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## ***Lilly v. Virginia*: A Chance To Reconceptualize The Confrontation Right**

**by Richard D. Friedman**

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In *Lilly v. Virginia*, the Supreme Court once again has the opportunity to grapple with the meaning of the Confrontation Clause of the Sixth Amendment. The basic facts of *Lilly* are simple, for they present the age-old problem of accomplice confessions. Three men, Gary Barker and Ben and Mark Lilly, went on a crime spree, during which one of them shot to death a young man they had robbed and kidnaped. Ben Lilly was charged with being the triggerman, and Barker testified to that effect at Ben's trial. Mark did not testify. But Mark had made a statement to the police shortly after the trio was apprehended, and he also identified his brother Ben as the triggerman. Mark's statement was introduced over Ben's objection. Ben was convicted. The Virginia Supreme Court upheld the conviction, treating Mark's statement as a declaration against penal interest, 499 S.E.2d 522 (1998), and the U.S. Supreme Court granted certiorari. The case was argued on March 29, 1999.

If the Court decides to treat the case within the framework it has attempted to set up for Confrontation cases, it would ask whether Mark's statement fit within a firmly rooted hearsay exception. (It seems fairly clear that Mark has been treated as being unavailable; whether either party could have induced him to testify raises interesting questions that

the Court will probably not touch.) There seems to be little doubt that the hearsay exception for declarations against interest is firmly rooted, and the Virginia courts did bring the statement within their version of the exception. Moreover, by virtue of the broad adoption of codifications based on the Federal Rules of Evidence, most American jurisdictions now treat declarations against penal interest as within the exception. But, as Lilly argues, most American jurisdictions refuse to use this line of reasoning to admit accomplice confessions. Indeed, in *Williamson v. United States*, 512 U.S. 594 (1994), in a relatively narrow reading of the exception for declarations against penal interest, refused to apply the exception to nonself-inculpatory statements, even if they are made within broader narrative that is generally self-inculpatory; it would not be surprising if the Court constitutionalizes that rule, and holds that Mark's statement identifying Ben as the triggerman was not against interest. But a sound framework for such a decision is difficult to articulate: Are the Supreme Court's interpretations of the Federal Rules now to be the determinant of what is "firmly rooted," and so of what the Confrontation Clause will tolerate? Or, by contrast, should a state be allowed to satisfy the Clause simply by putting a plausible tag of some well recognized exception on a statement? Alternatively, the Court could follow the bare majority in *Lee v. Illinois*, 476 U.S. 530 (1986), and hold that simply treating the statement as a declaration against penal interest "defines too large a class for meaningful Confrontation Clause analysis". But if the statement should be treated in terms of a subcategory, "as involving a confession by an accomplice which incriminates a criminal defendant," then what becomes of the idea that falling within a firmly rooted hearsay exception is enough to take a statement out of the Confrontation bar?

In my view, the problem is that the Court has defined the confrontation right in terms of, and so made it dependent upon, ordinary hearsay law. The Court should attempt to define the right in terms independent of hearsay law. In an amicus brief filed on behalf of the American Civil Liberties Union (and available through [www.aclu.org](http://www.aclu.org)), Margaret Berger and I have offered some approaches by which this could be done. The brief got some apparently favorable attention at oral argument, both from the bench and from Lilly's counsel. We will soon see whether the Court is yet willing to acknowledge that its Confrontation Clause decisions, by confounding a fundamental right that reached full flower in the Anglo-American legal system with the bog of hearsay law, have given little guidance to lower courts or protection to defendants, and have retarded the liberalization of hearsay law in civil cases and other situations where the confrontation right is not at stake.

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