the police as statements against penal interest. This section will review the facts and analyses of these cases. Trial counsel and defense counsel should understand the factors that led the courts to the conclusion that statements made to police are unreliable. These factors can help trial counsel advise law enforcement agencies during criminal investigations, and will also help trial counsel and defense counsel shape their arguments when offering or opposing statements against interest made to police. In addition, the Army Court of Criminal Appeals' comprehensive analytic framework is helpful to counsel because it accounts for a myriad of constitutional and evidentiary issues surrounding statements against penal interest.

United States v. Egan

The Army Court of Criminal Appeals was the first military appellate court to react to the Supreme Court's decision in *Lilly v. Virginia*. In *United States v. Egan*,[39] the Army court considered whether, after *Lilly*, statements against penal interest fall within a firmly rooted exception to the hearsay rule. The court's opinion also contains a well-organized and helpful summary of several related issues pertaining to statements against penal interest.

Specialist (SPC) Eric A. Egan was a soldier assigned to the United States European Command Joint Analysis Center in England. At trial SPC Egan was convicted of attempted distribution of ecstasy and wrongful use of marijuana. Specialist Egan confessed to an Air Force Office of Special Investigations (OSI) agent to numerous incidents of drug use and distribution. The OSI agent interviewed two individuals, Mr. Carter and Mr. Zellers, that SPC Egan had named in his confession. At trial, both individuals refused to answer questions for fear of incriminating themselves. The military judge admitted portions of their statements to OSI under Military Rule of Evidence (MRE) 804(b)(3) as statements against penal interest. The court held that the military judge erred by admitting these statements and, without these statements, SPC Egan's confession to one specification of distribution of ecstasy was insufficiently corroborated.[40]

The court's discussion contains an outstanding methodology for practitioners to follow when dealing with statements against penal interest. The court stated:

> In analyzing the admission of Mr. Carter's and Mr. Zellers' statements, we will determine first, whether the statements were made against penal interest; second, whether the statements needed to be and were trustworthy; third, whether the individual statements within the larger statements were admissible; and fourth, whether any improperly admitted statements harmed the appellant.[41]

The first issue is a question of evidentiary law. The second issue is the constitutional question addressed by *Lilly*. The third issue accounts for the "*Williamson* parsing process."[42] The fourth issue is a question of prejudice. The first three steps of this analysis will lead trial practitioners through the separate, yet related issues raised by statements against penal interest.

The court found that Mr. Carter's statement to OSI was not a statement against penal interest. The court noted that the evi-

38. United States v. Castelan, 219 F.3d 690, 695 (7th Cir. 2000) (citing 31 WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 6742 (2d ed. 2000)).

39. 53 M.J. 570 (Army Ct. Crim. App. 2000).

40. *Id.* at 571-72.

41. *Id.* at 574.

42. *Id.* at 576. This phase refers to the requirement established in *Williamson v. United States*, 512 U.S. 594 (1994), to examine each declaration that is part of a larger statement which is admitted as a statement against penal interest. In *Williamson*, the Supreme Court held that Federal Rule of Evidence (FRE) 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." 512 U.S. at 601.

dentiary standard of MRE 804(b)(3) is whether a reasonable person in the position of the declarant would not have made the statement unless he believed the statement to be true. The standard the court applied, however, was subjective: "[t]he criterion, however, is not whether a declarant's statement might be admissible to help convict [the declarant] if at some later time he were brought to trial but, instead, whether the declarant would himself have perceived at the time that his statement was against penal interest."[43] After-the-fact constructions by clever lawyers that show a statement is somehow technically against a declarant's penal interest are not enough to satisfy MRE 804(b)(3). The focus is on whether the declarant perceived at the time the statement was made that the statement was against his penal interest.

The court looked at the facts and circumstances surrounding Mr. Carter's statement to the OSI agent. Mr. Carter was a British citizen.[44] The OSI agent did not advise Mr. Carter of the potential consequences of making a statement under American or British law, but did advise him that the United States had no jurisdiction over him. Mr. Carter told the defense counsel "that when [he] gave a statement to the Air Force investigator [he] did not expect that it would be used against [him]."[45] Moreover, Mr. Carter stated that he would not have made the statement if he thought it could be used against him. Despite the fact that the OSI agent contradicted some of these assertions, the court was not persuaded that Mr. Carter subjectively believed that his statement would have exposed him to criminal liability.[46]

Mr. Zellers also gave OSI a statement about SPC Egan's involvement with illegal drugs. Mr. Zellers was not advised of the consequence of making a statement under American or British law, and he was unaware that the United States had no jurisdiction over him. Mr. Zellers told the defense counsel "that when [he] gave a statement to the Air Force investigators [he] was under the belief that it would not subject [him] to criminal liability."[47] The OSI agent that interviewed Mr. Zellers said that Mr. Zellers told him he was willing to give a statement, but he was reluctant to testify in court because Egan was his friend and he was afraid the British police might prosecute him for anything to which he admitted. The court concluded that Mr. Zellers' statement, as opposed to Mr. Carter's, met the evidentiary standard.[48]

Next, the court considered the constitutional issue as set out by the Supreme Court in *Lilly v. Virginia*:

> [T]he 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 guarantee of trustworthiness" such that adversarial testing would be expected to add little, if anything, to the statements' reliability.[49]

First, the court considered whether statements against penal interest fall within a firmly rooted hearsay exception.

In *United States v. Jacobs*,[50] a case decided before *Lilly*, the Court of Appeals for the Armed Forces held that statements

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43. *Egan*, 53 M.J. at 574 (citing United States v. Greer, 33 M.J. 426, 430 (C.M.A. 1991)). Notice the tension between MRE 804(b)(3) and *Greer*. Military Rule of Evidence 804(b)(3) implies an objective standard by requiring "that a *reasonable* person in the position of the declarant would not have made the statement unless the person believed it to be true." *Greer*, 33 M.J. at 429 (emphasis added) (quoting MCM, *supra* note 5, MIL. R. EVID. 803(b)(3)). *Greer*, however, clearly applied a subjective standard. In *Greer*, the court tried to reconcile this difference by pointing out that:

> [t]he requirement that the declarant believe that his statement is contrary to his penal or pecuniary interest stems from the common-sense proposition that "someone usually does not make a statement that may send him to jail or cost him money unless he believes it to be true." . . . On the other hand, in making statements from which a benefit may be derived, a declarant has less concern with truthfulness; so there is a special need to subject such statements to the safeguard of cross-examination.

Id. at 430 (citations omitted). *Cf.* United States v. Benton, 54 M.J. 717 (Army Ct. Crim. App. 2001). In *Benton*, the court stated:

> The evidentiary rule itself appears to incorporate aspects of both a subjective and an objective standard in determining this issue. It requires that the statement be so against one's interest that "a reasonable person *in the position of the declarant"* would not have made it unless the statement were true. . . . Our superior court has applied a subjective test, holding that the criterion is "whether the declarant would himself have perceived at the time that his statement was against his penal interest."

Id. at 726 (quoting both *Greer*, 33 M.J. at 430, and MCM, *supra* note 6, MIL. R. EVID. 803(b)(3)).

44. *Egan*, 53 M.J. at 572. Mr. Zellers was a British citizen as well. *Id.*

45. *Id.* at 575.

46. "The results of our analysis would be the same were we to use the objective standard[.]" *Id.*at 575 n.4.

47. *Id.*

48. *Id.* ("Under these circumstances, we conclude that Mr. Zellers perceived his unwarned statement to OSI about the appellant's criminal activities to so subject Mr. Zellers to criminal liability that he would not have made the statement unless he believed it to be true.").

against penal interest were a firmly rooted hearsay exception. However, in *Lilly v. Virginia*, a plurality of the Supreme Court ruled that admission of the type of statements admitted in *Jacobs* violated the Confrontation Clause.[51] The Army court is the first military appellate court to consider the impact of *Lilly* on *Jacobs.* The Army court did not explicitly find that *Lilly* overruled *Jacobs*, but did decline to follow *Jacobs* in light of *Lilly.*[52] The court did not treat Mr. Zellers' statements as firmly rooted hearsay; instead the court subjected the statements to the residual trustworthiness test.[53]

The Army court's decision not to follow *Jacobs* was correct. The CAAF's holding in *Jacobs* is vulnerable in light of *Lilly.* First, in *Jacobs*, an accomplice made the statements at issue to police during a custodial interview, and so they would fall within the third category of statements against penal interest described by *Lilly.*[54] Second, the CAAF's opinion in *Jacobs* contained no analysis. The court did not consider whether statements against penal interest were sufficiently reliable based on judicial and legislative experience. Rather the court held that statements against penal interest fell within a firmly rooted hearsay exception based on the weight of authority.[55] At the time CAAF decided *Jacobs*, six circuit courts of appeal treated declarations against penal interest as a firmly rooted hearsay exception and only two circuits did not.[56] However, several federal courts have reconsidered this issue since *Lilly*, and have held that statements against penal interest are not firmly rooted hearsay.[57]

The Army court subjected Mr. Zellers' statements to the residual trustworthiness test,[58] and found the statements were not reliable enough to satisfy the Confrontation Clause because the government was involved in the production of the statement, the statements described past events, and the statements were not subjected to cross-examination. Moreover, the statements were never intended to be used to prosecute Mr. Zellers; they were taken to prosecute SPC Egan. Since Mr. Zellers stood to benefit from his cooperation with the OSI, he had a motive to minimize his involvement and shift blame to SPC Egan.[59] Consequently, admission of Mr. Zellers' statements violated the Confrontation Clause. The court set aside one finding of guilty and dismissed the specification because, without the improperly admitted hearsay, the only remaining proof of

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49. 527 U.S. 116, 124-25 (1999) (citing Ohio v. Roberts, 448 U.S. 56, 66 (1980)). Citing *Roberts* for this proposition is problematic. In *Roberts*, the Court purported to establish a general approach to analyzing Confrontation Clause issues raised by hearsay, stating:

> [T]he Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred) the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant . . . when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.

448 U.S. at 65-66. However, later cases have limited the unavailability requirement. *See, e.g.*, White v. Illinois, 502 U.S. 346, 354 (1992) ("*Roberts* stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding."); United States v. Inadi, 475 U.S. 387, 394 (1986) ("*Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable.").

50. 44 M.J. 301 (1996).

51. 527 U.S. at 119.

52. Several federal courts have considered the impact of *Lilly* and have concluded that statements against penal interest made to the police do not fall within a firmly rooted hearsay exception. *See, e.g.*, United States v. McCleskey, 228 F.3d 640 (6th Cir. 2000); United States v. Gomez, 191 F.3d 1214 (10th Cir. 1999).

53. *Egan*, 53 M.J. at 575-76. *See supra* note 14 and accompanying text (quoting the two prong *Lilly* test).

54. *See supra* note 35 and accompanying text. The plurality opinion in *Lilly* stated that declarations against penal interest described a category that was too large for constitutional analysis. The plurality divided declarations against penal interest into three categories: (1) voluntary admissions against the declarant; (2) exculpatory evidence offered by the defense to show the declarant committed the crime; and (3) statements offered by the prosecution to prove the guilt of an alleged accomplice of the declarant. *Lilly*, 527 U.S. at 119.

55. *Jacobs*, 44. M.J. at 306.

56. *Id.*

57. *Compare* United States v. Gomez, 191 F.3d 1214 (10th Cir. 1999) (holding statements against penal interest do not fall within a firmly rooted hearsay exception) *with* Jennings v. Maynard, 946 F.2d 1502 (10th Cir. 1991) (holding statements against penal interest do fall within a firmly rooted hearsay exception).

58. The court also evaluated Mr. Carter's statements under the residual trustworthiness test even though they held that the statements did not fall within an exception to the hearsay prohibition. The court seemed uncomfortable evaluating statements against penal interest using the subjective standard. By finding that the statements fail the residual trustworthiness test, the court found a separate reason for finding error in this case. *See Egan*, 53 M.J. at 575-76. *See supra* note 43 (explaining the tension between the objective standard in the rule of evidence and the subjective standard in case law).

59. *Egan*, 53 M.J. at 576.

that specification was from the accused's uncorroborated confession.[60]

Egan is helpful to practitioners for two reasons. First, the court declined to follow *Jacobs.* Statements to police offered to establish the guilt of a declarant's accomplice do not fall within a firmly rooted hearsay exception, and proponents of statements against penal interest should not rely on *Jacobs*. Proponents of statements against interest must be prepared to satisfy the residual trustworthiness test. Second, the court's four-step analysis accounts for several issues raised when the government seeks to introduce statements against penal interest. Although the fourth step does not apply at the trial level, the first three steps form an outstanding analytic template.

United States v. McCleskey

In *United States v. McCleskey,*[61] the Sixth Circuit Court of Appeals reversed the decision of the trial court to admit statements against penal interest. The court held that the statements did not qualify for admission under FRE 804(b)(3) and admission of the statements violated the Confrontation Clause.[62]

In *McCleskey*, police stopped a vehicle near St. Louis, Missouri, for speeding. Because of the suspicious behavior of the occupants, the police requested permission to search the car. The occupants consented, and the police found six kilograms of cocaine in the trunk. The driver of the car agreed to cooperate with police. He made a written confession stating that he was a drug courier and he was taking the cocaine to Dayton, Ohio. The driver participated in an audiotaped phone call to McCleskey just prior to delivering the cocaine. The delivery to McCleskey was audiotaped and monitored by the police. However, ten days later, the driver recanted all portions of his previous confession that implicated McCleskey, and then disappeared. At trial, the government offered the driver's statements into evidence as statements against penal interest. The district court admitted the self-inculpatory statements of the driver, but excluded the parts of the confession that were not self-inculpatory.[63]

The Sixth Circuit held that the statements did not fall within the hearsay exception for statements against penal interest. According to the court:

> [T]he confession of an accomplice delivered while in police custody, inculpating a defendant, though the accomplice be unavailable at the time of trial, is classic, inadmissible hearsay, when offered by the government, *regardless* of the constitutional concern. Because of the incentive brought to bear upon such an accomplice to shift and spread blame to other persons, such a confession cannot be said to be "[a] statement which . . . so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true."[64]

The court held that admission of these unreliable statements violated the Confrontation Clause for the same reasons.[65]

In reaching this conclusion, the court cast doubt on whether confessions taken by the police could ever be admissible against the declarant's accomplice:

> In the vast majority of instances in which Rule 804(b)(3) is relied upon, it is the defendant who relies upon the Rule to admit a statement, otherwise hearsay, which operates to exculpate him by inculpating the statement's declarant . . . . Under such circumstances, the out-of-court statement is marked by significant indicia of reliability: a reasonable person who was not guilty of a crime would not normally falsely inculpate himself for the purpose of falsely exculpating another. However, where, as here, it is the government which seeks to introduce a statement, otherwise hearsay, which inculpates its declarant but which, in its detail, also inculpates the defendant by spreading or shifting onto him some, much, or all of the blame, the out-of-court statement entirely lacks such indicia of reliability. It is garden variety hearsay as to the declarant. Indeed, an alleged coconspirator in the custody of law enforcement officials will generally have a salient and compelling interest in incriminating other persons, both to reduce the degree

60. *Id.* at 581.

61. 228 F.3d 640 (6th Cir. 2000).

62. *Id.* at 645.

63. *Id.* at 642.

64. *Id.* at 645 (quoting FED. R. EVID. 804(b)(3)) (emphasis in original).

65. *Id.*

> of his own apparent responsibility and to obtain leniency in sentencing.[66]

The Sixth Circuit held that statements against penal interest do not fall within a firmly rooted hearsay exception. To be admissible, the statements must contain "particularized guarantees of the declaration's trustworthiness."[67] The court noted that although parts of the driver's confession were corroborated by other evidence, "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."[68] Looking at the facts and circumstances surrounding the making of the confession, the court noted that the declarant was advised of his *Miranda* rights, the confession was voluntary, he was aware he was subjecting himself to criminal liability, and the police did not expressly promise leniency for his cooperation. However, the court found that these factors only make the confession reliable as to the declarant's conduct, but "they offer no basis for finding the necessary circumstantial guarantees of trustworthiness as to the portion inculpating McCleskey. Manifestly, [the declarant] had a strong interest in shifting at least some of the responsibility from himself and onto McCleskey."[69] If the Sixth Circuit is correct, it is hard to imagine a case where a confession taken by the police could be used against the declarant's accomplice.

United States v. Ochoa

In *United States v. Ochoa*,[70] the Seventh Circuit found a violation of the Confrontation Clause but did not reverse Ochoa's conviction because the court found the error was harmless.[71] Pablo Ochoa was having financial problems and could not make the payments on his car. Ochoa went to a friend, Dave McLaughlin, to see if he knew anyone that could make the car disappear. McLaughlin contacted his brother-in-law, Gaylen Strange, who in turn contacted Mark Hinkle. Hinkle, who had prior "chop shop" experience, was working as a Federal Bureau of Investigation (FBI) informant. Hinkle arranged for McLaughlin and Strange to deliver the car to an undercover FBI agent. Ochoa reported the car stolen to his insurance company.[72]

The government charged Ochoa and Strange. Ochoa pled not guilty, but Strange pled guilty and agreed to testify against Ochoa. To build the case against Ochoa, the FBI attempted to find McLaughlin.[73]

An FBI agent, Agent May, went to a house owned by Art Garza to look for McLaughlin. When May arrived he found two men sitting on the porch. One was Garza and the other was McLaughlin. However, May did not know the second man was McLaughlin. The agent told Garza and the unidentified McLaughlin that McLaughlin could benefit by cooperating with the FBI and that McLaughlin may not be charged. McLaughlin contacted May and later met with him. McLaughlin told May about his and Ochoa's involvement in the fraud. After talking to the FBI, McLaughlin disappeared.[74]

At trial, the government called the undercover FBI agent and Strange. The government offered McLaughlin's statements to Agent May, which the trial judge admitted as statements against penal interest under FRE 804(b)(3), residual hearsay under FRE 807, and under FRE 804(b)(6).[75] The Seventh Circuit found that McLaughlin's statements were insufficiently reliable to satisfy the Confrontation Clause and that the government had not proved misconduct by Ochoa.[76]

The court noted that McLaughlin's statements did not fall within a firmly rooted hearsay exception and, because Agent May was involved in the production of the statement, McLaughlin's statements were presumptively unreliable.[77] The court held the facts and circumstances surrounding the making

66. *Id*. at 644.

67. *Id*.

68. *Id*. at 645 (emphasis in original).

69. *Id*.

70. 229 F.3d 631 (7th Cir. 2000).

71. *Id*. at 641.

72. *Id*. at 634.

73. *Id*. at 635.

74. *Id*.

75. *Id*. "A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness" is not excluded by the prohibition on hearsay. FED. R. EVID. 804(b)(6). The government thought that Ochoa's misconduct procured McLaughlin's absence because after McLaughlin disappeared, McLaughlin made seven phone calls to his employer from Ochoa's house. *Ochoa*, 229 F.3d at 635.

76. *Id*. at 637-39.

of the statements did not overcome this presumption. The court said:

> When Agent May approached Garza and said that McLaughlin could benefit by talking to the FBI, McLaughlin was sitting on Garza's porch and heard this proposition. Agent May informed McLaughlin that he could either be charged or cooperate and possibly not be charged when the two met. McLaughlin was also told that he was considered a lesser target of the investigation compared to Ochoa and Strange. Agent May's presentation gave McLaughlin a strong incentive to curry favor with the FBI by falsely implicating his two co-conspirators so that he would not be charged. . . . Similarly, McLaughlin's story spread the blame to the other participants in the conspiracy and particularly Ochoa, whom McLaughlin claims came up with the idea of engaging in insurance fraud. . . . Agent May also informed McLaughlin of all the facts as May knew them before asking McLaughlin to tell his story. This gave McLaughlin an opportunity to prevaricate by confirming possibly false parts of Agent May's story and then shaping his own statements into what May wanted to hear rather than what really happened.[78]

United States v. Castelan

United States v. Castelan[79] is another case where an appellate court found error in the admission of statements against interest made by an accomplice to the police after being arrested. The evidence showed that Castelan was involved in a conspiracy to distribute cocaine. An accomplice, named Olivares, negotiated two sales of cocaine with an undercover police officer. Each time, Olivares contacted Castelan and Castelan got the cocaine from a third party. On one occasion, Olivares delivered the cocaine to the undercover agent; on the other occasion Castelan delivered it.[80]

After Olivares was arrested, he implicated the others during an interview with the police. In the interview, Olivares specifically asked what the DEA could do to help him. Olivares eventually entered into a plea agreement and agreed to testify against Castelan. When Olivares refused to testify against Castelan, the government offered Olivares' post-arrest interview by a DEA agent as a statement against penal interest.[81]

On appeal, Castelan claimed his right to confront Olivares was violated. Castelan argued that Olivares' statements were unreliable because they were made under the same conditions the statements in *Lilly* were made. Olivares spoke to the police in a custodial interview. Moreover, he asked what benefit he could receive for his cooperation.[82] The government tried to distinguish *Lilly* by arguing that Olivares did not shift blame from himself or minimize his role in the drug transactions.[83] The Seventh Circuit noted that "[o]ne of the most effective ways to lie is to mix falsehood with truth, especially truth that seems persuasive because it is self-inculpatory."[84] The court did not accept the government's argument because "the non self-inculpatory parts of a confession do not become more credible simple because the declarant inculpates himself as well.[85] The court concluded admission of the hearsay statements violated the Confrontation Clause, but the court held that the error was harmless beyond a reasonable doubt.[86]

The common denominator to all of these cases is that the hearsay offered as statements against interest were made to the police. Each of these courts interpreted *Lilly v. Virginia* to mean that statements against penal interest do not fall within a firmly rooted hearsay exception. When applying the residual trustworthiness test, each of these courts found that the admitted statements against interest were not sufficiently reliable to satisfy the evidentiary rule, the Confrontation Clause, or both. The dynamics of the custodial interview create an incentive for the declarant to shift some or all of the blame to others, and

77. *Id.* at 637-38.

78. *Id.* at 638 (citations omitted).

79. 219 F.3d 690 (7th Cir. 2000).

80. *Id.* at 692-93.

81. *Id.* at 693-94.

82. *Id.* at 695.

83. *Id.* This argument was successful at the trial level. *Id.*

84. *Id.* at 696 (citing Lilly v. Virginia, 527 U.S. 116, 133 (1999)).

85. *Id.* at 695-96.

86. *Id.* at 697-98.

courts have historically been very suspicious of these types of statements. These results are consistent with the plurality opinion in *Lilly*. Since the statements in these cases were made to the police, Justices Scalia and Thomas would find their admission violated the Confrontation Clause. At a minimum, six justices of the Supreme Court likely would find a violation of the Confrontation Clause if they reviewed these cases.

Cases Distinguishing *Lilly v. Virginia*

If a declarant makes statements against penal interest to someone other than the police the dynamics change dramatically. The declarant may no longer have an incentive to try to curry favor to obtain leniency. This year's cases show that statements against penal interest made to family members or friends are sufficiently reliable to satisfy the Confrontation Clause and the evidentiary rule.

Courts have distinguished *Lilly* in another way as well. In two cases, the Second Circuit Court of Appeals approved of using plea allocutions of one coconspirator against another coconspirator for the limited purpose of proving the existence of a conspiracy if the plea allocution is properly redacted to omit any statements where the declarant shifts blame toward the defendant. Courts have held that the elimination of the blame-shifting statements and a limiting instruction are enough to protect the defendant's Confrontation rights.

United States v. Tocco

In *United States v. Tocco*,[87] the defendant was convicted of conspiracy in violation of the Racketeer Influenced and Corrupt Organization Act[88] and the Hobbs Act.[89] The government believed Tocco was the boss of the Detroit mafia family.[90]

At trial, Angelo Polizzi testified against Tocco. Polizzi testified about statements that his father, Michael Polizzi, made to him. Among other things, Angelo Polizzi testified his father told him that Tocco had been the leader of the Cosa Nostra organization[91] in Detroit since 1979. Michael Polizzi also identified other members of the charged conspiracies and told his son of his own involvement in the charged offenses. Michael Polizzi had been convicted for his part in the conspiracies and died shortly before Tocco's trial. The trial court allowed the statements made by Michael Polizzi as statements against his penal interest.[92]

The Sixth Circuit Court of Appeals considered whether Michael Polizzi's statements qualified as statements against penal interest under FRE 804(b)(3). After concluding they did, the court focused on an issue that the appellant did not raise: whether admission of these statements violated the Confrontation Clause.[93] The court distinguished *Lilly* and held admission of the statements did not violate the Confrontation Clause:

> We find that the circumstances surrounding Polizzi's statements in this case indicate that the statements were trustworthy, particularly in light of the fact that Polizzi's statements were made to his son in confidence, rather than to the police or to any other authority for the purpose of shifting blame to Tocco.[94]

The fact that the government was not involved in the making of the statement enhanced the statements' reliability.

The Sixth Circuit rejected this and numerous other issues raised by Tocco on appeal. However, the court did remand the case for the trial court to resentence Tocco because of violations of the federal sentencing guidelines.

United States v. Boone

In *United States v. Boone*,[95] the Ninth Circuit Court of Appeals upheld the admission of statements against penal interest where the declarant made the statements to his girlfriend. Tarchanda Cunningham was arrested and charged with conspiracy to commit robbery. Shortly after being arrested, she began cooperating with the authorities. Over a six-month period, Cunningham surreptitiously recorded several conversations with her boyfriend, Lamar Williams. In these conversations,

87. 200 F.3d 401 (6th Cir. 2000).

88. 18 U.S.C. § 1962 (2000).

89. *Id.* § 1951.

90. *Tocco*, 200 F.3d at 410.

91. The "Cosa Nostra" is commonly known as "the Mafia." *Id.* at 410.

92. *Id.* at 414-15.

93. *Id.* at 415-16.

94. *Id.* at 416.

95. 229 F.3d 1231 (9th Cir. 2000).

Williams implicated himself and Boone in several crimes, including the robbery of a rug store in Carmel, California. Because Williams was still at large, the government offered the statements by Williams to Cunningham as statements against Williams' penal interest. The jury convicted Boone of conspiracy to commit robbery, robbery, and use of a firearm during a crime of violence.[96]

Distinguishing *Lilly*, the court found that admission of these statements did not violate the Confrontation Clause, stating:

> *Lilly* dealt with a confession obtained by police during an in-custody interrogation. . . . Here, 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' 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 the blame.[97]

The court cited *Tocco*, and noted that its decision and *Tocco* was consistent with the view expressed by the three concurring justices in *Lilly v. Virginia*: "[Chief Justice Rehnquist] noted that prior Supreme Court case law had '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."[98]

United States v. Shea

In *United States v. Shea*,[99] the First Circuit Court of Appeals faced a much more complex factual situation. The government, in a joint trial, offered statements made to conspiring friends of the declarant against one defendant as an admission of a party opponent,[100] and as statements against penal interest against the other defendants. The court had to decide whether these statements violated the confrontation rights of the defendants that were not the declarant.

Shea and four co-defendants were convicted of numerous offenses relating to a conspiracy to rob armored cars from 1990 to 1996.[101] The government called as a witness a long time friend of two of the defendants. The witness had been recruited into the conspiracy in 1994 and was an acquaintance of all the defendants. This witness's testimony described the defendants' conduct during several offenses, their techniques, and admissions made by several defendants. The government also called several other witnesses that related admissions made by individual defendants to the charged offenses.[102]

The out-of-court statements made by individual defendants to the friends and associates that later testified at trial were offered as admissions of a party opponent. However, these statements were hearsay as to the other defendants unless they qualified as statements by a coconspirator or as statements against penal interest. Four defendants challenged admitted hearsay statements on evidentiary and constitutional grounds.[103]

The First Circuit found no evidentiary error, but considered whether the Supreme Court's decision in *Lilly* changed the constitutional analysis.[104] The court did not decide whether statements against penal interest fell within a firmly rooted hearsay exception after *Lilly.* The court noted that the trial judge admitted the statements as firmly rooted hearsay and, alternatively, found the statements passed the residual trustworthiness test.[105] The court distinguished *Shea* from *Lilly*, stating:

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96. *Id.* at 1232-33.

97. *Id.* at 1234 (citations omitted) (emphasis in original).

98. *Id.* at 1234 n.4 (citing United States v. Lilly, 527 U.S. 116, 147 (1999)).

99. 211 F.3d 658 (1st Cir. 2000). This case is the combined appeal of five co-defendants.

100. FED. R. EVID. 801(d).

101. *Shea*, 211 F.3d at 663.

102. *Id.* at 664.

103. *Id.* at 668.

104. Prior to *Shea*, the First Circuit had considered statements against penal interest to be a firmly rooted hearsay exception. *See* United States v. Saccoccia, 58 F.3d 754, 779 (1st Cir. 1995); *see also* United States v. Barone, 114 F.3d 1284 (1st Cir. 1997).

105. *Shea*, 211 F.3d at 669.

> *Lilly* disallowed the out-of-court statement of the defendant's brother who, under police questioning, conceded that he was involved in a shooting but identified the defendant as the triggerman; the court reasoned that the statement did not fall within a "firmly rooted" exception to the hearsay rule and thus failed under the Confrontation Clause. . . . *Lilly's* main concern was with statements in which, as is common in police-station confessions, the declarant admits only what the authorities are already capable of proving against him and seeks to shift the principal blame to another (against whom the prosecutor then offers the statement at trial). . . . 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 the police, and were not of the "blame shifting" variety.[106]

The fact that these statements were not made to the police and did not try to shift the blame to others changed the truth-telling dynamics considerably.

United States v. Papajohn

In *United States v. Papajohn*,[107] the Eighth Circuit Court of Appeals limited the impact of *Lilly* by distinguishing the facts and circumstances surrounding the making of the hearsay statements at issue in the case. Catherine Papajohn and her husband, Donald Lee Earles, were convicted of conspiring to burn down their convenience store in order to collect the insurance proceeds. They were also convicted of arson.[108]

At trial, Mr. Earles' son, Donald Scott Earles (Donnie), refused to testify. The trial judge allowed the government to read to the jury portions of Donnie's grand jury testimony. Although the court recognized that the grand jury testimony was not former testimony, the trial judge found it was residual hearsay.[109] Donnie testified before the grand jury three times. At his first grand jury appearance, Donnie testified that he did not know who burned down the convenience store. At his second appearance, Donnie testified that Ms. Papajohn and his father conspired to burn down the store to get the insurance money. At his third appearance, Donnie invoked his privilege against self-incrimination.[110] The jury convicted both defendants, but the trial court granted a judgment of acquittal. The government appealed, and the Eighth Circuit reinstated the convictions.[111]

The Eighth Circuit upheld the admission of Donnie's grand jury testimony as residual hearsay in the government's appeal of the judgment of acquittal.[112] Since the appeal was decided before the Supreme Court's decision in *Lilly v. Virginia*, Ms. Papajohn claimed that *Lilly* invalidated the court's decision.

The Eight Circuit distinguished Ms. Papajohn's case from *Lilly.* First, the court noted that Donnie was not an accomplice or charged with an offense at the time of his testimony. This is a distinction with little merit. If Donnie had set the fire by himself, he would have the same incentive to shift blame as he would if he were an accomplice. The court noted this weakness but tried to minimize it.[113] The only way the court could distinguish *Lilly* was to ignore totally the evidence that Donnie admitted to starting the fire.[114]

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106. *Id.* (citations omitted).

107. 212 F.3d 1112 (8th Cir. 2000).

108. *Id.* at 1115-16.

109. United States v. Earles, 113 F.3d 796, 799-800 (8th Cir. 1997).

110. *Papajohn*, 212 F. 3d at 1116.

111. *Id.* After the court reinstated the convictions, Donnie made a sworn statement that he did not know who was responsible for the fire and recanted his grand jury testimony inculpating his father and Ms. Papajohn. Moreover, the attorneys for Mr. Earles and Ms. Papajohn claimed that Donnie confessed to them that he had started the fire. *Id.*

112. *Id.* at 1118-19. *See Earles*, 113 F.3d at 799-801.

113. The court stated:

> We recognize that although Donnie was not charged with a crime at the time he made the statements, he might still have had some incentive to blame Ms. Papajohn and Mr. Earles, so that he would not later be charged with arson. It seems to us, however, that it can almost always be said that a statement made by a declarant that incriminates another person in a crime will make it less likely that the declarant will be charged for that crime. The extent to which this fact renders the declarant's statement untrustworthy is a matter of degree, and we think that it has not been shown that the clear incentive for the accomplice in *Lilly* is present here.

Papajohn, 212 F.3d at 1119.

The court was on more solid footing when it pointed out other differences between Donnie's testimony and the hearsay statements in *Lilly.* In *Lilly*, "the statements were made in response to leading police questions, asked during a custodial interrogation that took place very late at night, shortly after his arrest."[115] Donnie's statements were given under oath during a formal grand jury proceeding. Donnie was not charged with a crime, and was not in police custody at the time of his testimony. He answered open-ended questions with lengthy narrative answers. These differences convinced the court that Donnie's statements were sufficiently reliable, *Lilly* notwithstanding.

Although *Papajohn* is not a case about statements against penal interest, it does stand for the proposition that statements made to someone other than the police may be sufficiently reliable to satisfy the Confrontation Clause. Ms. Papajohn argued that the plurality's rationale of *Lilly*—that accomplice statements to police are unreliable because of the incentive to shift the blame—applied with equal force to Donnie's grand jury testimony.[116] The court rejected this argument because Donnie's statements were not made to police during a custodial interview. The Eighth Circuit concluded that this difference sufficiently distinguished the case from *Lilly.*

United States v. Petrillo

In *United States v. Petrillo,*[117] the Second Circuit Court of Appeals considered whether the admission of a co-conspirator's guilty plea allocution as a statement against penal interest violated the Confrontation Clause. Gerald Petrillo was convicted of mail fraud, conspiracy to defraud the Internal Revenue Service, filing false tax returns, and evading taxes.[118] To prove the conspiracy, the government offered the negotiated plea allocution of two co-defendants.[119] The plea allocutions were redacted so that they did not inculpate Petrillo. On appeal, Petrillo argued that the admission of the plea allocutions violated the Confrontation Clause.

After considering the facts and circumstances surrounding the making of the statement, the court concluded that the plea allocutions passed the residual trustworthiness test. Petrillo argued that the disparity in bargaining power between the government and a defendant makes a guilty plea allocution inherently untrustworthy. In addition, Petrillo argued that the two declarants had a motive to provide the government with evidence inculpating Petrillo because they were simultaneously negotiating a plea agreement for other charges.[120]

The court recognized that pretrial negotiations have the potential for coercion or misrepresentation, but the court concluded that the trial court did not abuse its discretion in admitting the plea allocutions.[121] The court was convinced that the statements were sufficiently reliable to satisfy the Confrontation Clause because the statements "were made in open court, under oath, before the sentencing judge, following extensive pre-trial proceedings, with the assistance of counsel, and against the declarant's penal interests."[122]

The court cited to another recent decision by the Second Circuit, *United States v. Moskowitz.*[123] In *Moskowitz*, the court considered whether a redacted plea allocution was admissible under FRE 804(b)(3). The Second Circuit noted:

> Given that the allocution was clearly against [the declarant's] interest, that the only blame-shifting portion of the allocution was redacted, and that the court gave a limiting instructions that we must presume the jury followed . . . the admission of [the declarant's] plea allocution under Rule 804(b)(3) was within the district court's discretion. . . . Although we have declined to decide whether a declaration against interest admitted under Rule 804(b)(3) is a firmly rooted exception to the hearsay rule, we have found particularized guarantees of trustworthiness where, inter alia, (1) the plea allocution undeniably subjected [the defendant] to

114. *See supra* note 110 (noting that some claim Donnie admitted starting the fire).

115. *Id.*

116. *Papajohn*, 212 F.3d at 1119.

117. 237 F.3d 119 (2d Cir. 2000).

118. *Id.* at 121.

119. *Id.* at 122.

120. *Id.*

121. *Id.* at 122-23.

122. *Id.* at 123.

123. 215 F.3d 265 (2d Cir. 2000).

> the risk of a lengthy term of imprisonment, even if it was also made in the hope of obtaining a more lenient sentence; (2) the allocution was given under oath; and (3) the district court instructed the jurors that they could consider [the defendant's] allocution only as evidence that a conspiracy existed and not as direct evidence that defendants were members of that alleged conspiracy or that they were otherwise guilty of the crimes charged against them.[124]

In both cases, the Second Circuit approved of admitting the redacted plea allocutions for this limited purpose.

Conclusion

This year's cases clearly make a distinction between statements against interest made to police during a custodial interview and statements against interest made to family members or friends. Finding error in the admission of statements made to the police during a custodial interview is consistent with the opinions of at least six justices of the *Lilly* court. Allowing statements made to family members or friends is consistent with the opinions of at least five members of the *Lilly* court. How the Court would rule on the admission of grand jury testimony and guilty plea allocutions is harder to predict. On one hand, they are statements produced by government actors and are formalized testimonial materials that resemble statements given under conditions that implicate the core concerns of the ancient ex parte affidavit practice. On the other hand, guilty plea allocutions and grand jury testimony are not statements taken by the police and are subject to the penalties for perjury. The admissibility of guilty plea allocutions and grand jury testimony will be decided using the residual trustworthiness test on a case by case basis, and the redaction of parts of the testimony that shifts blame will be an important factor.

Trial practitioners can make two generalizations about the impact of *Lilly v. Virginia*. First, if the proffered statement against penal interest was made to the police, it is unlikely the statement will be admissible. Second, if the proffered statement against penal interest was made to a family member or friend, the statement is much more likely to be reliable enough to satisfy the Confrontation Clause.

124. *Id.* at 269 (citing United States v. Gallego, 191 F.3d 156, 167 (2d Cir. 1999)) (internal alterations and quotation marks omitted). In *Petrillo*, the court noted that the third factor is unrelated to the trustworthiness of the statement. However, the court believed that limiting instructions further protect a defendant's rights under the Confrontation Clause. *Petrillo*, 237 F.3d at 123 n.1. In both cases the limiting instruction was given.