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SUPREME COURT OF THE UNITED STATES

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LILLY v. VIRGINIA

CERTIORARI TO THE SUPREME COURT OF VIRGINIA

No. 98–5881. Argued March 29, 1999— Decided June 10, 1999

Petitioner, his brother Mark, and Gary Barker were arrested at the end of a 2-day crime spree, during which they, *inter alia*, stole liquor and guns and abducted Alex DeFilippis, who was later shot and killed. Under police questioning, Mark admitted stealing alcoholic beverages, but claimed that petitioner and Barker stole the guns and that petitioner shot DeFilippis. When Virginia called Mark as a witness at petitioner's subsequent criminal trial, Mark invoked his Fifth Amendment privilege against self-incrimination. The trial court then admitted his statements to the police as declarations of an unavailable witness against penal interest, overruling petitioner's objections that the statements were not against Mark's penal interest because they shifted responsibility for the crimes to Barker and petitioner, and that their admission would violate the Sixth Amendment's Confrontation Clause. Petitioner was convicted of the DeFilippis murder and other crimes. In affirming, the Virginia Supreme Court found that the Confrontation Clause was satisfied because Mark's statements fell within a firmly rooted exception to the hearsay rule. The court also held that the statements were reliable because Mark knew that he was implicating himself as a participant in numerous crimes and because the statements were independently corroborated by other evidence at trial.

Held: The judgment is reversed, and the case is remanded.

255 Va. 558, 499 S. E. 2d 522, reversed and remanded.

JUSTICE STEVENS, delivered the opinion of the Court with respect to Parts I, II, and VI, concluding:

1. This Court has jurisdiction over petitioner's Confrontation Clause claim. He expressly argued the claim in his opening brief to the Virginia Supreme Court; and his arguments based on *Williamson v. United States*, 512 U. S. 594, and the Confrontation Clause opinion

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of *Lee v. Illinois*, 476 U. S. 530, in responding to the Commonwealth’s position, sufficed to raise the issue in that court. P. 4.

2. The admission of Mark’s untested confession violated petitioner’s Confrontation Clause rights. Adhering to this Court’s general custom of allowing state courts initially to assess the effect of erroneously admitted evidence in light of substantive state criminal law, the Virginia courts are to consider in the first instance whether this Sixth Amendment violation was “harmless beyond a reasonable doubt.” *Chapman v. California*, 386 U. S. 18, 24. P. 21.

JUSTICE STEVENS, joined by JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER, concluded in Parts III, IV, and V that Mark’s hearsay statements do not meet the requirements for admission set forth in *Ohio v. Roberts*, 448 U. S. 56, 66. Pp. 4–21.

(a) The Confrontation Clause ensures the reliability of evidence against a defendant by subjecting it to rigorous testing in an adversary proceeding, *Maryland v. Craig*, 497 U. S. 836, 845, as by cross-examination of a declarant, see *California v. Green*, 399 U. S. 149, 158. Hearsay statements are sufficiently dependable to allow their untested admission against an accused only when (1) the statements fall “within a firmly rooted hearsay exception” or (2) they contain “particularized guarantees of trustworthiness” such that adversarial testing would be expected to add little, if anything, to their reliability. *Roberts*, 448 U. S., at 66. Pp. 4–6.

(b) Statements are admissible under a “firmly rooted” hearsay exception when they fall within a hearsay category 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 a trial. *Mattox v. United States*, 156 U. S. 237, 244. The simple categorization of a statement as “against penal interest” defines too large a class for meaningful Confrontation Clause review. Such statements are offered into evidence (1) as voluntary admissions against the declarant; (2) as exculpatory evidence offered by a defendant who claims that the declarant committed, or was involved in, the offense; and (3) as evidence offered by the prosecution to establish the guilt of an alleged accomplice of the declarant. The third category, which includes statements such as Mark’s, encompasses statements that are presumptively unreliable, *Lee*, 476 U. S., at 541, even when the accomplice incriminates himself together with the defendant. Accomplice statements that shift or spread blame to a criminal defendant, therefore, fall outside the realm of those “hearsay exception[s] [that are] so trustworthy that adversarial testing can be expected to add little to [the statements] reliability.” *White v. Illinois*, 502 U. S. 346, 357. Such statements are not within a firmly rooted exception to the hearsay rule. Pp. 6–16.

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(c) The Commonwealth contends that this Court should defer to the Virginia Supreme Court's additional determination that Mark's statements were reliable and that the indicia of reliability the court found, coupled with the actions of police during Mark's interrogation, demonstrate that the circumstances surrounding his statements bore "particularized guarantees of trustworthiness," *Roberts*, 448 U. S., at 66, sufficient to satisfy the Confrontation Clause's residual admissibility test. Nothing in this Court's prior opinions, however, suggests that appellate courts should defer to lower court determinations regarding mixed questions of constitutional law such as whether a hearsay statement has sufficient guarantees of trustworthiness. See *Ornelas v. United States*, 517 U. S. 690, 697. Thus, courts should independently review whether the government's proffered guarantees of trustworthiness satisfy the Clause. Here, the Commonwealth's asserted trustworthiness guarantees are unconvincing. Mark was in custody for his involvement in, and knowledge of, serious crimes. He made his statements under governmental authorities' supervision, and was primarily responding to the officers' leading questions. He also had a natural motive to attempt to exculpate himself and was under the influence of alcohol during the interrogation. Each of these factors militates against finding that his statements were so inherently reliable that cross-examination would have been superfluous. Pp. 16–21.

JUSTICE SCALIA concluded that introducing Mark Lilly's tape-recorded statements to police at trial without making him available for cross-examination is a paradigmatic Confrontation Clause violation. Since the violation is clear, the case need be remanded only for a harmless-error determination. P. 1.

JUSTICE THOMAS, while adhering to his view that the Confrontation Clause extends to any witness who actually testifies at trial and is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial material, such as affidavits, depositions, prior testimony, or confessions, *White v. Illinois*, 502 U. S. 346, 365, agrees with THE CHIEF JUSTICE that the Clause does not impose a blanket ban on the use of accomplice statements that incriminate a defendant and that, since the lower courts did not analyze the confession under the second prong of the *Roberts* inquiry, the plurality should not address that issue here. P. 1.

THE CHIEF JUSTICE, joined by JUSTICE O'CONNOR and JUSTICE KENNEDY, concluded:

1. Mark Lilly's confession incriminating petitioner does not satisfy a firmly rooted hearsay exception because the statements in his 50-page confession which are against his penal interest are quite sepa-

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rate from the statements exculpating him and inculcating petitioner, which are not in the least against his penal interest. This 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. Not only were the confession's incriminating portions not a declaration against penal interest, but these statements were 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 exonerate himself. *Lee v. Illinois*, 476 U. S. 530, 541. A blanket ban on the government's use of accomplice statements that incriminate a defendant sweeps beyond this case's facts and this Court's precedents. Pp. 1–5.

2. The Virginia Supreme Court did not analyze the confession under the second prong of the *Ohio v. Roberts*, 448 U. S. 56, inquiry, so the case should be remanded for the Commonwealth to demonstrate that the confession bears “particularized guarantees of trustworthiness” and, if any error is found, to determine whether that error is harmless. Pp. 5–7.

STEVENS, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and VI, in which SCALIA, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined, the opinion of the Court with respect to Part II, in which SCALIA, SOUTER, GINSBURG, and BREYER, JJ., joined, and an opinion with respect to Parts III, IV, and V, in which SOUTER, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a concurring opinion. SCALIA, J., and THOMAS, J., filed opinions concurring in part and concurring in the judgment. REHNQUIST, C. J., filed an opinion concurring in the judgment, in which O'CONNOR and KENNEDY, JJ., joined.