Accomplice Confessions and the Confrontation Clause: Crawford v. Washington Confronts Past Issues with a New Rule

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Imagine being tried, convicted, and sentenced to prison, or even death, for a serious crime without the opportunity to cross-examine the prosecution's chief witness in order to test the accuracy of his accusations. This situation has occurred often in criminal prosecutions and is demonstrated by the following hypothetical. Alan and Dan want to collect on considerable debts that their long-time acquaintance Victor allegedly owes them. The pair plans to go to Victor's apartment to see if they can "talk" Victor into repaying the debt soon. Dan does not know where Victor lives, so Alan agrees to take Dan to Victor's apartment for the purpose of this "talk." While at Victor's apartment a verbal altercation between Dan and Victor quickly ensues. Dan suddenly pulls a knife from his pocket and fatally plunges it into Victor's chest. Dan and Alan flee Victor's apartment and remain at Alan's home until the police later apprehend them. Alan and Dan are arrested and taken to the station.

After waiving their *Miranda* rights, each separately agrees to give a tape-recorded statement to the police. As the police interrogate him, Dan tells police that he thought he saw Victor pull something from his pocket and hold it in his hand when Dan stabbed Victor. Alan, by contrast, tells police Victor had his empty hands splayed open as he was stabbed, but that Victor may have reached into his pocket just after he was stabbed.

The state charges Dan with murder and charges Alan as an accomplice. Dan is tried separately from Alan. At trial, the prosecution presents Dan's tape-recorded confession. When the prosecution calls Alan, he invokes his Fifth Amendment privilege against self-incrimination, rendering him unavailable for examination. In lieu of his testimony, the state plays Alan's tape-recorded confession from the police station. The trial judge admits this evidence over a hearsay objection because Alan's statements regarding
Victor’s murder, having been made by an accomplice to the crime, are against Alan’s penal interest—one of the state’s exceptions to the hearsay rule. As a result, the jury disbelieves Dan’s self-defense claim and convicts him of the murder.

On appeal, Dan claims Alan’s tape-recorded confession violated Dan’s right to cross-examine Alan and test the accuracy of his statements, as guaranteed by the Sixth Amendment’s Confrontation Clause. Relying on nearly a quarter century of Confrontation Clause precedent, the state supreme court upholds the conviction, reasoning that Alan’s confession is sufficiently reliable to satisfy the Confrontation Clause.

The admissibility of out-of-court accomplice confessions, like Alan’s, has been a volatile issue in American jurisprudence. The issue is one of great significance in criminal prosecutions because in many cases the accomplice confession—which accuses the defendant and exonerates the accomplice of the “worst part of their joint crimes”—is critical evidence for the prosecution. This crucial prosecution evidence often leads to convictions of these defendants and the imposition of death sentences. For these types of cases, where the prosecution needs “all admissible evidence” and the defendant needs “every constitutional protection,” the nation’s courts require clear guidance from the United States Supreme Court on whether and when the United States Constitution sanctions the use of out-of-court accomplice confessions against a criminal defendant.

Following a line of somewhat unclear confrontation precedent, the United States Supreme Court once again tackled Confrontation Clause issues in *Crawford v. Washington*. The issue before the Court was whether an out-of-court accomplice confession inculpating the defendant is admissible under the Confrontation Clause on the basis that it overlaps (i.e. interlocks) with the defendant’s confession. On a broader level, the Court addressed whether it should overhaul its current framework for analyzing the admissibility of extra-judicial statements (i.e. hearsay) under the Confrontation Clause. In a landmark decision, the Court sidestepped the first issue and rested its decision on the latter issue, over-turning decades of its own precedent to lay down a new Confrontation Clause framework.

2. Id.
3. See id.
5. Id. at 1358-59.
6. Id.
7. See id. at 1370 (abrogating the Confrontation Clause framework that the Court established in 1980).
Part II of this comment discusses the historical background of the Court's Confrontation Clause jurisprudence and hearsay law, especially in relation to the admissibility of accomplice confessions against the criminal defendant. Part III illustrates the Court's struggle with the admissibility of accomplice confessions through a discussion of how the Court grappled with the issues of interlocking confessions and the "against penal interest" exception to the hearsay rule. Part IV summarizes the state of the Court's confrontation doctrine prior to Crawford and presents the main criticisms of the doctrine. Part V outlines the background of Crawford v. Washington and analyzes the opinions of the Court. Part VI concludes with an examination of Crawford's impact on criminal prosecutions and the admissibility of accomplice confessions.

II. HISTORICAL BACKGROUND OF THE CONFRONTATION CLAUSE AND ACCOMPLICE CONFESSIONS

The Sixth Amendment of the United States Constitution provides that "the accused shall enjoy the right... to be confronted with the witnesses against him." A criminal defendant's right to confront and question his accusers face-to-face has "a lineage that traces back to the beginnings of Western legal culture." This common law right has roots in the laws of the ancient Hebrews and Romans, both of which recognized the value of ensuring a defendant's right to confront his accusers. Today, the right of confrontation generally involves a criminal defendant's right to cross-examine those witnesses face-to-face while they are under oath and present at trial.

"[T]he particular vice that gave impetus to the confrontation claim" was the English legal system's practice during the sixteenth and seventeenth centuries of trying criminal defendants on evidence that "consisted solely of ex parte affidavits or depositions." In lieu of live witnesses, the prosecution's "evidence" consisted of out-of-court testimonial materials, such as "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."

8. U.S. CONST. amend. VI.
10. See id.; see also Richard D. Friedman & Bridget McCormack, Dial-In Testimony, 150 U. Pa. L. REV. 1171, 1202 (2002) (citing Deuteronomy 19:15-18 (establishing that both accuser and accused must appear before the judge) and Acts 25:16 (explaining that Roman law provided an opportunity for prisoners to defend themselves face to face with their accusers)).
11. See Pointer v. Texas, 380 U.S. 400, 403-04 (1965). Thus, Confrontation Clause violations may occur when the prosecution introduces statements by a witness who does not testify at all at trial, or when the defendant's cross-examination of a witness is significantly restricted. See Chambers v. Mississippi, 410 U.S. 284, 295 (1973).
13. Id. at 157 (citing SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 326 (1883)) (internal quotation marks omitted); Sarah D. Heisler, My Brother, My Witness Against Me: The Constitutionality of the "Against Penal Interest" Hearsay Exception in Confrontation Clause Analysis, 90 J. CRIM. L. & CRIMINOLOGY 827, 828 (2000).
The notorious trial of Sir Walter Raleigh illustrates the problems with this practice, particularly with its relevance to admitting non-testifying accomplice statements against the defendant.\textsuperscript{14} In Raleigh’s trial for high treason, a confession letter written by Raleigh’s co-conspirator Lord Cobham, which implicated both himself and Raleigh in the treason plot, was introduced as crucial evidence to convict Raleigh.\textsuperscript{15} Despite Raleigh’s protests to be confronted with his accuser, whom he believed would now testify in his favor, Lord Cobham was prevented from testifying according to English law.\textsuperscript{16} Even though Raleigh was denied an opportunity to confront Lord Cobham in court, the confession letter was deemed sufficiently reliable evidence because the confession was self-inculpatory, voluntary, and consistent with parts of Raleigh’s pre-trial statements.\textsuperscript{17}

The decision of the Framers of the United States Constitution to include the right of confrontation in the Sixth Amendment can be traced to the common law’s hardening against the abuses exemplified in Raleigh’s trial.\textsuperscript{18} At the core of this confrontation right was the defendant’s opportunity for adversarial testing of the evidence against him—to cross-examine his accuser in order to test his knowledge, memory, and sincerity, under oath and in front of the jury or judge.\textsuperscript{19}

\textbf{A. The Development of Hearsay Law}

The Sixth Amendment right to confront witnesses is often implicated when the prosecution seeks to introduce statements made by witnesses (declarants) outside the trial setting.\textsuperscript{20} The “hearsay rule” is an evidentiary principle long applicable to both criminal and civil litigation, and it

\begin{footnotes}
\item[15] Petitioner’s Brief, supra note 14, at 13-14 (citing Trial of Sir Walter Raleigh, 2 How. St. Tr. 1, 24 (1809)).
\item[16] Id. (citation omitted); Green, 399 U.S. at 157 n.10.
\item[17] Petitioner’s Brief, supra note 14, at 14 (citation omitted).
\item[18] Green, 399 U.S. at 156-57 n.10 (citing F. Heller, The Sixth Amendment 104 (1951)); see also United States v. Inadi, 475 U.S. 387, 411 (1986) (Marshall, J., dissenting) (“The plight of Sir Walter Raleigh, condemned on the deposition of an alleged accomplice who had since recanted, may have loomed large in the eyes of those who drafted that constitutional guarantee.”).
\item[19] Mattox v. United States, 156 U.S. 237, 242-43 (1895); Heisler, supra note 13, at 828-29. The Court later reiterated these protections in greater detail, noting that confrontation:

\(1\) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; \(2\) forces the witness to submit to cross-examination, the “greatest legal engine ever invented for the discovery of truth”; \(3\) permits the jury that is to decide the defendant’s fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

\textit{Green}, 399 U.S. at 158 (citation omitted).
\item[20] See Heisler, supra note 13, at 828-29.
\end{footnotes}
generally prohibits statements made out-of-court and offered by a litigant to prove what the statement asserts.\textsuperscript{21} "The general prohibition against admitting hearsay evidence reflects concerns about the reliability of out-of-court statements not made under oath or tested by cross-examination."\textsuperscript{22} Similarly, as the Confrontation Clause doctrine developed, the Court recognized that "[t]he central concern of the Confrontation Clause 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."\textsuperscript{23} Hearsay also involves certain inherent risks: the knowledge, memory, and sincerity of the declarant regarding his out-of-court statement cannot be tested in front of the jury.\textsuperscript{24} The prohibition against hearsay at trial and the Confrontation Clause, therefore, were interpreted to protect similar values: trustworthiness of the evidence and adversarial testing of the statements and the witnesses in court.\textsuperscript{25}

The hearsay rule has been codified in the evidence laws of American jurisdictions, but there are many exceptions and hearsay is often allowed in certain circumstances where the hearsay evidence is deemed "sufficiently reliable to permit its introduction at trial. . . .\"\textsuperscript{26} The rationale behind these hearsay rule exceptions often lies in the circumstances in which an out-of-court statement is made.\textsuperscript{27} Some hearsay statements are made under circumstances that traditionally indicate that cross-examination of the declarant in court would add little or nothing to the statements' trustworthiness.\textsuperscript{28} For example, Federal Rule of Evidence (FRE) 803 includes exceptions to the hearsay rule that allow hearsay statements "regardless of whether or not the declarant is available to testify."\textsuperscript{29} In contrast, FRE 804 includes exceptions that allow hearsay only when the declarant is unavailable to testify.\textsuperscript{30} Hearsay listed under FRE 804 is


\textsuperscript{24} Aurzada, *supra* note 22, at 594 n.34 (citing 2 JOHN W. STRONG, MCCORMICK ON EVIDENCE § 245, at 93 (4th ed. 1992)); see also Williamson v. United States, 512 U.S. 594, 598 (1994) (citing the risks that declarant may lie, misperceive, misremember, or be misunderstood).

\textsuperscript{25} California v. Green, 399 U.S. 149, 156 (1970).

\textsuperscript{26} Keller, *supra* note 21, at 161. See, e.g., FED. R. EVID. 802, 803, 804.

\textsuperscript{27} See FED. R. EVID. 803, 804 advisory committee's notes (setting out the rationales for various exceptions to the hearsay rule).

\textsuperscript{28} See, e.g., FED. R. EVID. 803(2) (excited utterances made spontaneously by the declarant who is still under the stress of an exciting event); 804(b)(2) (declarations of an unavailable declarant who believes his death is imminent); 804(b)(3) (statements against the declarant's interest). See also Williamson, 512 U.S. at 598 (stating that the Federal Rules of Evidence recognize that some forms of hearsay "are less subject to these hearsay dangers"); Aurzada, *supra* note 22, at 594 (making clear that the reliable nature of some hearsay "acts as an acceptable substitute for the ordinary test of cross-examination").

\textsuperscript{29} Aurzada, *supra* note 22, at 594; see also FED. R. EVID. 803.

\textsuperscript{30} FED. R. EVID. 804; Aurzada, *supra* note 22, at 595.
considered trustworthy only when the declarant is not available to testify, and is founded upon "the policy that 'less is better than nothing' if the testimony would be otherwise inadmissible."\textsuperscript{31}

One such FRE 804 exception is a declarant's statement "against penal interest."\textsuperscript{32} For example, the FRE allows a hearsay statement made by an unavailable declarant that "at the time of its making . . . so far tended to subject the declarant to civil or criminal liability" that the declarant "would not have made the statement unless believing it to be true."\textsuperscript{33} The rationale behind this rule is that a person does not generally make statements damaging to herself unless she is convinced they are true.\textsuperscript{34} In criminal trials, this allows the prosecution to introduce as evidence against the defendant statements made by unavailable third parties.\textsuperscript{35}

The general "statement against interest" exception was recognized at common law.\textsuperscript{36} Controversy over the exception originated when the House of Lords, in the Sussex Peerage Case of 1844, ruled that "the defendant could not offer evidence of a confession to the crime made by another person who was unavailable to testify."\textsuperscript{37} United States jurisprudence followed this ruling for many years with the purpose of "preventing the admission of fabricated self-inculpatory statements made in order to exculpate the accused."\textsuperscript{38} Accordingly, the courts prohibited the admission in criminal trials of hearsay confessions made by non-defendants.\textsuperscript{39} This practice changed somewhat after Justice Holmes' dissent in \textit{Donnelly v. United States},\textsuperscript{40} wherein Justice Holmes doubted the propriety of a blanket prohibition on third-party confessions.\textsuperscript{41} Following \textit{Donnelly}, United States

\textsuperscript{31} Aurzada, \textit{supra} note 22, at 595 (citations omitted).
\textsuperscript{32} See, e.g., \textit{FED. R. EVID.} 804(b)(3) (allowing also for statements by an unavailable third party that are against that third party declarant's proprietary and pecuniary interest).
\textsuperscript{33} \textit{Id.}
\textsuperscript{34} \textit{FED. R. EVID.} 804(b)(3) advisory committee's note.
\textsuperscript{35} See \textit{FED. R. EVID.} 804(b)(3).
\textsuperscript{36} Aurzada, \textit{supra} note 22, at 595; see also 2 \textsc{John W. Strong, McCormick on Evidence} § 318, at 340 (4th ed. 1992).
\textsuperscript{37} Aurzada, \textit{supra} note 22, at 595.
\textsuperscript{38} \textit{Id.}
\textsuperscript{39} \textit{Id.}
\textsuperscript{40} See \textit{id.} (discussing \textit{Donnelly v. United States}, 228 U.S. 243, 277-78 (1913) (Holmes, J., dissenting)).
\textsuperscript{41} See \textit{id.}. As Justice Holmes stated in \textit{Donnelly}: [T]he exception to the hearsay rule in the case of declarations against interest is well known; no other statement is so much against interest as a confession of murder, it is far more calculated to convince than dying declarations, which would be let in to hang a man . . . I think we ought to give [the defendant] the benefit of a fact that, if proved, commonly would have such weight. \textit{Donnelly}, 228 U.S. at 278 (Holmes, J., dissenting) (citation omitted).
courts, along with federal and state statutes and rules, have incorporated statements against penal interest as an exception the hearsay rule.\textsuperscript{42}

Despite the establishment of the against penal interest hearsay exception, statements against interest that incriminate another person are still traditionally viewed as unreliable.\textsuperscript{43} First, the rationale that people will generally not make statements damaging to their own interests breaks down at the individual level, and it is through cross-examination of the individual declarant that the inconsistencies and oddities of his statements are tested.\textsuperscript{44} Second, in the context of long narrations, the part of the declarant’s statement that is against his interest is often collateral to the statements incriminating the defendant, which are rarely against the declarant’s interest.\textsuperscript{45} Third, often the declarant, especially one in custody, has a motive to give false statements, such as the desire to curry favor with the authorities or to shift or spread blame to others out of revenge or in hopes of leniency from the authorities.\textsuperscript{46} Consequently, because of the reliability concerns surrounding inculpatory statements against penal interest, many courts have been reluctant to admit them as exceptions to the hearsay rule.\textsuperscript{47}

In a typical criminal trial situation where the prosecution seeks to introduce hearsay statements of an unavailable declarant against a defendant, the prosecution must first establish that the proffered hearsay satisfies one of the jurisdiction’s recognized hearsay exceptions.\textsuperscript{48} Then, once the evidence is admitted under an exception, the prosecution must establish that the hearsay does not violate the Confrontation Clause.\textsuperscript{49} Concerns about the

\textsuperscript{42} Aurzada, \textit{supra} note 22, at 595 (citing \textsc{John Henry Wigmore}, \textsc{Wigmore on Evidence} § 1477, at 360 nn.6-7 (Chadbourn Rev. 1974). In 1975, Congress enacted the Federal Rules of Evidence, codifying the “against interest exception” for the Federal courts. \textit{Id.} Washington, Delaware, Louisiana, Maryland, Minnesota, Montana, Texas, and West Virginia are among the states that recognize the against penal interest exception. \textit{See\textit{,}} \textit{e.g.}, State v. Crawford, 54 P.3d 656, 662 (Wash. 2002), \textit{cert. granted}, 539 U.S. 914 (2003), \textit{rev’d by} 124 S. Ct. 1354 (2004); \textit{see also} Lilly v. Virginia, 527 U.S. 116, 133 n.4 (1999) (listing a series of cases recognizing the against penal interest exception in those states).

\textsuperscript{43} Keller, \textit{supra} note 21, at 163.

\textsuperscript{44} Id. Some people willingly make statements against their interest to protect others. Others feel that making the statement, while damaging on its face, will ultimately be helpful to them. \textit{See infra} note 46 and accompanying text. Still others are unaware that the statements they are making are damaging to their self-interests. For example, when giving statements to the police, suspects may not understand accomplice laws that place equal culpability for the crime on the accomplice and the person who actually committed the most culpable acts. This same accomplice may believe he is minimizing his culpability by revealing the complete criminal acts of his partner when in actuality the accomplice is increasing his penal liability. \textit{See infra} note 296 (noting that the accomplice would benefit by limiting the defendant’s liability in her statements to the police, but by increasing the defendant’s culpability, she potentially increased her own).

\textsuperscript{45} Keller, \textit{supra} note 21, at 163.

\textsuperscript{46} Id. at 163-64; \textit{see also} Williamson v. United States, 512 U.S. 594, 601 (1994).

\textsuperscript{47} Keller, \textit{supra} note 21, at 164; \textit{see also} Lilly, 527 U.S. at 133 n.4 (noting that some states do not recognize any against penal interest exception and other states only prohibit the admission of an accomplice confession against a criminal defendant).


\textsuperscript{49} See \textit{id.}; Idaho v. Wright, 497 U.S. 805 (1990) (holding that hearsay satisfied Idaho’s residual hearsay exception before addressing Confrontation Clause concerns); Lilly, 527 U.S. at 121-22 (noting that the defendant objected to the admission of hearsay under the against penal interest
necessity for relevant evidence must be balanced against the competing concern for reliability of the evidence and the defendant’s right to confront witnesses against him. Thus, when a hearsay statement by a third party is admitted against a criminal defendant under an against penal interest exception, the statement must carry enough reliability to satisfy not just the hearsay rule requirements but the Confrontation Clause requirements as well. With its establishment in American jurisprudence, admission of inculpatory statements under the ‘against interest’ hearsay exception would ultimately come to a complicated intersection with the Sixth Amendment’s Confrontation Clause.

B. Mattox v. United States: A First Look at Hearsay and the Confrontation Clause

As early as the nineteenth century, the United States Supreme Court recognized that the Confrontation Clause was not designed to ‘bar the admission into evidence of every relevant extrajudicial statement made by a nontestifying declarant simply because it in some way incriminate[d] the defendant.’ The Court first addressed the intersection of hearsay and the Sixth Amendment’s Confrontation Clause in Mattox v. United States. In Mattox, two witnesses who had testified against the defendant in his first trial died before his second trial, denying the defendant an opportunity to cross-examine the witnesses during the second trial. The defendant challenged the admission of the hearsay as a violation of his right to confront those witnesses at his trial. The Court recognized that, while the Confrontation Clause was primarily designed to protect criminal defendants from being tried on depositions and ex parte affidavits, in certain situations public policy and necessity for evidence in the case warranted that certain statements from unavailable witnesses should be admitted, despite the defendant’s constitutional confrontation right. The Court noted that the

exception and claimed that it violated his Confrontation Clause rights); Williamson, 512 U.S. at 605 (holding that because hearsay did not satisfy the against penal interest exception, the Confrontation Clause issue did not need to be addressed).

50. Keller, supra note 21, at 161.
51. Id. at 161-62.
52. See generally Lilly, 527 U.S. at 116.
53. 156 U.S. 237 (1895).
55. Mattox, 156 U.S. at 237; Heisler, supra note 13, at 828-29.
56. Mattox, 156 U.S. at 238.
57. Id. at 240.
58. Id. at 242-43. The Court determined that the Confrontation Clause provided the occasion: [N]ot only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.
Framers did not intend rigid construction of basic constitutional rights, but that the spirit of the Constitution incorporated exceptions recognized at common law.\footnote{Mattox, 156 U.S. at 243. For example, the admission of dying declarations had long been treated as competent evidence despite the defendant's lack of opportunity to cross-examine the declarant at trial. \textit{Id.} The rationale behind this exception was that a declarant is unlikely to tell a lie in the moments just before he meets his Maker. \textit{See 5 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 1443.}}

Moreover, the Court found that the substance of the Confrontation Clause was satisfied where a criminal defendant had already had an opportunity to cross-examine a witness at a former trial.\footnote{Mattox, 156 U.S. at 245. The previous opportunity for the defendant to cross-examine the witnesses would give reliability to the hearsay statements because the statements had already been subjected to adversarial testing. \textit{Id.; Heisler, supra note 13, at 828-29. The Court seemed to say that, in form, the presence of the prior cross-examination in the first trial satisfied the Confrontation Clause in the second trial. \textit{See Mattox, 156 U.S. at 245.}}} In so holding, the Court determined that confrontation rights did not extend so far as to allow the accused to "go scot free simply because death has closed the mouth of that witness."\footnote{Mattox, 156 U.S. at 243.} While never mentioning the term "hearsay," the \textit{Mattox} Court carved out the first hearsay exceptions to the Confrontation Clause,\footnote{Id.; see also Heisler, supra note 13, at 829; Maryland v. Craig, 497 U.S. 836 (1990) (holding that literal face-to-face confrontation with the witness may be overcome by the necessities of the case).} marking the Court's first deliberate step away from a Sixth Amendment absolute requirement that a criminal defendant be able to confront and cross-examine each witness against him in every trial.\footnote{Id. at 243.}

As a result, \textit{Mattox} sparked the American legal system's struggle to define the interplay between the Confrontation Clause's rule of confrontation and the admission of hearsay against a criminal defendant.\footnote{Id. at 243-49; see also Heisler, supra note 13, at 829.} The struggle extended to the state courts when, in 1965, the Supreme Court in \textit{Pointer v. Texas}\footnote{380 U.S. 400 (1965).} made the Confrontation Clause applicable to the states through the Fourteenth Amendment.\footnote{See id. at 403-04.}

The Supreme Court maintained that the defendant's right to confront and cross-examine one's accuser is the "greatest legal engine ever invented for the discovery of truth."\footnote{Green, 399 U.S. at 158 (citation omitted). The Court also announced in \textit{Dutton v. Evans}, 400 U.S. 74 (1970), that the mission of the Confrontation Clause was to advance the accuracy of the truth-determining process by ensuring that the trier-of-fact has a sufficient basis for evaluating the truth of a statement. \textit{Id.} at 89.} However, the Court continued to recognize the need to carve out exceptional situations to the Clause's literal requirement of confrontation in each criminal prosecution where hearsay was introduced.\footnote{Heisler, supra note 13, at 830.} The Court developed its Confrontation Clause doctrine such that hearsay law
and the Confrontation Clause allowed for similar exceptions when hearsay could be introduced without cross-examination of the declarant at trial.\(^6\)

The link between confrontation doctrine and hearsay law was somewhat an inevitable step assuming, as the Court maintained, that both were designed to protect reliability of the evidence,\(^7\) and that both hearsay law and confrontation doctrine also called for flexibility in order to allow for the competing interests of the prosecution.\(^8\)

Nevertheless, the Court flatly rejected the notion that the Confrontation Clause and hearsay laws were one and the same.\(^9\) As confrontation jurisprudence developed, though, the Court fielded criticism for increasingly linking the Confrontation Clause and hearsay laws.\(^10\) The Court was critiqued for abandoning the Confrontation Clause's original purpose of testing the believability of the witness in front of the jury and for turning the Clause into a reliability rule of evidence rather than an essential procedural protection for criminal defendants.\(^11\) Critics argued that the Clause no longer protected the accused with the tool of cross-examination, but merely protected reliable evidence, a protection already afforded by the hearsay rules to both the defense and the prosecution.\(^12\) There is a fine line,

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69. The development of similar exceptions is not surprising considering that the Confrontation Clause and hearsay laws protected against similar risks. See Green, 399 U.S. at 156 (recognizing the protection of similar values by the Confrontation Clause and hearsay laws).

70. Id. at 156.


72. As the Court stated in Green:

While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. . . . The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied.

Green, 399 U.S. at 155-56 (citations omitted).


74. See, e.g., Randolph N. Jonakait, Restoring the Confrontation Clause to the Sixth Amendment, 35 UCLA L. REV. 557, 558 (1988) (critiquing the Court's construction that the Confrontation Clause's purpose is to protect reliability and accuracy of the evidence, which turns the Clause into nothing more than a "minor adjunct to evidence law"); John G. Douglass, Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay, 67 GEO. WASH. L. REV. 191, 194 (1999) (criticizing the Court for turning confrontation questions involving hearsay into a reliability analysis); see also infra notes 271-78 and accompanying text.

75. Jonakait, supra note 74, at 580-81.
however, between testing the believability of the witness through cross-examination and the Court's construction of the Clause, which advanced the accuracy of the witness' statements.76

Therefore, it was not inconceivable that the Court, following Mattox and other early confrontation cases, would continue to focus on reliability as a necessary requirement for Confrontation Clause purposes.77 As the Court pushed forward with this focus in mind, the admissibility of out-of-court accomplice confessions provided a vivid picture of the Court's struggle to define a comprehensive theory of the relationship between hearsay and the Confrontation Clause.

C. Douglas v. Alabama.78 Accomplice Confessions Problematic Under the Confrontation Clause

Douglas v. Alabama involved one of the Court's first encounters with the admissibility of accomplice confessions under the Confrontation Clause.79 The trial court admitted the accomplice confession against the defendant, which implicated both the accomplice and the defendant in the alleged crime, identified the defendant as the one who shot and wounded the victim, and provided the prosecution's "crucial link" to the government's case against the defendant.80

The defendant in Douglas challenged the admission of his accomplice's confession as a violation of his Confrontation Clause right, and the Court agreed, reversing the defendant's conviction.81 The Douglas Court recognized that custodial accomplice confessions, which accuse the defendant of the same or more serious crime and are presented to the jury by

76. See id. at 584-88 (conceding that it may appear that accuracy of the evidence is consistent with the Clause's original purpose of allowing assessment of the witness' believability).
77. See Crawford v. Washington, 124 S. Ct. 1354, 1373 (2004) (noting that, while the Confrontation Clause is concerned with reliability, the courts below were misguided in their method of finding reliability, because in certain situations, cross-examination is the only method for establishing reliability).
79. Id. at 417. The Court also took the opportunity to determine the permissible interpretations of a declarant's unavailability at trial. Id. at 420. When called as a witness at trial, the accomplice invoked his Fifth Amendment right not to testify. Id. at 416. The Douglas Court held that, if a witness invokes his Fifth Amendment right against self-incrimination, he is deemed unavailable for cross-examination. Id. at 420. Determining the parameters of a declarant's unavailability was a necessary component of confrontation doctrine development because, as the Mattox Court noted, the declarant's unavailability not only results in the defendant's denial of confrontation, but may also represent a factor in the prosecution's need for the evidence, which might otherwise be lost without the declarant's statements. See Mattox v. United States, 156 U.S. 237, 242-43 (1895). The declarant's unavailability is thus important to the Mattox Court's focus on balancing the need for the evidence with the defendant's confrontation rights, and the declarant's unavailability often cuts both ways in this balancing analysis. See id. A declarant is deemed unavailable in a variety of other circumstances. See, e.g., Idaho v. Wright, 497 U.S. 805, 809 (1990) (three-year old child's young age rendered her incompetent to testify); Ohio v. Roberts, 448 U.S. 56, 75 (1980) (declarant is unavailable if prosecution establishes that good faith effort failed to locate declarant); Mattox, 156 U.S. at 260-61 (death renders a declarant unavailable); see also Heisler, supra note 13, at 830.
80. Douglas, 380 U.S. at 419.
81. See id. at 420, 423.
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law enforcement, pose problems for a defendant's confrontation right. In *Douglas*, presentation of this testimony by law enforcement, without a response from an "unavailable" accomplice, served to indicate the truth of the underlying confession. The defendant was entitled to his constitutional right to cross-examine the accomplice in order to establish whether the statement made by the accomplice was true.

Furthermore, the language of *Douglas* suggested that the key factor in reversing the defendant's conviction was the weight that the accomplice confession added to the prosecution’s case. The accomplice confession was crucial evidence, seemingly uncorroborated by statements from the defendant or other testimony. Implicit in the Court's reasoning was that, had the accomplice confession been corroborated by other constitutionally admissible evidence, the Confrontation Clause violation might have been "a mere minor lapse" and not reversible error. *Douglas* cast doubt on the reliability of accomplice confessions and focused on their harmfulness as key prosecution evidence, previewing the Court's preference for in-court cross-examination of the accomplice.

**D. Bruton v. United States:** *Confrontation Clause Concerns in Joint Trials*

The Court echoed its *Douglas* sentiments in *Bruton v. United States*. In *Bruton*, the defendant and his codefendant were tried jointly for armed postal robbery. The trial court allowed the postal inspector to testify about the codefendant's pre-trial confession, subject to a limiting instruction that the jury not consider the confession against the defendant. On appeal, the Court overturned the defendant's conviction, reasoning that the risk was too

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82. The trial court allowed the prosecution to read the entire accomplice confession in front of the jury and, on appeal, the Court equated the prosecution's reading of the accomplice's confession document with actual testimony by law enforcement. *Id.* at 419. See *id.* at 419-20 (holding that the in-court testimony of three law enforcement officers, identifying the confession as having been made by the accomplice, "enhanced the danger" that the jury would treat the accomplice's refusal to answer as indicating the truth of his confession); see also Heisler, supra note 13, at 832.


84. *Id.*

85. *Id.*; Keller, supra note 21, at 165.

86. See *Douglas*, 380 U.S. at 416-23 (discussing the substantial weight the accomplice confession added to the prosecution's case without mentioning any corroborating evidence).

87. *Id.* at 420; see also Keller, supra note 21, at 165.


89. 391 U.S. 123 (1968).

90. *Id.*

91. *Id.* at 124.

92. *Id.* at 125 n.2. There was no domestic hearsay exception, such as an against penal interest exception, to admit the codefendant confession directly against the defendant, and thus the jury could only consider the confession against the codefendant himself. *Id.*
great that the jury would consider the codefendant's confession against the defendant.93

The Bruton Court expressed two concerns regarding accomplice confessions and a defendant's confrontation rights: 1) the unreliability of the accomplice confessions and 2) the harmfulness of the accomplice confessions if admitted without corroborating evidence in violation of the Confrontation Clause.94 The Court first pointed out that, without cross-examination, the jury could not determine if the confession was true or if it was an attempt to transfer blame to the defendant, and "it was against such threats to a fair trial that the Confrontation Clause was directed."95 Consequently, the Court held confessions by accomplices and codefendants, un-tested by cross-examination, to be unreliable evidence.96

Moreover, within its reasoning, the Court once again reiterated its concerns from Douglas that the "introduction of [the codefendant's] confession added substantial... weight to the Government's case in a form not subject to cross-examination."97 Thus, the Bruton analysis may perhaps be taken a step further because of the Court's emphasis on the importance of the codefendant's confession to the defendant's conviction.98 At least one legal analyst argued that Bruton could be construed to prohibit in any trial the admission of an accomplice confession against a defendant if it adds substantial weight to the prosecution's case—that is, when there is a lack of evidence corroborating the confession.99 However, it is unclear whether the Bruton Court intended the lack of corroboration to be a factor in finding a violation of the Confrontation Clause or a factor in the analysis of whether the confrontation rights violation was harmless error.100

93. Id. at 136-37. Therefore, admission of the codefendant's confession at the joint trial amounted to a de facto admission against the defendant, which violated the defendant's constitutional right to cross-examine his alleged accomplice as to the trustworthiness of his statements. Id. Bruton thus established the rule that in joint trials the Confrontation Clause prohibited admitting a codefendant's confession, even if the jury is instructed to disregard the statement as to the defendant. See id. at 137. One year after its Bruton decision, the Court was faced with a Bruton error, but affirmed the defendant's conviction after concluding that the error was harmless. See Harrington v. California, 395 U.S. 250, 254 (1969).

94. See Bruton, 391 U.S. at 136-37.

95. Id. at 136.

96. See id. at 136-37 ("The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination.").

97. Id. at 127-28.

98. Id. at 136-37.

99. Keller, supra note 21, at 167 (restating the Bruton rule as "[o]nly if other evidence in a constitutionally admissible form establishes the same facts to a sufficient degree can the inculpatory statement against penal interest be admitted"). This rule would apply in all trials because the Bruton Court only relied upon the joint trial factor when discussing the adequacy of jury instructions. Id.; see Bruton, 391 U.S. at 135-36.

100. Compare Keller, supra note 21, at 173 (noting a similarity between the author's Bruton "substantial weight" rule and the harmless error rule), with James B. Haddad & Richard G. Agin, A Potential Revolution in Bruton Doctrine: 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, 242 (1990) (noting that the "devastating" effect that admission of the codefendant's confession had on the defendant's case was a factor in finding a violation of the defendant's right of confrontation).
The Court also reserved the question of whether an accomplice statement is itself admissible directly against the defendant in a separate trial if domestic hearsay law in fact permits it. The Court previewed its future opinions by indicating that an accomplice confession may be admissible under an applicable hearsay exception, even though the defendant still lacked an opportunity to cross-examine the accomplice and test the reliability of the evidence. Thus, while Bruton focused on the inherent unreliability and harmfulness of accomplice confessions, the Court reserved for future cases the issue of whether statements admitted under traditional hearsay exceptions might satisfy the Confrontation Clause.

E. Ohio v. Roberts: A Framework for Confrontation Clause Analysis

The Court solidified its “reliability” focus, evidenced in its early confrontation cases, when in Ohio v. Roberts it established a universal

101. Keller, supra note 21, at 168. The Court avoided a broad constitutional holding by stating, “There is not before us . . . any recognized exception to the hearsay rule . . . and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause.” Bruton, 391 U.S. at 128 n.3. Introduction of a statement at a joint trial may be more prejudicial because the two defendants stand side-by-side, the same jury hears all the evidence against each defendant, and there is also a risk that the jury may draw improper inferences from the declarant’s refusal to answer, even though this is only a factor in determining the weight the statement gives to the prosecution’s case. Keller, supra note 21, at 167.

In reserving this question, the Court appeared to contradict the rationale implicit in its reasoning. Haddad & Agin, supra note 100, at 242. On the one hand the Court held that excluding a jointly tried codefendant’s confession against a defendant through a mere limiting instruction nevertheless violated the defendant’s Confrontation Clause rights. See Bruton, 391 U.S. at 136-37. On the other hand, the Court did not determine whether the Confrontation Clause is violated when an accomplice’s confession is directly admitted against the defendant, such as in separate trials where the accomplice confession is admitted against the defendant under an against penal interest exception. See Keller, supra note 21, at 167; see also Haddad & Agin, supra note 100, at 242.


103. Haddad & Agin, supra note 100, at 242. Justice Stewart, who wrote a concurring opinion in Bruton, advised a more universal holding:

[C]ertain kinds of hearsay are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, whatever instructions the trial judge might give. . . . It is for this very reason that an out-of-court accusation is universally conceded to be constitutionally inadmissible against the accused, rather than admissible for the little it may be worth.

Bruton, 391 U.S. at 138 (Stewart, J., concurring) (emphasis added) (citations omitted). Justice Stewart diverged from his Bruton opinion in Dutton v. Evans, 400 U.S. 74 (1970), indicating that some accomplice confessions made post-arrest may be admitted against a defendant without cross-examination where the confession is admissible under domestic hearsay laws. Id. at 82-83; see also Haddad, supra note 73, at 97 (recognizing the anomaly presented in Bruton).

104. Keller, supra note 21, at 167-68.

framework for analyzing hearsay under the Confrontation Clause. In Roberts, the Court was "called upon to consider once again the relationship between the Confrontation Clause and the hearsay rule with its many exceptions." The Roberts Court re-emphasized that the Confrontation Clause could not be rigidly applied because such an application "would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme," but noted that in upholding the accuracy of evidence, the Clause "reflects a preference for face-to-face confrontation at trial." The Court then established a two-step process for determining the admissibility of hearsay under the Confrontation Clause.

The Court's decision became known as the "Roberts Test." Under the Roberts Test, hearsay satisfied the Confrontation Clause if the prosecution 1) produces the declarant or proves that the declarant is unavailable and 2) the hearsay statement bears adequate "indicia of reliability." A statement bears adequate indicia of reliability if the evidence falls "within a firmly rooted hearsay exception," or if the statement carries "particularized guarantees of trustworthiness" such that adversarial testing would be expected to add little, if anything, to [its] reliability. The Court did not

106. Id. at 65; see also Heisler, supra note 13, at 833.
107. Roberts, 448 U.S. at 62. In Roberts, the defendant was convicted of forgery, but his conviction was later reversed when the Ohio Supreme Court determined that the prosecution's use of an unavailable witness' preliminary hearing testimony violated the defendant's right of confrontation. Id. at 58-61. When the State of Ohio appealed, the Supreme Court reinstated the conviction, finding that the witness was unavailable after a good faith search to locate her and that her preliminary hearing statement was sufficiently trustworthy because the defendant had an adequate opportunity to cross-examine the witness while she had been under oath at the hearing. Id. at 65-66, 72-73. It is significant to note that, in two of its major Confrontation Clause decisions involving unavailable witnesses, the Court found no violation of the Clause where there was a former opportunity to cross-examine the declarant who was under oath. See id.; Mattox v. United States, 156 U.S. 237, 245 (1895).
108. Roberts, 448 U.S. at 63.
109. Id.
110. Id. at 65.
112. Roberts, 448 U.S. at 65. However, the Court noted that the demonstration of unavailability might not always be required where the "utility of trial confrontation" was minimal. Id. at 65 n.7. For example, excited or spontaneous utterances and statements made by a patient for the purpose of medical diagnosis is hearsay that is reliable because of the circumstances under which those statements are made. Fed. R. Evid. 803(1) & (2) advisory committee's notes. Even if the declarant is available to testify at trial, the factors that contribute to the reliability of excited utterances and medical diagnosis statements "cannot be recaptured even by later in-court testimony." White v. Illinois, 502 U.S. 346, 356 (1992).
113. Roberts, 448 U.S. at 65 (citation omitted).
114. Lilly v. Virginia, 527 U.S. 116, 124-25 (1999) (quoting Roberts, 448 U.S. at 66). Despite its rejection that the Clause remained a distinct rule apart from the hearsay rule, the Court for the first time recognized a direct relationship between hearsay rules and the Clause. See Jonakait, supra note 74, at 573 (pointing out that even the language of the second reliability prong of Roberts seems to borrow language from the "residual exception" to the hearsay rule). Compare Fed. R. Evid. 807 (providing that hearsay that does not fall within a traditional hearsay exception may still be admissible if it carries "circumstantial guarantees of trustworthiness"), with Roberts, 448 U.S. at 66 (hearsay is reliable if it falls within a firmly rooted exception or has "particularized guarantees of
define "firmly rooted," nor did it set forth a standard for the lower courts to
determine particularized guarantees of trustworthiness,115 but the Roberts
Test provided a framework for courts to determine the reliability, and thus
admissibility, of hearsay under the Confrontation Clause.116

The Court later refined its Roberts Test, establishing in White v. Illinois117 that "where proffered hearsay has sufficient guarantees of
reliability to come within a firmly rooted exception to the hearsay rule, the
Confrontation Clause is satisfied."118 Accordingly, the Court equated
satisfaction of a "firmly rooted" hearsay exception with satisfaction of the
Confrontation Clause requirements, regardless of the declarant's availability
to testify.119 The Court reasoned that certain hearsay statements satisfying
firmly rooted exceptions are made under circumstances providing such
trustworthiness "that cross-examination would add little or no value" at
trial.120 Thus, the trustworthiness of a firmly rooted hearsay statement was a
substitute for face-to-face confrontation at trial.121

trustworthiness"). However, in one case the Court found that a hearsay statement admissible under a
residual hearsay exception nevertheless violated the Confrontation Clause. Idaho v. Wright, 497

115. Roberts, 448 U.S. at 66. In an opinion that pre-dated Roberts, the Court did identify factors
"widely viewed as determinative of whether a statement may be placed before the jury though there
is no confrontation of the declarant." Dutton v. Evans, 400 U.S. 74, 89 (1990). The factors
included:

(1) Whether the hearsay statement contained an express assertion of past fact, (2)
whether the declarant had personal knowledge of the fact asserted, (3) whether the
possibility that the statement was based upon a faulty recollection is remote in the
extreme, and (4) whether the circumstances surrounding the statement make it likely that
the declarant fabricated the assertion of fact.

Anthony v. Dewitt, 295 F.3d 554, 563 (6th Cir. 2002) (paraphrasing the Dutton factors) (citing
Dutton, 400 U.S. at 88-89).

116. Heisler, supra note 13, at 834.


118. Id. at 356. The Court effectively did away with the requirement of declarant unavailability,
the "necessity" prong of the Roberts Test, in cases where hearsay fell within a firmly rooted
exception. Id.; see also Jonakait, supra note 74, at 559 (noting that "[r]ecent decisions indicate that
the reliability branch survives, but the general unavailability requirement has been jettisoned").

119. See White, 502 U.S. at 356-57. The Court had previously found that firmly rooted exceptions
were those types of hearsay that longstanding judicial and legislative experience recognized as
trustworthy. Wright, 497 U.S. at 817. Later, however, the White Court noted that its decision in
United States v. Inadi, 475 U.S. 387 (1986), limited the Roberts unavailability requirement to those
cases when the challenged hearsay statements were made in the course of a prior judicial proceeding.
White, 502 U.S. at 354.

120. Heisler, supra note 13, at 838; White, 502 U.S. at 355-56.

121. See White, 502 U.S. at 355-56. For example, excited utterances and statements made for
medical diagnosis are made trustworthy by the circumstances surrounding their making, which
cannot be recaptured in later court testimony. Id. As the Court noted:

A statement that has been offered in a moment of excitement—without the opportunity to
reflect on the consequences of one's exclamation—may justifiably carry more weight
with the trier or fact than a similar statement offered in the relative calm of the
courtroom. Similarly, a statement made in the course of procuring medical services,
where the declarant knows that a false statement may cause misdiagnosis or
The Court noted, however, that in the case of hearsay in which an accomplice inculpates the defendant, testimony is preferred because cross-examination is most effective for "the discovery of truth." Beyond this observation, White failed to provide further guidance on the admissibility of accomplice confessions because the facts of the case did not involve that type of hearsay. Constitutional admissibility of accomplice confessions against criminal defendants continued to flounder in the murky waters of Confrontation Clause jurisprudence.

With the general confrontation framework established, the Court allowed succeeding confrontation cases to slowly develop the particulars of constitutional reliability based upon the facts each case presented, including cases involving the admissibility of accomplice confessions. However, following Roberts and White, the Court's new framework received criticism for solidifying the link between hearsay and the Confrontation Clause and eroding criminal defendants' confrontation rights. Two issues relating to
admissibility of accomplice confessions under the Confrontation Clause seemed to plague the Court and signal major reform of its confrontation theory, even fairly soon after its Roberts decision: interlocking confessions and the against penal interest exception to the hearsay rule.

III. INTERLOCKING CONFESSIONS AND THE AGAINST PENAL INTEREST EXCEPTION: ILLUSTRATING THE COURT’S STRUGGLE WITH ACCOMPlice CONFESSIONS AND THE CONFRONTATION CLAUSE

A. The Court Grapples With “Interlocking” Confessions

1. Lee v. Illinois and the Interlocking Confession Cases

Six years after Roberts, the Court again faced the two issues of reliability and harmfulness that were raised in Bruton. In Lee v. Illinois, neither of the jointly-tried murder defendants testified at trial, but both defendants gave statements to the police that were substantially similar or “interlocking”; both confessions admitted that the codefendant stabbed the first victim and that the defendant had stabbed the second victim. The two confessions differed in that the codefendant suggested that both defendants premeditated the killings, whereas the defendant claimed self-defense. The prosecutor relied heavily upon the codefendant’s written custodial confession in order to convict the defendant of both murders. The appeals court affirmed, holding that the codefendant’s confession was sufficiently

See Jonakait, supra note 74, at 575-78 (noting that confrontation jurisprudence is “scanty” compared to generations of “accumulated evidentiary wisdom”). As such, the Court rendered the Confrontation Clause a mere “anachronism,” outmoded by evidence law. Id. at 578.

127. See infra notes 129-173 and accompanying text. Interlocking confessions occur where the defendant and accomplice give such similar confessions that they are said to “interlock.” See State v. Crawford, 54 P.3d 656, 663 (Wash. 2002), cert. granted, 539 U.S. 914 (2003), rev’d by 124 S. Ct. 1354 (2004). Some courts have used the interlocking nature of the accomplice confession (i.e. one that is corroborated by the defendant’s own confession) to establish reliability. See id. at 663-64 (relying on the interlocking nature to admit an accomplice confession).

128. See infra notes 174-254 (discussing the Court’s struggle with this exception).


130. Id.

131. Id. at 534-36.

132. Id. at 535. Specifically, the codefendant told the police that he and the defendant had previously discussed a plan to “do something” to both victims, suggesting a premeditated plan to kill. Id. In contrast, the defendant’s statement indicated that the codefendant spontaneously “snapped” and killed the first victim while the defendant killed the second victim in self-defense. Id.

133. Id. at 538.
reliable, despite the defendant’s inability to cross-examine the codefendant at trial, because the confession “interlocked” with the defendant’s. 134

Utilizing the Roberts framework, the Supreme Court reversed, holding that the hearsay confession failed to satisfy the Confrontation Clause because the codefendant’s statement, as an accomplice confession, “was presumptively unreliable and ... did not bear sufficient independent ‘indicia of reliability’ to overcome that presumption.” 135 Particularly, the Court found that the circumstances surrounding the codefendant’s confession “uniquely threatened” the “truthfinding function of the Confrontation Clause,” because “the arrest statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant’s statements about what the defendant said or did are less credible than ordinary hearsay evidence.” 136

Moreover, the Court rejected the State’s contention that because the two confessions “interlocked” or overlapped to a great extent, the codefendant’s confession was thus trustworthy in its entirety. 137 Rejecting what it called “selective reliability,” the Court held that an accomplice “confession is not necessarily rendered reliable simply because some of the facts it contains ‘interlock’ with the facts in the defendant’s statement.” 138 Thus, “when the discrepancies between the statements are not insignificant, the codefendant’s confession may not be admitted.” 139

The facts of Lee did not raise the question of whether sufficiently corroborated confessions are admissible, but the Court pointed out that “[o]bviously, when codefendants’ confessions are identical in all material respects, the likelihood that they are accurate is significantly increased.” 140

134. Id. The Illinois Appeals Court declined to explain why or how the “interlocking” nature of the codefendant’s confession distinguished the case from Bruton and satisfied the Confrontation Clause, even though both involved joint trials. Id.
135. Id. at 539.
136. Id. at 541 (quoting Bruton v. United States, 391 U.S. 123, 141 (1968) (White, J., dissenting)). The Court noted that the codefendant gave his confession only after he had been told that the defendant, Lee, had already implicated him in the murders. Id. at 544. Furthermore, the codefendant may have had a motive to spread the blame to Lee because “once partners in a crime recognize that the ‘jig is up,’ they tend to lose any identity of interest and immediately become antagonists, rather than accomplices.” Id. at 544-45. Dissenting from the majority, Justice Blackmun, with whom then-Justice Rehnquist joined, focused on the against penal interest nature of the codefendant’s confession. Id. at 551 (Blackmun, J., dissenting). The dissenting Justices found that, while accomplice confessions are generally suspect because they tend to minimize the declarant’s culpability, the codefendant’s confession at issue was sufficiently reliable because the confession was “thoroughly and unambiguously adverse to his penal interest.” Id. (Blackmun, J., dissenting). The dissenters believed that the confession fell within that class of declarations against penal interest that are generally reliable and fall “squarely within established hearsay exceptions,” because instead of minimizing his liability, the codefendant equally damaged his own defense by telling police that both he and the defendant plotted the victims’ murders. Id. at 552-53 (Blackmun, J., dissenting).
137. Id. at 545.
138. Id. (citing Parker v. Randolph, 442 U.S. 62, 79 (1979) (Blackmun, J., concurring in part and concurring in the judgment)).
139. Id.
140. Id.
It might be inferred from the Court's language that when the discrepancies between interlocking statements are insignificant, the accomplice confession carries the necessary constitutional reliability. In *Lee*, however, the accomplice confession detailing the defendant's participation in the premeditated planning of the murders clearly diverged from the defendant's otherwise interlocking confession, rendering the confession incapable of overcoming the presumption of unreliability.

The holding of *Lee* was significant to cases involving accomplice confessions because of the Court's emphasis on the presumptive unreliability of custodial confessions that inculpate the defendant. However, the Court did not establish a per se ban on the admission of accomplice statements, keeping the door open for the admissibility of accomplice confessions against a defendant and agreeing that the presumption of unreliability may be overcome in circumstances differing from the facts of *Lee*. As recognized by the Court that same year in *New Mexico v. Earnest*, its holding in *Lee* overruled *Douglas v. Alabama* to the extent that *Douglas* held that the Confrontation Clause mandated an opportunity for a criminal defendant to cross-examine a codefendant regarding his out-of-court statement, either at the time of the statement's making or at trial. Rather, the prosecution is "entitled to an opportunity to overcome the weighty presumption of unreliability attaching to codefendant statements by demonstrating that the particular statement at issue bears sufficient 'indicia of reliability' to satisfy Confrontation Clause concerns."

Lacking clarity, though, was the question of whether the "indicia of reliability" of an accomplice confession may be inferred because it interlocks with the defendant's own confession that is admitted at trial.

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142. *See Lee*, 476 U.S. at 543.
143. *See id.* at 541.
144. *See id.* at 543. *Lee* stepped even further in this direction than did *Bruton*, which precluded admission of codefendant confessions in jointly tried cases and merely reserved the question of accomplice confession admissibility in separate trials for another day. *See Bruton v. United States*, 391 U.S. 123, 137 (1968). *Lee* suggested that a confession by an accomplice or codefendant may be admissible in a separate or joint trial depending on the statement's content and the context in which it is given. *See Lee*, 476 U.S. at 543.
148. *Id.* at 649-50 (Rehnquist, J., concurring). Justice Rehnquist noted that although, since *Roberts*, the Court had not yet set forth specific standards for determining the constitutional admissibility of hearsay, "lack of cross-examination is not necessarily fatal to the admissibility of evidence under the Confrontation Clause." *Id.* at 649 (Rehnquist, J., concurring).
Earnest and Lee highlighted the Court’s struggle with the admissibility of accomplice confessions that interlock with the defendant’s own confession. Then-Justice Rehnquist, who wrote a concurring opinion in Earnest, relied on Lee’s language addressing the interlock issue to suggest that the codefendant’s statement might be sufficiently reliable if it interlocks with a defendant’s confession absent any significant discrepancies bearing on the defendant’s participation in the crime. Justice Rehnquist declined to address what a “significant” or “insignificant” discrepancy might be or who should make that determination. The Lee case at least presented a set of facts that the Court determined represented significant discrepancies, but the Court had yet to determine what facts represent insignificant discrepancies in order for an accomplice confession to sufficiently interlock.

Before Lee and Earnest, the Court had first addressed the issue of interlocking confessions in Parker v. Randolph, where the Court focused less on the reliability issue of the accomplice confession and more on the “prejudicial impact” spared when the defendant’s interlocking confession is also admitted. The Court’s focus in Parker reflected the language from


151. Justice Rehnquist, quoting from Lee, noted:
If those portions of the codefendant’s purportedly “interlocking” statement which bear to any significant degree on the defendant’s participation in the crime are not thoroughly substantiated by the defendant’s own confession, the admission of the statement poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment. In other words, when the discrepancies between the statements are not insignificant, the codefendant’s confession may not be admitted. See Earnest, 477 U.S. at 649 (Rehnquist, J., concurring) (quoting Lee, 476 U.S. at 545).

152. See id. at 649-50 (Rehnquist, J., concurring) (failing to address the issue).

153. Lee, 476 U.S. at 545.


155. Id. at 72-74. In Parker, the trial court admitted the codefendant’s and defendant’s hearsay confessions, instructing the jury not to consider the codefendant’s confession against the defendant. Id. at 66-67. On appeal, then-Justice Rehnquist, writing for the Court, distinguished Parker from Bruton, holding that “admission of interlocking confessions with proper limiting instructions conforms to the requirements of the Sixth and Fourteenth Amendments to the United States Constitution.” Id. at 75. Parker’s holding addressed confusion among the lower courts, holding that cases involving interlocking confessions were not controlled by the Bruton rule. See id. at 68 n.4. The Parker Court reasoned that Bruton protected against the “devastating” consequences of admitting a codefendant’s confession in a joint trial with a non-confessing defendant. Id. at 72. It is in situations such as Bruton, where the defendant “maintains his innocence,” that the prejudicial impact of a codefendant’s confession “is simply too great in such cases to be cured by a limiting instruction.” Id. at 72. In contrast, where the defendant’s own confession, which is merely corroborated by the codefendant’s interlocking confession, is introduced at trial, the Sixth Amendment right to cross-examination of the codefendant is of “less practical value” and “likely [to] yield small advantage” to the defendant “whose own admission of guilt stands before the jury unchallenged.” Id. at 73. While distinguishing the case from Bruton, the Court’s analysis still followed a type of reverse-Bruton rationale: If the prejudice caused to the defendant is minimal, then the admission of the accomplice confession does not add weight to the government’s case and does not violate the Confrontation Clause. See id. (stating that Bruton protected against the admission of codefendant confessions that added substantial weight to the government’s case and prejudiced the defendant); Keller, supra note 21, at 169.
Douglas and Bruton where the Court was concerned about the harmfulness of admitting an uncorroborated accomplice confession\footnote{See Bruton v. United States, 391 U.S. 123, 127-28 (1968); Douglas v. Alabama, 380 U.S. 415, 416-23 (1965).} and which may speak more to the harmless error analysis and not the reliability inquiry on which the Court’s other Confrontation cases focused.\footnote{See Parker, 442 U.S. at 79 (Blackmun, J., concurring) (stating that the majority’s opinion “will result in no more than a shift in analysis” from whether the admission of an accomplice confession is harmless when it is considered in light of the great weight provided by the defendant’s own confession). However, the Court briefly commented on reliability, noting that “the natural ‘motivation to shift blame onto others,’ recognized by the Bruton Court” did not “render the incriminating statements of codefendants ‘inevitably suspect’” where the defendant’s confession “corroborated his codefendant’s statements by heaping blame onto himself.” \textit{Id.} at 73 (quoting Bruton, 391 U.S. at 136).}

In \textit{Cruz v. New York},\footnote{481 U.S. 186 (1987).} the Court’s position swung the other way; it rejected \textit{Parker} and held that,

Quite obviously, what the “interlocking” nature of the codefendant’s confession pertains to is not its \textit{harmfulness} but rather its \textit{reliability}: If it confirms essentially the same facts as the defendant’s own confession it is more likely to be true. Its reliability, however, may be relevant to whether the confession should (despite the lack of opportunity for cross-examination) be \textit{admitted as evidence} against the defendant. . . .\footnote{Id. at 192-93.}

The \textit{Cruz} Court further commented that “the defendant’s confession may be considered at trial in assessing whether his codefendant’s statements are supported by sufficient ‘indicia of reliability’ to be \textit{directly} admissible against him (assuming the ‘unavailability’ of the codefendant) despite the lack of opportunity for cross-examination. . . .”\footnote{Id. at 193-94 (emphasis added).} Thus, the \textit{Cruz} Court allowed for the possibility that, where an accomplice confession is directly admissible against the defendant (e.g. through the against penal interest hearsay exception), interlock between the accomplice’s and the defendant’s confessions could be used to satisfy the second “reliability prong” of the Roberts Test.\footnote{\textit{Id.} at 193. The Court declined to explain why the Confrontation Clause may not be violated if the codefendant’s confession is directly admissible against the defendant under domestic law. \textit{See id.}} However, even after \textit{Bruton, Lee, and Cruz}, the Court had set forth no definitive rule on whether interlock between the accomplice’s and defendant’s confessions could be used to infer reliability or if it was a
factor in determining whether a Confrontation Clause violation was harmless to the defendant.\footnote{162}

2. *Idaho v. Wright*:\footnote{163} Reliability and the Anti-Bootstraping Rule

Later in *Idaho v. Wright*,\footnote{164} the Court honed its reliability analysis, further clarifying what the prosecution must establish to satisfy the "reliability prong" of the *Roberts* Test.\footnote{165} The *Wright* Court stressed that, in order to satisfy the *Roberts* Test, the out-of-court statement must be inherently reliable.\footnote{166} The Court opined that the "[a]dmission [of hearsay] under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements."\footnote{167} For those hearsay statements falling outside a firmly rooted exception, particularized guarantees of trustworthiness required for admissibility by *Roberts* "must be shown from the totality of the circumstances," but only from those circumstances "that surround the making of the statement and that render the declarant particularly worthy of belief."\footnote{168} The Court made clear that reliability cannot be established by "evidence corroborating the truth of a hearsay statement," because this would "permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility."\footnote{169}

\begin{itemize}
\item \footnote{162} See *id.*; *Lee*, 476 U.S. at 543-44; *Bruton*, 391 U.S. at 128; Petitioner's Brief, \textit{supra} note 14, at 1 (questioning on appeal whether an accomplice confession was admissible under the Clause on the basis of the interlock theory).
\item \footnote{163} 497 U.S. 805 (1990).
\item \footnote{164} *Id.*
\item \footnote{165} See *id.* at 816-17.
\item \footnote{166} *Id.* at 816-19.
\item \footnote{167} *Id.* at 817 (citing *Bourjaily v. United States*, 483 U.S. 171, 183 (1987); *Lee*, 476 U.S. at 552 (Blackmun, J. dissenting); *Ohio v. Roberts*, 448 U.S. 56, 66 (1980); and *Mattox v. United States*, 156 U.S. 237, 243 (1895) to hold that Idaho's residual hearsay exception, which served as a "catch-all" for statements not otherwise satisfying traditional hearsay exceptions, was not firmly rooted).
\item \footnote{168} *Id.* at 819. The Court cited the firmly rooted "excited utterance" exception as an example of hearsay statements made under such circumstances that "adversarial testing would add little to their reliability." *Id.* at 820-21. Essentially, statements falling outside firmly rooted exceptions must be as reliable as those falling under a firmly rooted hearsay exception. *Id.* at 821.
\item \footnote{169} *Id.* at 822-23. The *Wright* Court therefore rejected the State of Idaho's contention that physical evidence corroborating a three-year old sexual abuse victim's accusations rendered her hearsay statements adequately reliable for admission under the Confrontation Clause. *Id.* In doing so, the Court considered *Lee v. Illinois*, where the Court similarly declined to rely upon corroborative physical evidence and the "interlocking" confession theory to support the trustworthiness of the accomplice's confession. *Id.* at 824. As in *Lee*, the *Wright* Court cautioned against the use of "selective reliability": relying upon partial corroboration of the hearsay statement to infer trustworthiness of the entire statement. *Id.* The *Wright* Court seemed to close the door, whereas the *Lee* Court left open the possibility that an accomplice statement sufficiently interlocked with a defendant's confession may satisfy the Confrontation Clause, as also recognized in *Earnest*. See *New Mexico v. Earnest*, 477 U.S. 648, 649-50 (1986) (Rehnquist, J., concurring); *Lee*, 476 U.S.
cross-examination tests the declarant's state of mind and his truthfulness at the time he made the statement, reliability will not be found in outside factors and "other evidence" that merely corroborates the truth of the statement.\footnote{170} 

\textit{Wright's} prohibition against the use of "other evidence" to infer the trustworthiness of hearsay under the Confrontation Clause necessarily called into question the prosecution's use of a defendant's interlocking statement to infer reliability of an accomplice's statement, a practice never flatly prohibited in \textit{Lee}.\footnote{171} Indeed, four of the dissenting justices in \textit{Wright} cited \textit{Lee} and \textit{Cruz} for the proposition that corroborating evidence, including the use of a defendant's interlocking confession, should still be used to infer trustworthiness.\footnote{172} The Court had not yet directly addressed this issue of
reliability and interlocking accomplice confessions, considering the implications of both Wright and Lee.173

B. The Court Wrestles with the Against Penal Interest Exception

There remained another significant issue surrounding the reliability and admissibility of accomplice confessions that are admissible directly against a defendant in those jurisdictions allowing the practice under an against penal interest exception to the hearsay rule.174 This exception was recognized at common law and codified in the Federal Rules of Evidence, as well as many state evidence codes.175 However, the inherent suspicion in the reliability of accomplice confessions, as increasingly recognized by the courts,176 raised the question of whether and under what circumstances accomplice confessions could satisfy the Roberts Test.177

1. Williamson v. United States:178 Dissecting the Hearsay Exception

Williamson v. United States179 presented a prime opportunity for the Court to elucidate its position about admitting accomplice confessions under the against penal interest hearsay exception, a necessary step to get most accomplice confessions before the jury.180 The defendant in Williamson appealed the admission of his accomplice’s confession under the statement against penal interest exception to the Federal Rules of Evidence.181 Justice

sufficiently reliable to be admitted). Even before the Court first addressed the issue in Parker v. Randolph, 442 U.S. 62 (1979), the concept that interlocking confessions were inherently reliable was already part of federal jurisprudence. See, e.g., United States ex rel. Cantanzaro v. Mancusi, 404 F.2d 296, 300 (2d Cir. 1968) (finding that “interlocking confessions” of jointly tried defendants were reliable enough to satisfy the Confrontation Clause).

173. Although the Court granted certiorari to address this issue in Crawford v. Washington, 539 U.S. 914 (2003), it never directly answered the questions raised by these cases, choosing instead in Crawford to redefine the Confrontation Clause analysis completely and do away with the need to establish reliability. See Crawford, 124 S. Ct. at 1359-73.

174. See, e.g., Lilly v. Virginia, 527 U.S. 116, 120 (1999) (noting that the question on appeal to the Supreme Court was the constitutional admissibility of a non-testifying accomplice’s confession that was directly admissible against the defendant under Virginia’s against penal interest exception).

175. Auzada, supra note 22, at 595; see also 2 JOHN W. STRONG, MCCORMICK ON EVIDENCE § 318, at 340-41 (4th ed. 1992); see also FED. R. EVID. 804(b)(3). As noted previously, Washington, Delaware, Louisiana, Maryland, Minnesota, Montana, Texas, and West Virginia are among the states that recognize the against penal interest exception. See supra note 42.


177. See, e.g., Lilly, 527 U.S. at 120 (addressing, in several different opinions the constitutional admissibility of non-testifying accomplice confessions).


179. Id.

180. Id. at 596; see also Noworyta, supra note 48, at 440 (emphasizing that the confession must be admissible under a domestic hearsay exception before the court determines whether admitting the confession violates the Confrontation Clause under Roberts).

181. Williamson, 512 U.S. at 598. The defendant was tried and convicted on drug distribution charges. Id. at 597. At trial, a drug enforcement agent was allowed to testify as to an accomplice’s confession after the accomplice, Harris, refused to testify. Id. The trial court ruled that the statements were admissible under Federal Rule of Evidence 804(b)(3) because Harris’ statement “clearly implicated himself,” and was therefore against his penal interest, and because Harris was
O'Connor, who delivered the opinion for the plurality Court, struggled to define the meaning of "statement" to determine whether and what portions of the accomplice's long narrative confession were admissible under the exception.182

Similar to the concerns reflected in the Confrontation Clause, the Court recognized that the general rule against hearsay was "premised on the theory that out-of-court statements are subject to particular hazards," particularly that the declarant could have lied, misperceived events, misremembered, and that his statements could be taken out of context.183 Furthermore, "arrest statements of a codefendant have traditionally been viewed with special suspicion," because of the codefendant's motivation to shift blame to the defendant or curry favor with the authorities in order to exculpate himself.184

Statements against the declarant's penal interest protected against these risks, because people generally do not subject themselves to criminal liability unless they believe the statements are true.185 Nevertheless, the risk, as the Court saw it, was that the accomplice would place false self-exculpatory statements—those inculpating and shifting blame to the defendant—in close proximity with more persuasive and true self-inculpatory statements, because "[o]ne of the most effective ways to lie is to mix falsehood with truth."186 For this reason, as Justice O'Connor explained, the principle behind the Rule supported a narrow interpretation of the against penal interest exception, allowing only those single "declarations or remarks within the confession that are individually self-inculpatory."187 Accordingly, self-serving and collateral statements were not reliable enough to satisfy the against penal interest exception.188 Justice O'Connor noted that the Court's ruling did not preclude all accomplice statements that unavailable as required by the rule. Id. at 598-99 (citing FED. R. EVID. 804(b)(3) for the admissibility of "statement[s] which . . . at the time of [their] making . . . 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[s] unless believing [them] to be true") (alterations in original).

182. See id. at 598-602. Justice O'Connor first looked at the Federal Rules of Evidence, which defined "statement" as "an oral or written assertion." Id. at 599 (quoting FED. R. EVID. 801(a)(1)). She also noted that Webster's Dictionary defined "statement" as both "a report or narrative," suggesting an "extended declaration," and "a single declaration or remark." Id. (internal quotations and citations omitted). Justice O'Connor ultimately concluded that the principle behind the statement against penal interest rule, that people do not make self-inculpatory statements unless believing them to be true, supported the narrower interpretation. Id.

183. Id. at 598.


185. FED. R. EVID. 804(b)(3) advisory committee's note.

186. Williamson, 512 U.S. at 599-600.

187. Id. at 599.

188. Id. at 600-02.
inculpate a defendant, because when viewing each statement in context, even seemingly neutral statements may actually be truly self-inculpatory. 189

Regarding the specific confession at issue in Williamson, the Court remanded the case for further inquiry into the self-inculpatory nature of the accomplice confession, never reaching the issue of whether the confession was admissible under the Confrontation Clause. 190 Williamson's emphasis that reliability is found only in the portions of an accomplice confession that are directly against penal interest is nevertheless significant for Confrontation Clause analysis purposes, especially in light of the Court's noting that "the very fact that a statement is genuinely self-inculpatory... is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible under the Confrontation Clause." 191

2. Lilly v. Virginia: 192 Creating an Uncertain State of Confrontation Doctrine

After Williamson, questions remained about whether and under what circumstances accomplice confessions admitted under an against penal interest hearsay exception could satisfy the reliability requirement of the Confrontation Clause. 193 Specifically, the Court had yet to determine whether accomplice statements against penal interest could come in as a "firmly rooted" hearsay exception or would otherwise require particularized guarantees of trustworthiness to meet the Roberts Test. 194 The question does not have particular relevance to those states that prohibit the admission of third-party statements implicating the defendant in a criminal trial under their against penal interest hearsay exceptions, 195 nor to those states that do not even have the against penal interest exception. 196 However, this unanswered Confrontation Clause question applied to federal courts, because as noted earlier, the language of the federal evidence rules allowed the admission of accomplice statements against penal interest as evidence against a defendant. 197 Likewise, several states that have adopted similar rules and that have followed the interpretation of the against penal interest

189. Id. at 603. To use the Court's example, the statement, "I hid the gun in Joe's apartment," is not necessarily a "confession of a crime; but if it is likely to help the police find the murder weapon, then it is certainly self-inculpatory." Id. As one scholar noted, Justice Scalia also made the point in his concurring opinion that "implicating someone else does not automatically negate the fact that the statement is against the declarant's penal interest." Aurzada, supra note 22, at 601 (citing Williamson, 512 U.S. at 606-07).

190. Williamson, 512 U.S. at 605.

191. Id. (citing Lee v. Illinois, 476 U.S. 530, 543-45 (1986)).


193. See id. at 134. Decided in 1999 after Williamson, the Supreme Court's plurality decision in Lilly was the first to "explicitly" answer whether against penal interest accomplice confessions were firmly rooted. Id.

194. See id. (deciding whether accomplice confessions were firmly rooted).

195. See id. at 133 n.4 (noting that Arkansas, Indiana, Kansas, Maine, Nevada, New Jersey, North Dakota, and Vermont are among such states by citing statutes and cases from those states).

196. See id. at 133-34 n.4 (citing hearsay laws in Alabama, Georgia, and Missouri).

197. FED. R. EVID. 804(b)(3).
exception from Williamson stood to benefit from the Court's guidance on the issue of accomplice confessions.\textsuperscript{198}

Even after deciding in a number of cases whether specific hearsay evidence violated a defendant's confrontation rights, case law in this area remained incomplete and unsettled.\textsuperscript{199} However, the Court did little to resolve the open issues when it took up the matter of accomplice hearsay confessions again in Lilly v. Virginia.\textsuperscript{200} While the Court did not come to a consensus on the admissibility of accomplice confessions under the Confrontation Clause, the Lilly decision highlighted the dialogue among the Justices on the over-arching issues of how the Court should address the intersection of hearsay and the Confrontation Clause.\textsuperscript{201} Lilly is thus more important for the questions it raised—identifying key issues in confrontation doctrine—rather than the questions it answered.\textsuperscript{202}

Justice Stevens announced and delivered the plurality opinion of the Court in Lilly, framing the question of the case as "whether the accused's Sixth Amendment right 'to be confronted with the witnesses against him' was violated by admitting into evidence at his trial a nontestifying accomplice's entire confession that contained some statements against the accomplice's penal interest and others that inculpated the accused."\textsuperscript{203} In Lilly, the defendant was convicted of murder after the state introduced his accomplice's tape-recorded confession under the against penal interest exception for hearsay statements of an unavailable witness.\textsuperscript{204} The defendant appealed, arguing that the admission of the accomplice confession violated the Confrontation Clause.\textsuperscript{205} The Supreme Court of Virginia

\textsuperscript{198} See Lilly, 527 U.S. at 133 n.4 (providing a list of state court decisions which adhered to the Supreme Court's interpretation of Federal Rule of Evidence 804(b)(3) as explained in Williamson); State v. Crawford, 54 P.3d 656 (Wash. 2002), cert. granted, 539 U.S. 914 (2003), rev'd by 124 S. Ct. 1354 (2004). See also Kirst, supra note 1, at 92 ("Courts did not always have clear guidance from the Supreme Court about whether [accomplice confessions were] forbidden by the Confrontation Clause.").

\textsuperscript{199} Kirst, supra note 1, at 88.

\textsuperscript{200} See generally Lilly, 527 U.S. 116; see also Kirst, supra note 1, at 88 (noting that Lilly has been "described as 'a case without a majority opinion' that has 'no majority analysis' because the Court was 'fractured' or 'fragmented'"") (citations omitted).

\textsuperscript{201} See Kirst, supra note 1, at 88-89.

\textsuperscript{202} Id. at 89.

\textsuperscript{203} Lilly, 527 U.S. at 120. The defendant Lilly, his brother Mark, and a third acquaintance stole liquor and guns from a home and robbed a small country store. \textit{Id.} They later abducted the victim during a carjacking and one of the men shot and killed the victim. \textit{Id.} The three men proceeded to rob two other stores before the police apprehended them. \textit{Id.} Mark accused the defendant of masterminding the robberies and maintained that he himself had been severely drunk during the crime spree although he had participated in the robberies. \textit{Id.} at 120-21. After the police told Mark that if he did not "break family ties" he could face a life sentence, Mark admitted that his brother, the defendant, had instigated the carjacking and shot the victim. \textit{Id.} at 121. At the defendant's separate trial for murder, the State of Virginia called Mark to testify, but Mark "invoked his Fifth Amendment privilege against self-incrimination." \textit{Id.}

\textsuperscript{204} \textit{Id.} at 121-22.

\textsuperscript{205} \textit{Id.}
affirmed the conviction, holding that admission of the accomplice’s statements did not violate the defendant’s confrontation rights, because they were statements against interest and fell within a firmly rooted exception to the state’s hearsay law.\(^{206}\)

All of the Justices concurred in reversing the Virginia Supreme Court and a majority remanded the case for a review of whether the confrontation violation was harmless error.\(^{207}\) In analyzing the admissibility of the accomplice confession under the Confrontation Clause, the opinions of the Justices reflected the unique concerns surrounding the general reliability of accomplice confessions that inculpate the defendant.\(^{208}\)

Justice Stevens’ lead opinion analyzed the defendant’s confrontation challenge under the Roberts requirement that hearsay must either satisfy a firmly rooted exception or carry particularized guarantees of trustworthiness.\(^{209}\) Before turning to the Roberts inquiry, Justice Stevens rejected the argument advanced by Justice Thomas in White v. Illinois that the Confrontation Clause should be “narrowly construed to apply only to” the practice of prosecuting criminal defendants on certain formalized testimonial materials, such as ex parte affidavits, out-of-court depositions, and accomplice confessions.\(^{210}\) Justice Stevens stated that the Court should adhere to its Roberts framework, reasoning that “[b]ecause that restrictive reading of the Clause’s term ‘witnesses’ would have virtually eliminated the Clause’s role in restricting the admission of hearsay testimony, we considered it foreclosed by our prior cases.”\(^{211}\) The accomplice confession at issue in Lilly, taken by the police for future use at trial, was formalized testimonial material that would nevertheless implicate the Confrontation Clause under this narrower approach.\(^{212}\)

Joined by Justices Souter, Ginsburg, and Breyer, Stevens turned to the reliability inquiry under Roberts to analyze the against penal interest exception to the hearsay rule.\(^{213}\) Justice Stevens commented that accomplice

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206. Id. at 122 (noting that the Supreme Court of Virginia relied upon White v. Illinois, 502 U.S. 346, 356 (1992), for the proposition that proffered hearsay that comes within a firmly rooted exception satisfies the Confrontation Clause).

207. Id. at 120, 135-40 (plurality opinion); id. at 143 (Scalia, J., concurring in the Court’s judgment).

208. See generally id. at 120-49.

209. Id. at 124-25. Justice Stevens first determined, in Part II of his opinion, that the Supreme Court had subject-matter jurisdiction over the case. Id. at 123. Even though the defendant had focused on state hearsay law in his appeal to the Supreme Court of Virginia, he had also alleged a Sixth Amendment violation and relied upon Supreme Court confrontation jurisprudence in his briefs to the Court. Id. According to Justice Stevens, this was sufficient to challenge the constitutionality of admitting Mark’s statements, giving the Supreme Court jurisdiction over the case. Id.

210. Id. at 124 (citing Justice Thomas’ concurrence in White, 502 U.S. at 361, 363, which argues that the Clause should be thus interpreted).

211. Id.

212. Id. at 125.

213. Id. at 127. Citing Lee, Stevens noted that “the simple categorization of a statement as a ‘declaration against penal interest . . . defines too large a class for meaningful Confrontation Clause analysis.’” Id. (quoting Lee v. Illinois, 476 U.S. 530, 544 n.5 (1986)). Accordingly, Justice Stevens described three categories of statements commonly offered into evidence under the against penal interest exception. Id.
statements that incriminate a defendant are of "quite recent vintage" and, when offered against a criminal defendant, are the functional equivalent of those used in the early English ex parte affidavit system.\textsuperscript{214} Since the Court first indicated its distrust of this type of evidence,\textsuperscript{215} the Court has "spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants."\textsuperscript{216} Justice Stevens cited the holdings from \textit{Douglas, Lee, White,} and \textit{Williamson} for the Court's consistent reluctance to admit accomplice statements that "shift or spread blame."\textsuperscript{217} Reversing the Supreme Court of Virginia, Justice Stevens declared that "accomplices' confessions that inculpate 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."\textsuperscript{218}

Justice Stevens cautioned that the Confrontation Clause does not impose a "'blanket ban on the government's use of [nontestifying] accomplice statements that incriminate a defendant.' Rather, it simply means that the government must satisfy the second prong of \textit{Ohio v. Roberts}...."\textsuperscript{219} The

The first category involves voluntary admissions of the declarant that, when offered into evidence against the declarant himself, are typically admissible without a confrontation problem. \textit{Id.} Justice Stevens described the common use of party opponent admission as having a "heritage confirming their admissibility." \textit{Id.; see, e.g., Fed. R. Evid. 801(d)(1) (stating that a party's own out-of-court statements are admissible against him at trial).} Justice Stevens further noted that, in joint trials, admitting the declarant's confession against him, but not against his codefendant, involves confrontation problems as elucidated in \textit{Bruton} and its progeny. \textit{Lilly,} 527 U.S. at 127-29. Moreover, in cases of jointly tried defendants, the fact that the codefendant's confession was against his penal interest "did not justify its use as evidence against another person." \textit{Id.} at 128.

The second category involves exculpatory evidence offered by the defendant who claims that it was the declarant, and not he, "who committed (or was involved) in the crime in question." \textit{Id.} at 129. The Confrontation Clause is not implicated in these situations because it is the defendant who offers the evidence. \textit{Id.} at 130.

The hearsay at issue in \textit{Lilly} involved the third category: where the government offers the statements of an alleged accomplice against the defendant. \textit{Id.} It is really only this third category that implicates the Confrontation Clause, because if a voluntary admission of the defendant were offered against the defendant, he would not cross-examine himself and, further, if the defendant offers exculpatory statements, there are no Confrontation Clause concerns. \textit{Leading Cases: I. Constitutional Law,} 113 Harv. L. Rev. 200, 239 (1999) [hereinafter \textit{Leading Cases}].

\textsuperscript{214} \textit{Lilly,} 527 U.S. at 130-31.

\textsuperscript{215} \textit{Id.} at 131 (citing \textit{Crawford v. United States,} 212 U.S. 183, 204 (1909) (holding that an accomplice confession that "incriminate[s the accomplice] together with the defendant,.... ought to be received with suspicion, and with the very greatest care and caution. . . .").

\textsuperscript{216} \textit{Id.} (quoting \textit{Lee,} 476 U.S. at 541, and citing \textit{Cruz v. New York,} 481 U.S. 186, 195 (1987) (White, J., dissenting) and \textit{Bruton v. United States,} 391 U.S. 123, 136 (1968)). While Justice Stevens cited both \textit{Lee} and \textit{Cruz,} which involved interlocking confession issues, the \textit{Lilly} opinion did not address interlocking confession jurisprudence. \textit{See id.} Justice Stevens was able to pass over this issue because interlock was not at issue in \textit{Lilly.} \textit{See id.} Moreover, while the Court's precedent supported the presumptive unreliability of accomplice confessions, the Court had never found an accomplice confession constitutionally admissible based upon the interlock theory. \textit{See, e.g., Lee,} 476 U.S. at 545; \textit{Cruz,} 481 U.S. at 193.

\textsuperscript{217} \textit{Lilly,} 527 U.S. at 132-34.

\textsuperscript{218} \textit{Id.} at 134.

\textsuperscript{219} \textit{Id.} at 135 n.5 (quoting Chief Justice Rehnquist's concurring opinion).
Court’s opinion thus centered on the unreliability of accomplice confessions and not on their historical use in criminal trials.\textsuperscript{220} However, Justice Stevens noted that:

It is highly unlikely that the presumptive unreliability that attaches to accomplices’ confessions that shift or spread blame can be effectively rebutted when the statements are given under conditions that implicate the core concerns of the old \textit{ex parte} affidavit practice—that is, when the government is involved in the statements’ production, and when the statements describe past events and have not been subjected to adversarial testing.\textsuperscript{221}

The case before the Court exemplified this observation.\textsuperscript{222} The accomplice confession in \textit{Lilly} lacked such particularized guarantees of trustworthiness to make cross-examination at trial “superfluous” in order to satisfy the Confrontation Clause.\textsuperscript{223} Specifically, the accomplice gave his statement while under the influence of alcohol, under government custody for serious charges, and in response to the police’s leading questions, which gave the accomplice a natural motive to exculpate himself as much as possible.\textsuperscript{224} Because the statements were “untrustworthy,” the statements violated the defendant’s Confrontation Clause rights.\textsuperscript{225}

Chief Justice Rehnquist wrote a concurring opinion in which Justice O’Connor and Justice Kennedy joined.\textsuperscript{226} The Chief Justice found that the accomplice statement in \textit{Lilly} was not truly self-inculpatory and, therefore, the facts of \textit{Lilly} did not raise the question of whether genuinely self-inculpatory accomplice confessions that inculpate the defendant violate the Confrontation Clause.\textsuperscript{227} The Chief Justice believed that Justice Stevens’ plurality holding reached too broadly beyond the facts, amounting to a “complete ban on the government’s use of accomplice confessions that inculpate a codefendant.”\textsuperscript{228} While noting that custodial confessions are

\begin{itemize}
\item \textsuperscript{220} See id. at 137-39.
\item \textsuperscript{221} Id. at 137.
\item \textsuperscript{222} See id. at 137-39. Justice Stevens rejected arguments that the statements were reliable because 1) they were corroborated by other evidence (citing Idaho v. Wright, 497 U.S. 805, 822 (1990) (holding hearsay must be inherently trustworthy without reference to other trial evidence)); 2) the police informed the accomplice of his \textit{Miranda} rights before he made his statement (citing Lee v. Illinois, 476 U.S. 530, 544 (1986) (holding a confession that is voluntary under the Fifth Amendment does not bear on the truthfulness of the confession)); and 3) the accomplice implicated himself as a participant in the crime spree (citing Williamson v. United States, 512 U.S. 594, 599 (1994) (holding that just because a person makes a broadly self-inculpatory statement does not mean the non-self-inculpatory parts are more credible)). See id. at 137-39.
\item \textsuperscript{223} See id. at 138-39. This reasoning exemplifies the Court’s position that reliability of testimonial hearsay is an adequate substitute for the procedural guarantee of cross-examination, a position that was explicitly rejected by the majority of the Court in \textit{Crawford v. Washington}, which Justice Stevens joined. See Crawford v. Washington, 124 S. Ct. 1354, 1374 (2004).
\item \textsuperscript{224} Lilly, 527 U.S. at 139.
\item \textsuperscript{225} See id.
\item \textsuperscript{226} Id. at 144 (Rehnquist, C.J., concurring in the judgment).
\item \textsuperscript{227} Id. at 145 (Rehnquist, C.J., concurring in the judgment).
\item \textsuperscript{228} Id. (Rehnquist, C.J., concurring in the judgment).
\end{itemize}
viewed with "special suspicion," the Chief Justice suggested that there was no reason that "custodial confessions that equally inculpate both the declarant and the defendant" should not fall within a firmly rooted hearsay exception; likewise non-custodial or "private" confessions, such as those made to friends or family, may satisfy a firmly rooted exception. The Chief Justice concurred in the judgment because he decided only that a custodial confession placing sole responsibility for the murder on the defendant did not satisfy a firmly rooted hearsay exception.

Justice Thomas wrote to espouse his view that the right of confrontation is implicated by hearsay only when it is "contained in formalized testimonial material, such as affidavits, depositions, prior testimony, or confessions." This was an idea that Justice Thomas had also advanced in White v. Illinois. While Justice Thomas found that the accomplice's statements, as a custodial confession, fell within this category of "formalized testimony," he agreed with the Chief Justice's view that the Confrontation Clause did not impose a blanket ban on accomplice confessions that incriminate a defendant.

In his own concurring opinion, Justice Scalia cited Justice Thomas' view in White to support his belief that introduction of the accomplice confession without opportunity for cross-examination amounted to a "paradigmatic Confrontation Clause violation." As the confrontation

229. Id. at 146-47 (Rehnquist, C.J., concurring in the judgment). The Chief Justice went on to cite a number of federal court decisions that had "concluded that such statements fall under a firmly rooted hearsay exception." See id. at 147 n.3 (Rehnquist, C.J., concurring in the judgment).

230. Lilly, 527 U.S. at 148.

231. Id. at 143 (Thomas, J., concurring in part and concurring in judgment) (quoting White v. Illinois, 502 U.S. 346, 365 (1992)). Justice Thomas declined to analyze why or how the accomplice's statements were "testimonial material" beyond the fact that they constituted a "confession." Id. However, Justice Thomas' confrontation view, contained in both his White and Lilly opinions, reflects the more traditional purpose of the Confrontation Clause. See California v. Green, 399 U.S. 149, 157 (1970); Jonakait, supra note 74, at 578. Justice Thomas' view seems consistent with those commentators who called for returning confrontation to its role as a defendant's guarantee to an adversary process: testing in front of the jury of those "witnesses against" the defendant, and prohibiting admission of their out-of-court "testimony." Jonakait, supra note 74, at 585-86. Justice Thomas' traditionalist take on the Confrontation Clause departed from the Court's "reliability-focused" approach, because the proper inquiry would not involve a reliability analysis, but rather determining if the hearsay statement was "testimonial." Lilly, 527 U.S. at 143 (Thomas, J., concurring). Regardless of whether Justice Thomas' "testimonial" test met their concerns, this departure was welcomed by commentators who argued that, while the adversary system does tend to advance the accuracy of the truth-finding process, this does not necessarily lead to the Court's conclusion that the prosecution's hearsay satisfies the Clause if it makes the truth-finding process more accurate. See, e.g., Jonakait, supra note 74, at 584-85. According to these commentators, the accused should be guaranteed an adversary criminal trial, complete with cross-examination of the defendant's accusers, even if that does not advance the best truth-determining process. See id.

232. See White, 502 U.S. at 365 (Thomas, J., concurring).

233. Lilly, 527 U.S. at 143; Leading Cases, supra note 213, at 238.

234. Lilly, 527 U.S. at 143 (Scalia, J., concurring).
violation was clear, Justice Scalia would have just remanded the case for a determination of harmless error.\textsuperscript{235}

Justice Breyer wrote to address a groundswell of scholarly arguments that questioned the Court’s confrontation doctrine as linking the Confrontation Clause directly to the hearsay rule, turning the Clause into a rule that protects “trustworthiness” and not “confrontation.”\textsuperscript{236} Justice Breyer opined that the \textit{Roberts} hearsay-based test is arguably “both too narrow and too broad.”\textsuperscript{237} The test is too narrow in the sense that any hearsay satisfying a firmly rooted hearsay exception receives little Confrontation Clause scrutiny.\textsuperscript{238} On the other hand, the test is too broad because it makes a constitutional issue out of any hearsay not falling within a firmly rooted hearsay exception.\textsuperscript{239} Justice Breyer found that the Court did not need to address this question in order to decide \textit{Lilly}, but he wanted to “point out that the fact that we do not reevaluate the link in this case does not end the matter. It may leave the question open for another day.”\textsuperscript{240}

Although none of the Justices’ single opinions were supported by a majority of the Court, \textit{Lilly} did propose some confrontation rules that were supported by a majority.\textsuperscript{241} “While none of these refinements derived from \textit{Lilly} are a holding on actual facts, each indicates how confrontation doctrine might develop.”\textsuperscript{242} Seven Justices analyzed the admissibility of a custodial confession under \textit{Roberts}.\textsuperscript{243} Although there was no majority proposal on a specific rule, “[a]ll nine Justices appeared to agree that the rule for a private confession should not be the same as the rule for a custodial confession. . . .”\textsuperscript{244} However, the fractured \textit{Lilly} opinion should not be interpreted as simply drawing a distinction between custodial and non-custodial confessions.\textsuperscript{245}

As to custodial confessions, the Court left open the possibility that an accomplice confession may have particularized guarantees of trustworthiness, but “provided a limited survey of which facts might suffice as particularized guarantees of trustworthiness.”\textsuperscript{246} Moreover, the Court’s acknowledgment that custodial confessions are highly suspect indicated that

\begin{footnotesize}
\textsuperscript{235} Id. (Scalia, J., concurring); \textit{Leading Cases, supra} note 213, at 238.
\textsuperscript{236} \textit{Lilly}, 527 U.S. at 140 (Breyer, J., concurring).
\textsuperscript{237} Id. at 141 (Breyer, J., concurring).
\textsuperscript{238} Id. (Breyer, J., concurring).
\textsuperscript{239} Id. at 142 (Breyer, J., concurring); \textit{Leading Cases, supra} note 213, at 238.
\textsuperscript{240} \textit{Lilly}, 527 U.S. at 142-43. Just five years after \textit{Lilly}, the Court abolished the \textit{Roberts} Test in a purported effort to sever the link between hearsay and the Confrontation Clause. \textit{See} \textit{Crawford v. Washington}, 124 S. Ct. 1354, 1356-73 (2004).
\textsuperscript{241} Kirst, \textit{supra} note 1, at 94-95.
\textsuperscript{242} Id. at 95.
\textsuperscript{243} \textit{Lilly}, 527 U.S. at 134-35 (Stevens, J., joined by Souter, Ginsburg and Breyer, JJ); \textit{Lilly}, 527 U.S. at 148 (Rehnquist, C.J., concurring and joined by O’Connor and Kennedy, JJ.).
\textsuperscript{244} Kirst, \textit{supra} note 1, at 95. One commentator surveyed ninety-eight appellate cases decided after \textit{Lilly} which involved the use of a private confession and eighteen of these convictions were upheld in favor of admissibility. \textit{See} \textit{id.} at 105, 138 n.407.
\textsuperscript{245} \textit{Leading Cases, supra} note 213, at 240.
\textsuperscript{246} Kirst, \textit{supra} note 1, at 96.
\end{footnotesize}
they might never be trustworthy enough.\textsuperscript{247} The Court further declined to list any factors for lower courts to consider when determining whether hearsay has particularized guarantees of trustworthiness.\textsuperscript{248}

On the other hand, the Chief Justice and Justices O'Connor and Kennedy believed that genuinely self-inculpatory custodial confessions may satisfy a firmly rooted hearsay exception without the need to address particularized guarantees of trustworthiness under \textit{Roberts}.\textsuperscript{249} On its facts, however, \textit{Lilly} did not provide a basis for testing the Justices' stances on whether the equally or genuinely inculpatory nature of an accomplice's custodial confession could provide sufficient "indicia of reliability" where the self-accusations in the confession are closely tied to statements relating to the defendant's guilt.\textsuperscript{250}

\textsuperscript{247} See \textit{Lilly}, 527 U.S. at 137 (noting that "'[i]t is highly unlikely that the presumptive unreliability that attaches to accomplice's [custodial] confessions that shift or spread blame can be effectively rebutted'). Many of the cases following \textit{Lilly} involved the use of accomplice custodial confessions. Kirst, \textit{supra} note 1, at 107. In forty-five cases involving custodial confessions out of ninety-eight post-\textit{Lilly} cases surveyed, the accomplice confession was inadmissible under \textit{Lilly}, because the statement in some way shifted or spread blame, curried favor with authorities, or avoided suspicion. \textit{Id.} at 106. In twenty-five of the ninety-eight cases, appellate courts held that \textit{Lilly} did not exclude the use of a custodial confession. \textit{Id.} at 112. The lower courts departed from \textit{Lilly} by 1) reasoning that \textit{Lilly} was a plurality opinion and thus not binding precedent; 2) narrowly interpreting \textit{Lilly} to avoid its conclusions about trustworthiness; 3) holding that \textit{Lilly} did not apply to an accomplice statement that did not name or refer to the defendant when it was made or after it was redacted; or 4) admitting genuinely self-inculpatory confessions. \textit{Id.} at 113.

\textsuperscript{248} Kirst, \textit{supra} note 1, at 144. The Court's reasons for finding a lack of trustworthiness were fairly fact-specific to the \textit{Lilly} case, for instance, \textit{Lilly}'s intoxication, leading questions by the police, and shifting and spreading blame for the worst part of the crime spree to the defendant. \textit{Lilly}, 527 U.S. at 139. While some of the ninety-eight post-\textit{Lilly} cases surveyed used these \textit{Lilly} facts as factors against trustworthiness, none of these cases identified "additional facts that might be used to generate even a tentative list of guarantees of trustworthiness." Kirst, \textit{supra} note 1, at 145.

\textsuperscript{249} \textit{Lilly}, 527 U.S. at 146. Justices Thomas and Scalia's position on the genuinely self-inculpatory issue is less clear. \textit{Leading Cases, supra} note 213, at 241. While both believe that the Confrontation Clause is only "'implicated by... formalized testimonial material, such as... confessions,'" the phrase "implicated by" is not equated with "violated by." \textit{Id.} at 240 (quoting \textit{White v. Illinois}, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment)). Taking into account the fact that both Justices Scalia and Thomas focused on the truly self-inculpatory nature of the accomplice confession in \textit{Williamson}, arguably both Justices view a Confrontation Clause violation as one that "hinges on whether the statement is genuinely self-inculpatory." \textit{Id.} at 240-41.

\textsuperscript{250} Kirst, \textit{supra} note 1, at 97-98. The facts of \textit{Lilly} involved a statement that shifted responsibility for the murder to the defendant, depriving the Court of an opportunity to discuss under what circumstances truly self-inculpatory confessions might be admissible. \textit{Lilly}, 527 U.S. at 121, 146 (Rehnquist, C.J., concurring in judgment). In fact, four of the ninety-eight post-\textit{Lilly} appellate cases that were surveyed upheld the constitutional admissibility of genuinely self-inculpatory custodial confessions that also implicated the defendant for reasons such as the fact that the accusations against the defendant were intertwined closely with the self-inculpating portions and that the accomplice did not appear to be shifting blame to the defendant. Kirst, \textit{supra} note 1, at 130-34 (citing United States v. Photogrammetric Data Servs., Inc., 259 F.3d 299 (4th Cir. 2001); People v. Farrell, 34 P.3d 401 (Colo. 2001); Stevens v. People, 29 P.3d 305 (Colo. 2001); Gabow v. Commonwealth, 34 S.W.3d 63 (Ky. 2001)).
The Lilly Court arguably allowed for the possibility of alternative trustworthiness grounds for admitting accomplice statements against a defendant. Chief Justice Rehnquist had not specifically rejected the use of interlocking confessions to establish reliability, a position he had earlier supported in New Mexico v. Earnest. The Chief Justice’s positions in Earnest and Lilly suggest that the interlocking theory and the genuinely/equally inculpatory theory could provide alternative grounds for an accomplice confession to satisfy the Roberts reliability requirement. Thus, after Lilly the Court had yet to resolve many issues surrounding accomplice confessions, and the Justices’ varying views on the matter.

251. At least ten cases following Lilly that involved accomplice statements against interest were admitted under other Supreme Court precedent, serving as a reminder that a prosecutor can use an accomplice statement under another confrontation rule despite the fact that it would be excluded under Lilly. Kirst, supra note 1, at 104-05 & n.113 (citing United States v. Dhinsa, 243 F.3d 635 (2d Cir. 2001); Martin v. State, 57 S.W.3d 136 (Ark. 2001); People v. Davis, 2001 WL 1589245 (Cal. Ct. App. Dec. 13, 2001); State v. Tangie, 616 N.W.2d 564 (Iowa 2000); State v. Hallum, 606 N.W.2d 351 (Iowa 2000); Commonwealth v. Babbitt, 723 N.E.2d 17 (Mass. 2000); People v. Riley, 636 N.W.2d 514 (Mich. 2001); State v. Moreno, 2000 WL 16318 (Minn. Ct. App. Jan. 11, 2000); State v. Dennis, 523 S.E.2d 173 (S.C. 1999); State v. Davis, 10 P.3d 977 (Wash. 2000)).

252. 477 U.S. 648 (1986). For example, as one scholar has pointed out, Justice Rehnquist in New Mexico v. Earnest stated that an accomplice’s confession could be admissible against a defendant if it was “thoroughly substantiated by the defendant’s own confession” because the facts of the confession interlocked. See Kirst, supra note 1, at 97 (citing Earnest, 477 U.S. at 649 (Rehnquist, J., concurring) (quoting Lee v. Illinois, 476 U.S. 530, 545 (1986))..

253. See Lilly, 527 U.S. at 146 (Rehnquist, C.J., concurring); Earnest, 477 U.S. at 649 (Rehnquist, J., concurring); Kirst, supra note 1, at 97-98 (noting that the Chief Justice’s position indicates that “theories about confrontation should be considered tentative and open to reconsideration if they are not part of a holding”); see also State v. Crawford, 54 P.3d 656, 663-64 (Wash. 2002) (holding that interlocking confessions are an alternative ground for satisfying the “indicia of reliability” test), cert. granted, 539 U.S. 914 (2003), rev’d by 124 S. Ct. 1354 (2004). However, Justice Stevens’ opinion in Lilly indicates that at least four of the Justices would reject the use of corroborating evidence to infer reliability. See Lilly, 527 U.S. at 137-38 (citing Idaho v. Wright, 497 U.S. 805, 822 (1990), to say that the Court has “squarely rejected the notion that evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears particularized guarantees of trustworthiness”) (internal quotation marks omitted)). However, some of the opinions following Lilly upheld the admission of custodial accomplice confessions, relying partly on corroboration by other evidence at trial as a guarantee of trustworthiness. Kirst, supra note 1, at 145.

The Court’s focus on the inherent reliability found in the making of custodial confessions also indicates another potential result: When an accomplice’s confession interlocks with a defendant’s so that it is admissible under the interlock theory, the confession may still be thrown out on the alternative ground that the circumstances surrounding the making of the statement are unreliable. See Lilly, 527 U.S. at 137-139 (stating that the accomplice confession did not carry sufficient “indicia of reliability” because of the circumstances surrounding the custodial confession); Wright, 497 U.S. at 826 (rejecting the use of corroborating physical evidence to infer reliability, which can be found only in the circumstances of the statement’s making); Lee v. Illinois, 476 U.S. 530, 541, 545 (1986) (stating that the codefendant’s custodial confession was unreliable because of his motive to spread blame and because defendant’s confession did not sufficiently interlock). Whether or not an accomplice confession that is genuinely self-inculpatory could likewise still be inadmissible because of the circumstances surrounding the making of the statement is unclear after Lilly. Kirst, supra note 1, at 97-98. However, an equally inculpatory confession, by its own nature, is unlikely to spread or shift blame—a primary reliability concern long held by the Court. See, e.g., Lilly, 527 U.S. at 136; Williamson v. United States, 512 U.S. 594, 601 (1994); White v. Illinois, 502 U.S. 346, 357 (1992); Lee, 476 U.S. at 545.
created an uncertain state of confrontation doctrine as demonstrated by the lower courts' inconsistent interpretations of the Court's precedent.\textsuperscript{254}

IV. AN OVERVIEW: CONFRONTATION CLAUSE PRECEDENT AND ITS CRITICISMS

Reliability has been a fundamental focus of the Court's confrontation jurisprudence beginning with \textit{Mattox}, which recognized that confrontation ensured that the declarant and his statements were subject to adversarial testing.\textsuperscript{255} It also made clear that the defendant's right of confrontation must give way to public policy, such as necessity of the evidence, in those situations when adversarial testing of the hearsay evidence is not as valuable.\textsuperscript{256} \textit{Douglas}, however, found that the prosecution's use of accomplices' custodial confessions that implicate the defendant in an equal or more serious crime pose more serious problems under the Confrontation Clause, especially when the inculpatory confession is crucial evidence for the government's case.\textsuperscript{257} The \textit{Bruton} Court further strengthened the Court's view toward the inherent unreliability of inculpatory accomplice confessions and the harmfulness of admitting a codefendant's confession in a joint trial where the confession is key evidence against the defendant who has no opportunity to cross-examine his codefendant.\textsuperscript{258}

\textit{Roberts}, together with \textit{White}, established the Court's Confrontation Clause framework, which could be used to analyze the admissibility of accomplice confessions: hearsay was admissible under the Confrontation Clause if it satisfied a "firmly rooted" hearsay exception or if the declarant was unavailable and the hearsay carried particularized guarantees of trustworthiness.\textsuperscript{259} Even with a universal framework in place, the Court struggled to define a consistent doctrine, which was exemplified by two issues surrounding accomplice confessions.\textsuperscript{260}

\textit{Lee} grappled with the issue of interlocking confessions, wherein the Court found that the particular circumstances surrounding the accomplice confession at issue, coupled with the fact that the defendant's and

\begin{itemize}
\item \textsuperscript{254} See Kirst, \textit{supra} note 1, at 104-44 (discussing the inconsistent application of the Court's confrontation doctrine following \textit{Lilly} as lower courts interpreted \textit{Lilly} in "many ways").
\item \textsuperscript{255} \textit{Mattox} v. United States, 156 U.S. 237, 242-43 (1895) (stating that confrontation protects the defendant's right to test the declarant's recollection, sift his conscience, and allow the jury to decide whether the declarant is "worthy of belief").
\item \textsuperscript{256} \textit{Id.} at 243 (finding that the former testimony of a declarant who was cross-examined at a previous trial, along with dying declarations, were admissible where the declarant was unavailable).
\item \textsuperscript{257} \textit{Douglas} v. Alabama, 380 U.S. 415, 419-20 (1965).
\item \textsuperscript{258} \textit{Bruton} v. United States, 391 U.S. 123, 127-28, 137 (1968).
\end{itemize}
accomplice's confessions were not sufficiently interlocking, did not provide sufficient reliability to satisfy the Confrontation Clause.\textsuperscript{261} While the Court provided for the possibility of using interlock for Confrontation Clause purposes, it did not clarify whether interlock may be used to infer reliability or as a factor in the harmless error analysis.\textsuperscript{262}

\textit{Wright} seemed to close the door that \textit{Lee} left open, holding that particularized guarantees of trustworthiness could only be found in the totality of the circumstances surrounding the making of the statement and not by reference to other corroborating evidence, thus casting doubt on whether the interlock theory could be used to infer reliability of an accomplice confession.\textsuperscript{263} Because the Court had never directly addressed it, the permissible use of interlock to establish the reliability of an accomplice confession remained an open issue.\textsuperscript{264}

The second issue surrounding accomplice confessions, the against penal interest exception, arose in \textit{Williamson} where the Court required intense scrutiny of an accomplice confession to insure that each statement within it was directly against the declarant's interest in order to be reliable, and in fact, to be one of the particularized guarantees of trustworthiness required by the Confrontation Clause.\textsuperscript{265} The \textit{Lilly} opinion could only muster four Justices to hold that accomplice confessions admitted under the against penal interest exception were not firmly rooted, doubting whether these presumptively unreliable statements could ever carry particularized guarantees of trustworthiness to satisfy the Confrontation Clause.\textsuperscript{266} Moreover, a majority of the Justices could not agree on a workable standard for analyzing accomplice confessions under the \textit{Roberts} confrontation framework, and a few of the Justices questioned the framework altogether.\textsuperscript{267}

If anything, \textit{Lilly} is an example of the Court's somewhat convoluted interpretation and divided application of its confrontation doctrine.\textsuperscript{268} Indeed, the \textit{Lilly} plurality's treatment of the against penal interest exception serves to highlight the shortcomings of the \textit{Roberts} doctrine as some justices argued that certain accomplice confessions should be admissible under a firmly rooted exception without further constitutional analysis while some justices would engage in an intensive 'trustworthiness' inquiry on a case-by-

\textsuperscript{261} \textit{Lee}, 476 U.S. at 539, 545.
\textsuperscript{263} \textit{See Wright}, 497 U.S. at 819, 822-23; \textit{see also} \textit{Crawford} v. \textit{Washington}, 124 S. Ct. 1354, 1378 (2004) (Rehnquist, C.J., concurring) (noting that \textit{Wright} would have precluded the lower court's reliance on the interlocking nature of the defendant's and accomplice's confession to establish reliability).
\textsuperscript{264} \textit{See Crawford}, 124 S. Ct. at 1359 (questioning whether the interlock theory provided sufficient reliability for Confrontation Clause purposes).
\textsuperscript{267} \textit{See id.} at 120-47.
\textsuperscript{268} \textit{See id.}
Justices seemed to agree that the rule for private confessions should not be the same for custodial accompanying text (noting that, although there was no majority proposal on a specific rule, the 641, 698 government-prepared hearsay. supra L.J. 1045, 1045-47 (1998); Dickinson, Akhil Failed Marriage in Need of a Quick Divorce, Joshua C. Dickinson, concurring); Petitioner's Brief, concurring); Bruton v. United States, 391 New York, 481 Lilly, 527 U.S. at 143 (Thomas, J., concurring); Lilly, 527 U.S. at 143 (Scalia, J., concurring); Lilly, 527 U.S. at 141 (Breyer, J., concurring); White, 502 U.S. at 365 (Thomas, J., concurring); Petitioner's Brief, supra note 14, at 25-26; Leading Cases, supra note 213, at 242; Joshua C. Dickinson, The Confrontation Clause and the Hearsay Rule: The Current State of a Failed Marriage in Need of a Quick Divorce, 33 CREIGHTON L. REV. 763, 800-01 (2000). 272. See, e.g., Williamson, 512 U.S. 594 (plurality with four separate opinions); White v. Illinois, 502 U.S. 346 (1992) (7-2 decision); Idaho v. Wright, 497 U.S. 805 (1990) (5-4 decision); Cruz v. New York, 481 U.S. 186 (1987) (5-4 decision); Lee v. Illinois, 476 U.S. 530 (1986) (5-4 decision); Bruton v. United States, 391 U.S. 123 (1968) (6-2 decision). 271. See Lilly, 527 U.S. at 143 (Thomas, J., concurring); Lilly, 527 U.S. at 143 (Scalia, J., concurring); Lilly, 527 U.S. at 141 (Breyer, J., concurring); White, 502 U.S. at 365 (Thomas, J., concurring); Petitioner's Brief, supra note 14, at 25-26; Leading Cases, supra note 213, at 242; Joshua C. Dickinson, The Confrontation Clause and the Hearsay Rule: The Current State of a Failed Marriage in Need of a Quick Divorce, 33 CREIGHTON L. REV. 763, 800-01 (2000). 272. See Lilly, 527 U.S. at 141 (Breyer, J., concurring); Petitioner's Brief, supra note 14, at 28-37; Akhil Reed Amar, Confrontation Clause First Principles: A Reply to Professor Friedman, 86 GEO. L.J. 1045, 1045-47 (1998); Dickinson, supra note 271; Douglass, supra note 74, at 195; Jonakait, supra note 74, at 578-79. 273. Lilly, 527 U.S. at 116 (plurality opinion supported by four concurring opinions); Lee, 476 U.S. at 547 (four dissenting justices); Dickinson, supra note 271, at 763. For instance, one critique was that the Court had failed to make clear distinctions between general out-of-court statements and government-prepared hearsay. Akhil Reed Amar, Sixth Amendment First Principles, 84 GEO. L.J. 641, 698 (1996) [hereinafter Amar, Sixth Amendment First Principles]; see also supra note 244 and accompanying text (noting that, although there was no majority proposal on a specific rule, the Justices seemed to agree that the rule for private confessions should not be the same for custodial
that of severing the Clause from its marriage to hearsay and reliability and returning the Clause to its traditional roots. These approaches purportedly narrowed and simplified the Clause's application, stepping away from the Roberts framework that had produced inconsistent results, set forth ad hoc rules simply to achieve fair results, and clung to the concept that the hearsay rule was somehow related to the Confrontation Clause.

One of the major suggested changes to the Court's approach came from two of its own members. Justices Thomas and Scalia advocated that the Sixth Amendment's original purpose did not apply the confrontation right generally to all hearsay, but only extended the confrontation right to those out-of-court statements that are "contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." Other suggested approaches reflected similar traditionalist theories, including a bar on admitting all hearsay statements gathered by the government unless the declarant is produced for trial, or a prohibition on those statements made with the understanding that they will be used at trial.

274. See, e.g., Dickinson, supra note 271, at 803-08: Amar, Sixth Amendment First Principles, supra note 273, at 694-97; see also Petitioner's Brief, supra note 14, at 28-37.

275. Dickinson, supra note 271, at 801-10, 818 (criticizing the current approach for allowing government produced statements, such as custodial accomplice confessions, to be admitted against a defendant without cross-examination merely because the statement fortuitously falls in a firmly rooted hearsay exception); Amar, Sixth Amendment First Principles, supra note 273, at 647 (arguing that a return to the plain meaning of the Sixth Amendment would simplify many of the problems the Court has created with its current confrontation framework).

276. White, 502 U.S. at 360-65 (Thomas, J., concurring, joined by Justice Scalia) (noting that under this "prosecutorial restraint" approach, hearsay statements not gathered by the government would still be analyzed under the Confrontation Clause, but not at such a heightened standard); Dickinson, supra note 271, at 804-05.

277. Margaret A. Berger, The Deconstitutionalization of the Confrontation Clause: A Proposal For a Prosecutorial Restraint Model, 76 MINN. L. REV. 557, 561-64 (1992) (noting that under this "prosecutorial restraint" approach, hearsay statements not gathered by the government would still be analyzed under the Confrontation Clause, but not at such a heightened standard); Dickinson, supra note 271, at 804-05.

278. Dickinson, supra note 271, at 804-06; see also Oral Argument, Crawford v. Washington, 123 S. Ct. 1354 (2004) (announcing this standard without adopting a test for how to determine if hearsay is "testimonial").
However, the Court adhered to nearly twenty-five years of reliability-based Confrontation Clause precedent beginning with its 1980 decision in Roberts when the Court first solidified its confrontation framework. It is significant that as recently as 1999, seven of the nine justices analyzed the Confrontation Clause issue under the Roberts Test. Moreover, Lilly was not the first case in which the Roberts hearsay-confrontation framework had been criticized, and yet the Court continued to reaffirm its precedent and the reliability principles of confrontation questions. In fact, members of the Court rebuffed attempts, even by their fellow jurists, to fashion a new standard.

Weigh the evidence more favorably for the accused, then the defendant has suffered no detriment from the lack of cross-examination. Id. at 588.

While this standard purports to depart from the Court's reliability-hearsay focus, it circles right back to the issue. Id. at 596. When a jury assesses what weight to give the evidence, it is essentially determining how reliable the evidence is. See Jonakait, supra note 74, at 608 (noting that a hearsay statement would be admissible under this suggested standard if it is "so trustworthy that it must be accurate"). The standard is arguably nothing more than a variation on the Court's recognition that statements are constitutionally "reliable" where cross-examination of the declarant would be superfluous. See Idaho v. Wright, 497 U.S. 805, 820 (1990).

The Court was also critiqued for turning the Confrontation Clause into a rule governing the admissibility of evidence rather than a right of confronting evidence and cross-examining witnesses at trial. See Douglas, supra note 74, at 195. The concern was that the confrontation right ends at exactly the point where it should begin: once hearsay passes constitutional muster and is admitted into evidence. Id. at 194. Therefore, a suggested approach was to provide for an "affirmative right to 'confront' hearsay, to impeach the hearsay declarant, and to challenge hearsay testimony through any reasonably available means." Id. at 197, 252-53.

Other commentators have suggested approaches similar to the one advocated by Justice Thomas in White and Lilly, arguing that the Confrontation Clause should be more narrowly and strictly construed to flatly prohibit statements of those who are "witnesses" against the defendant. Amar, supra note 272, at 1045-46. However, the word "witnesses" has so many possible interpretations that it renders any new standard attempting to narrow the Clause's scope with this term equally, if not more, amorphous than the Roberts Test. See id. at 1046 (discussing the multiple meanings and understandings of the word "witnesses"). For example, it has been suggested that "witnesses" encompasses only those who "testify either by taking the stand in person or via government-prepared affidavits, depositions, videotapes, and the like." Id. at 1045. Another interpretation is that "witnesses" includes those who give statements elicited by government agents acting under auspices of a criminal prosecution. Dickinson, supra note 271, at 807-08. Proponents recognize that a new standard does not necessarily provide an easier and cleaner application, especially when it comes to accomplice confessions. See Amar, supra note 272, at 1049 (noting that "[p]olice station confessions and statements are a tad trickier"). An accomplice's confession at the police station is almost always elicited by government agents during a criminal prosecution, but are the statements necessarily "government-prepared testimony" when they are given without an oath? See Amar, supra note 272, at 1049; Dickinson, supra note 271, at 807.

See White, 502 U.S. at 365 (Thomas, J., concurring) (arguing that the Court's confrontation framework should be replaced in favor of the traditional "formalized testimonial" approach). While Justice Thomas continued to advance this view in Lilly, a majority of the Justices adhered to the Roberts framework. Kast, supra note 1, at 95 n.50 for a breakdown.
The unsettled state of confrontation jurisprudence left it ripe for further adjudication by the Court.\textsuperscript{283} Notwithstanding a reevaluation of the Roberts reliability framework, confusion among the Court’s confrontation precedent necessitated clarification on 1) whether interlock is a proper basis for reliability of an accomplice confession,\textsuperscript{284} or 2) whether interlock is only an appropriate basis for harmless error analysis,\textsuperscript{285} and 3) whether and when accomplice confessions that are admitted directly against a defendant are sufficiently reliable to satisfy the Confrontation Clause.\textsuperscript{286}

\textbf{V. CRAWFORD V. WASHINGTON: CONFRONTING THE ISSUES WITH A NEW RULE}

The Court’s next opportunity to address accomplice confessions and the Confrontation Clause came in Crawford v. Washington, which focused on the interlocking confessions doctrine and a reevaluation of the Roberts framework.\textsuperscript{287} Crawford involved an appeal from the Washington Supreme Court, where the defendant was charged with first degree assault with a deadly weapon after stabbing Richard Lee at Lee’s apartment.\textsuperscript{288} On the night of the offense, police arrested the defendant and his wife Sylvia, who had been present during the assault.\textsuperscript{289} In tape recorded statements, the defendant and Sylvia told their stories: on the night of the assault, the defendant became angry over an incident that occurred several weeks prior, in which Lee had allegedly sexually assaulted Sylvia.\textsuperscript{290} Sylvia then directed the defendant to Lee’s apartment where, after talking with Lee for a while, the defendant stabbed Lee twice.\textsuperscript{291} The key distinguishing factor in these statements was that the defendant insinuated that Lee may have had something in his hand as the defendant stabbed him, but Sylvia indicated that Lee may have reached for something after he was stabbed.\textsuperscript{292}

At trial, the defendant claimed self-defense and invoked Washington’s marital privilege to prevent Sylvia from testifying against him.\textsuperscript{293} The state introduced Sylvia’s tape-recorded confession under the state’s against penal
interest exception to the hearsay rule. Subsequently, the jury disbelieved the self-defense claim and convicted the defendant of first-degree assault with a deadly weapon. The Washington Court of Appeals reversed the conviction, holding that the defendant’s confrontation right was violated by admission of Sylvia’s confession.

On appeal, the Washington Supreme Court reversed the appellate court and reinstated the conviction, finding that Sylvia’s confession was sufficiently reliable to satisfy the Confrontation Clause because it interlocked with the defendant’s own confession.

The Supreme Court accepted Crawford’s appeal of the Washington Supreme Court’s ruling. The questions on appeal were: 1) whether the Confrontation Clause “permits the admission against a criminal defendant of a custodial statement by a potential accomplice on the ground that parts of the statement ‘interlock’ with the defendant’s custodial statement,” and 2) whether the “Court should reevaluate the Confrontation Clause framework established in Ohio v. Roberts” in favor of a framework that prohibits admission of hearsay contained in formalized testimonial material, such as custodial confessions. In a landmark 7-2 decision, the Court bypassed the first issue and reversed decades of its own precedent to announce a new Confrontation Clause rule.

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294. Id. At closing argument the prosecutor relied upon Sylvia’s statement, arguing that her statement that Lee reached for something after he was stabbed refuted the defendant’s self-defense claim. Petitioner’s Brief, supra note 14, at 12.

295. Crawford, 54 P.3d at 658. The appeals court found that admission of Sylvia’s statement “was reversible error because her statement did not possess adequate indicia of reliability, nor did it interlock with Michael’s second statement.” Id.

296. Id. at 664. The court first determined that invoking the privilege rendered Sylvia unavailable for Confrontation Clause purposes. Id. at 659. Adhering to the Williamson rule, the court next determined that Sylvia’s entire confession describing the defendant’s involvement in the stabbing was self-inculpatory, rendering it admissible under the “against interest exception.” Id. at 662-63. The court reasoned that, while Sylvia’s statements were damaging to the defendant, Sylvia also implicated herself as an accomplice. Id. at 662. Thus, Sylvia would benefit from limiting the defendant’s liability, but instead she increased the defendant’s culpability by saying that Lee had empty hands when he was stabbed, consequently increasing her own culpability as well. Id. at 662-63.

Turning to the Confrontation Clause analysis, the court relied upon the state’s interlocking confession rule that states, “[w]hen a codefendant’s confession is virtually identical [i.e., interlocks] to that of a defendant, it may be deemed reliable.” Id. at 663 (citing State v. Rice, 844 P.2d 416 (Wash. 1993) as adopting Lee v. Illinois, 476 U.S. 530 (1986)). The court specifically found that both Sylvia’s statement and the defendant’s confessions were sufficiently interlocking in that they were “equally ambiguous” and “unclear” on “when, if ever, Lee possessed a weapon.” Id. at 664.


298. Petitioner’s Brief, supra note 14, at 1.

299. Crawford v. Washington, 124 S. Ct. 1354, 1354-70 (2004). Considering that many of the Court’s past confrontation cases resulted in 5-4 or plurality decisions, the apparent solidarity, at least among seven of the Justices, is remarkable, especially considering that the Court took such a radical step in overhauling its confrontation precedent. See supra notes 266-270 and accompanying text.
Justice Scalia, who had only concurred in the judgments in both *White* and *Lilly*, now delivered the Court’s majority opinion. Justices Ginsburg, Kennedy, Stevens, Breyer, Souter, and Thomas joined Justice Scalia.

The Court began by noting that the text of the Sixth Amendment does not alone “resolve” whether the *Roberts* reliability framework comports with the meaning of the Confrontation Clause, making it immediately apparent that the Court would reconsider altogether its *Roberts* framework in the ensuing opinion. The Court then launched into a historical analysis of the common law confrontation right by examining sources discussing English common law cases, which the Court believed that the Constitution’s Framers relied upon in drafting the Confrontation Clause. Upon examination of the historical common law confrontation right, the Court reached two conclusions: 1) the Confrontation Clause was directed at prohibiting the “use of *ex parte* examinations as evidence against the accused,” and 2) the Framers of the Constitution “would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”

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301. *Crawford*, 124 S. Ct. at 1356.
302. Id.
303. See id. at 1359. Instead of delving into the traditional *Roberts* analysis with which Justice Stevens began his *Lilly* opinion only five years previous, Justice Scalia first addressed Petitioner Crawford’s contention that *Roberts* should be overruled. Compare *Lilly*, 527 U.S. at 124-25 with *Crawford*, 124 S. Ct. at 1359.
304. *Crawford*, 124 S. Ct. at 1359 (citations omitted).
305. Id. at 1363. The out-of-court statements that concerned the common law courts of England were pre-trial examinations of the defendant’s accusers by Justices of the Peace, which were often read at trial in lieu of live testimony. *Id.* at 1359. This was “a practice that ‘occasioned frequent demands by the prisoner to have . . . the witnesses against him, brought before him face to face.’” *Id.* (quoting 1 J. Stephen, *History of the Criminal Law of England* 326 (1883)). Justice Scalia noted that some common law cases still allowed evidence of out-of-court statements without cross-examination at trial. *Id.* at 1361 (citation omitted). However, around the time the Constitution was ratified in 1791, courts were applying the original common law rule that out-of-court statements were inadmissible without the “benefit of a cross-examination.” *Id.* (citing three King’s Bench cases from 1791, 1789, and 1787, and two nineteenth century treatises as evidence of the Framer’s intent to adopt this rule). Justice Scalia also cited to early state courts as support for the original meaning of the common law confrontation right, noting that some courts did not allow out-of-court examinations unless the defendant had been present to cross-examine the accuser, while other early cases “went so far as to hold that prior testimony was inadmissible in criminal cases even if the accused had a previous opportunity to cross-examine.” *Id.* (citing to several early cases in support).
306. Id. at 1365. Justice Scalia’s narrow interpretation that the Confrontation Clause applies only to testimonial materials was rejected by Justice Stevens in his opinion for the Court in *Lilly* as too narrow. *Lilly*, 527 U.S. at 124 (citing Justice Thomas’ concurring opinion in *White v. Illinois*, 502 U.S. 346, 361, 363 (1992)).
A. The Confrontation Clause Applies to "Testimonial" Statements

The first conclusion led to a determination of the type of statements that implicate the Confrontation Clause. The Court determined that the Clause only applies to "witnesses against the accused," which it interpreted to mean those who give "testimonial" statements. However, the Court declined to adopt a standard to determine when a statement is "testimonial," "leav[ing] for another day any effort to spell out a comprehensive definition of "testimonial." The Court's only guidance was several "various formulations" of the term "testimonial" statements, determining that "at a minimum . . . prior testimony at a preliminary hearing, before a grand jury, or at a former trial," as well as statements made during police interrogations, are "testimonial.

Respecting police interrogations, the Court suggested that this category of testimonial statements includes any circumstances where government officers are "involve[d]" in producing statements "with an eye toward trial," as the Court believed was the case in Crawford. The Court reasoned that even under a "narrow standard," "[s]tatements taken by police officers in the course of interrogations are also testimonial," because police interrogations are analogous to the pre-trial examinations by eighteenth-century justices of the peace, which gave rise to the common law confrontation right.

The Court failed to further describe how police

307. See Crawford, 124 S. Ct. at 1363-64.
308. Id. at 1364.
309. Id. at 1374.
310. Id. at 1364, 1374. The Court cited several proposed tests to determine when a statement is "testimonial," including "'ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.'" Id. at 1364 (quoting Petitioner's Brief, supra note 14, at 23). The Court listed these varying standards, but concluded that the Clause excluded Sylvia Crawford's confession "regardless of the precise articulation" of the "testimonial" statements standard. See id. at 1364, 1374.
311. Id. at 1367 n.7 (declining to explain what "involve[d]" or "with an eye toward trial" means).
312. Id. at 1364-65. The Court contended that the justices of the peace during the era of the Constitution's founding had more of an investigative and prosecutorial function rather than a judicial function, which makes their examinations comparable to current-day law enforcement interrogations. Id. at 1365. The Court refuted Chief Justice Rehnquist's claim that the traditional confrontation right did not extend to unworn statements, such as confessions to law enforcement, by arguing that it is "implausible" that the Sixth Amendment would bar sworn testimony but would admit unworn testimony. Id. at 1365 n.3. Without explicitly saying so, the Court seemed to be alluding to the fact that unworn testimony is less reliable, as indicated by the "general bar" on unworn testimony, i.e. evidence law's general hearsay rule. See id.; FED. R. EVID. 801-804 (noting that out-of-court, and thus presumably unworn, statements are made inadmissible by the general hearsay rule, unless the statement falls within a hearsay exception that recognizes the hearsay's reliability). The Court's conclusion that certain unworn statements, such as statements to the police, are inadmissible under the Confrontation Clause seems to open the door for the Clause to also bar other unworn statements that may include non-testimonial statements. See Crawford, 124 S. Ct. at 1375 (Rehnquist, C.J., concurring) (noting that classifying "statements as testimonial beyond that of sworn affidavits and depositions [is] somewhat arbitrary").
interrogations produce "testimonial" statements other than that they present
the "same risk" as common law-era justice of the peace examinations. 313
Even the term "interrogation" seems subject to debate, because "just as
various definitions of 'testimonial' exist, one can imagine various definitions
of 'interrogation.'" 314

Without setting a uniform standard on these critical terms, the Court
determined that Sylvia Crawford's recorded statement, "knowingly given in
response to structured police questioning, qualifies under any conceivable
definition." 315 The Court posited several "conceivable" definitions of
"testimonial," but failed to define a so-called "narrow standard," so that
prosecutors and judges might have guidance for those times when the
circumstances surrounding the production of the confession are not so clear,
that is, in times when accomplice confessions are not produced exactly like
the one at issue in Crawford. 316

The Court was also unclear on whether the Confrontation Clause is
implicated by non-testimonial hearsay. For example, the Court believed that
a traditionalist focus suggests that not all hearsay implicates the Sixth
Amendment and that, where non-testimonial hearsay is at issue, its
admissibility should be subject only to the development of hearsay law. 317
The Court also opined that the Confrontation Clause may not be "solely
concerned with testimonial hearsay," implying that certain non-testimonial
material may implicate a defendant's confrontation right, but failing to
delineate which type of hearsay that may be. 318

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313. Crawford, 124 S. Ct. at 1365. The risk that Justice Scalia seems to be identifying is that of
"prosecutorial abuse." See id. at 1367 n.7 (noting that government involvement in the production of
statements with "an eye toward trial presents unique potential for prosecutorial abuse").

314. Id. at 1365 n.4. The Court used the term "interrogation" in a "colloquial, rather than any
technical legal sense." Id. (declining to explain this distinction, but citing to Rhode Island v. Innis,
446 U.S. 291, 300-01 (1980)). By doing so, the Court at least indicated a breadth to the term
"interrogation" beyond that described in its jurisprudence involving interrogations where Miranda
rights are involved. See Innis, 446 U.S. at 301 ("[T]he term 'interrogation' under Miranda refers not
only to express questioning, but also to any words or actions on the part of the police (other than
those normally attendant to arrest and custody) that the police should know are reasonably likely to
elicit an incriminating response from the suspect"); see also Michael S. Walsh & Joseph K. Scott III,

315. Crawford, 124 S. Ct. at 1365 n.4. See also id. at 1367 n.7 (declining to explain what
"involved" or "with an eye toward trial" means). The Court's point here is undermined by the fact
that even those who joined with the Court in advocating a more traditionalist approach to the
Confrontation Clause doubted whether statements taken by the police were barred by the Clause.
See Amar, supra note 272, at 1049 & n.15 (opining that placing police station confessions in the
category of testimonial or government-produced statements may not be consistent with the
Confrontation Clause's traditional concerns as the confessions are unsworn).

316. See Crawford, 124 S. Ct. at 1364, 1365 n.4. The Court does appear to exclude, from the
definition of "testimonial," business records, official records, statements in furtherance of a
conspiracy, and casual remarks overheard by a third party. See id. at 1364, 1367; see also Walsh &
Scott III, supra note 314, at 39.

317. Crawford, 124 S. Ct. at 1368, 1374.

318. Id. at 1365.
B. Unavailability and a Prior Opportunity for Cross-Examination

The second conclusion that the Court drew from its historical analysis of the confrontation right was that testimonial hearsay is admissible only when 1) the declarant is unavailable and 2) the defendant had a prior opportunity to cross-examine the declarant.

The Court turned to a review of its Confrontation Clause precedent, noting that the results of many, if not all, of these cases “hew closely” to this line. The Court cited Mattox, Bruton, Lee, White, and even Roberts, among other cases, to illustrate that the Court consistently excluded prior testimony and accomplice confessions because the defendant did not have a prior opportunity to cross-examine or the declarant was not unavailable, and admitted such hearsay where those factors did exist.

Although the results of the Court’s decisions have been “faithful to the original meaning of the Confrontation Clause,” the Court believed that the same could not be said of the rationale behind the results. While the Court

319.Id. The Court was quick to point out that unavailability is a necessary condition and not merely a way to establish reliability. Id. at 1366-67. However, the requirement of unavailability has not normally been used as a factor for reliability, but rather goes to the degree of the prosecution’s need for the evidence balanced against the defendant’s right of confrontation. See Mattox v. United States, 156 U.S. 237, 243 (1895) (recognizing that in certain situations, necessity of the evidence warranted its admission); see also FED. R. EVID. 804 (delineating a list of exceptions for what could be characterized as “testimonial” hearsay and requiring that the declarant be unavailable). The requirement of unavailability brings up an interesting issue, with respect to a defendant’s forfeiture of his Confrontation Clause rights, if the prosecution can demonstrate that he has brought about the declarant’s unavailability (e.g. killing a key witness before he has a chance to testify at trial). See Crawford, 124 S. Ct. at 1370 (accepting a “rule of forfeiture by wrongdoing” on equitable grounds). If a key witness made non-cross-examined hearsay statements that were crucial to convicting the defendant, but the witness suddenly disappeared or died before trial without the prosecution’s ability to show that the defendant caused his unavailability, the prosecution is automatically precluded from using the hearsay statements, no matter how reliable they may be—much to the benefit of the defendant who may have cleverly concealed his involvement in rendering the witness unavailable. See id. at 1373-74 (precluding non-cross-examined hearsay statements even if the declarant is unavailable). This result may be at odds with the policy announced in Mattox, which required a balancing of the defendant’s confrontation rights with the prosecution’s need for the evidence. See Mattox, 156 U.S. at 243-45 (refusing to allow the defendant to go “scot free simply because death has closed the mouth of that witness”).

320. Crawford, 124 S. Ct. at 1365-66 (noting that the common law cases in 1791, the year the Sixth Amendment was ratified, and the state decisions following ratification, conditioned admissibility of testimonial hearsay on these two requirements).

321. Id. at 1367-68.

322. Id. at 1367-69. The Court rejected Washington State’s argument that Lee created a rule admitting a confession where it sufficiently “interlocked” with the defendant’s. Id. at 1368. The Court noted that Lee prohibited the admission of an accomplice confession “when the discrepancies between the statements [were] not insignificant.” Id. Washington State argued that the logical inference from Lee was that, where the discrepancies are insignificant, the accomplice confession is admissible under the Confrontation Clause. Id. The Crawford Court posited that, if the Lee Court had meant to announce such an exception for interlocking confessions, “it would not have done so in such an oblique manner.” Id.

323. Id. at 1369. The Court alluded to Justice Breyer’s recognition in Lilly that the Roberts Test is both too broad because it makes a constitutional issue out of every type of hearsay, and too narrow.
admitted that the ultimate goal of the Clause is to ensure reliability of the evidence, reliability is not a substantive guarantee, but a procedural guarantee that can only be assessed through cross-examination of the declarant. The Court thus rejected the Roberts Test because it was based upon “amorphous notions of ‘reliability,’” replacing the “constitutionally prescribed method of assessing reliability” through the “crucible of cross-examination” with a “mere judicial determination of reliability.”

The “vague” and “manipulable” standards and “open-ended balancing tests” created by the Roberts legacy do violence to the Framers’ original intent in designing the confrontation right and lack any “meaningful protection” in criminal prosecutions. According to the Court’s new position, “[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually

in that testimonial statements are admitted “upon a mere finding of reliability.” Id.; see also Lilly v. Virginia, 527 U.S. 116, 141 (1999) (Breyer, J., concurring).

324. Crawford, 124 S. Ct. at 1370.

325. Id. The Court went so far as to compare “dispensing with confrontation because testimony is obviously reliable” with “[d]ispensing with [a] jury trial because a defendant is obviously guilty.” Id. at 1371. Remarkably, Justice Stevens, who now joined Justice Scalia in his re-formulation of the Confrontation Clause framework, had stated in Lilly that the Court should continue to adhere to Roberts, because a more restrictive reading of the Confrontation Clause was “foreclosed by [the Court’s] prior cases.” Lilly, 527 U.S. at 124. Moreover, Justices Breyer, Ginsburg, Kennedy, and Souter, all of whom had, like Justice Stevens, analyzed the Confrontation question in Lilly under the Roberts framework, now joined with Justice Scalia in abrogating Roberts in favor of Justice Scalia’s new approach. Compare id. at 127, 144 (Justices Souter, Ginsburg, and Breyer joined Justice Stevens in analyzing the confrontation question under Roberts, and Justice Kennedy joined in the Chief Justice’s Roberts analysis), with Crawford, 124 S. Ct. at 1356 (Justices Stevens, Souter, Ginsburg, Breyer, and Kennedy, as well as Justice Thomas, joined Justice Scalia in rejecting Roberts). Only Chief Justice Rehnquist and Justice O’Connor believed the Court should continue to apply Roberts. Crawford, 124 S. Ct. at 1374 (Rehnquist, C.J., concurring).

The Court cited several lower court cases which used numerous factors to determine when a statement is reliable. Id. at 1371. While one case considered something to be a “reliability” factor, another case considered the exact opposite to be a factor in favor of reliability, an inconsistency that concerned the Court. Id. (comparing, as one example, Nowlin v. Commonwealth, 579 S.E.2d 367, 371-72 (Va. Ct. App. 2003), which “found a statement more reliable because the witness was in custody and charged with a crime,” with State v. Bintz, 650 N.W.2d 913, 918 (Wis. Ct. App. 2002), which “found a statement more reliable because the witness was not in custody and not a suspect”). Moreover, the Court bemoaned the fact that lower courts “[found] reliability in the very factors that make the statements testimonial,” thus finding an “antidote to the confrontation problem” where the Clause’s demands were most urgent. Id. at 1372.

326. Id. at 1373-74. The Court indicated that the Framers intended to provide criminal defendants with “meaningful protection” from judicial and prosecutorial abuse. Id. at 1374. According to the Court, the Framers believed government officers, and specifically judges, could not be trusted to safeguard the rights of the people. See id. at 1373-74. Thus, the Court believed that the Framers would have been “loath to leave too much discretion in judicial hands” by allowing judges to admit hearsay without confrontation after deeming a statement “reliable.” Id. at 1373. The logical inference is that the Court’s new standard, which does away with judicial determinations of reliability for confrontation purposes, is founded upon the Framers’ deep-seated fear of the untrustworthiness of eighteenth-century judges and government officers. See id. at 1373-74. In contrast, the Court’s precedent reflected a developing trend away from this view of the untrustworthiness of judicial officers as it hinged confrontation analysis on judicial determinations of hearsay reliability. See id. at 1376-78 (Rehnquist, C.J., concurring) (citing several of the Court’s precedent over the years that have focused the confrontation question on the reliability of the hearsay and not on whether it was testimonial or not).
prescribes: confrontation." In the absence of a prior or current opportunity for cross-examination, the Confrontation Clause necessarily calls for courts to preclude the testimonial hearsay altogether rather than choose "an alternative means of determining reliability."278

In the Crawford case, because the defendant had no prior opportunity to cross-examine his wife, admission of her testimonial statements violated the defendant's Sixth Amendment rights.279

C. The Chief Justice's Concurring Opinion

The Chief Justice, with whom Justice O'Connor joined, although concurring in a reversal of the Washington Supreme Court, vigorously dissented from the Court's decision to overrule Roberts.280 He criticized the distinction that the Court created between testimonial and non-testimonial statements as "arbitrary" and out of touch with the Confrontation Clause's historical roots.281 In studying the common law confrontation right, the Chief Justice found that the Framers were primarily concerned with the use of sworn out-of-court statements, such as affidavits and depositions, because non-testimonial and unsworn statements were not generally used as substantive evidence in criminal trials.282 In contrast, the Court's past confrontation doctrine, which extended the confrontation question to all forms of hearsay, reflected the liberal use of both testimonial and non-testimonial hearsay as substantive evidence in modern-day trials.283

327. Id. at 1374. The Court conceded that reliability is a goal of the Confrontation Clause, lending credit to the lower court cases (and presumably its own precedent) where the courts acted in "utmost good faith when they found reliability." Id. at 1373.

328. See id. at 1370, 1373. The Court clarified that "[i]t is not enough to point out that most of the usual safeguards of the adversary process attend the statement, when the single safeguard missing is the one the Confrontation Clause demands." Id. at 1372.

329. Id. at 1374.

330. Id. at 1374-78 (Rehnquist, C.J., concurring in the judgment).

331. Id. at 1374-78 (Rehnquist, C.J., concurring). The Chief Justice opined that although the Framers were concerned about certain forms of testimonial statements, there is no indication in the historical record that they were concerned with the broader category of testimonial statements described in the majority opinion. Id. at 1375 (Rehnquist, C.J., concurring).

332. Id. at 1374 (Rehnquist, C.J., concurring). The Chief Justice noted that, under the common law, out-of-court statements by someone other than the criminal defendant (i.e. hearsay) was not evidence upon which a conviction could be based, particularly if it was unsworn material. Id. at 1374-75 (Rehnquist, C.J., concurring). Hearsay was generally only used to corroborate sworn testimony. Id. at 1374 n.1 (citations omitted).

333. Id. at 1375-76 (Rehnquist, C.J., concurring) (citing to early confrontation cases which did not draw a distinction between testimonial and non-testimonial statements). The Chief Justice saw little value in "trading our precedent for an imprecise approximation at this late date" when neither the Supreme Court nor any other court, to his knowledge, had ever drawn the testimonial/non-testimonial distinction. Id. at 1376 (Rehnquist, C.J., concurring).
Moreover, the Chief Justice was not convinced that the Confrontation Clause should “categorically” exclude testimonial statements. At the time the Constitution was ratified, the principles regarding the admissibility of hearsay were still developing and the Chief Justice found it implausible that the Framers would create such a “cut and dried” prohibition on testimonial evidence when the law during their own time was not entirely settled. Instead, the law wisely developed exceptions to confrontation, which were consistently “derived from the experience that some [hearsay is] just as reliable as cross-examined in-court testimony due to the circumstances under which [the statements] were made.”

Consequently, the Chief Justice would adhere to Ohio v. Roberts as a framework consistent with these principles. Indeed, he found that the Court did not need to create a new rule in order to overturn the Washington Supreme Court, but could have adhered to Roberts and its progeny with the same result. Specifically, he would hold that Idaho v. Wright precluded the admission of a statement solely because other evidence at trial corroborated it. As such, Wright foreclosed the Washington Supreme

334. Id. (Rehnquist, C.J., concurring). The Chief Justice found that case law from the period surrounding the Constitution’s ratification was largely inconsistent in its treatment of testimonial evidence. Id. (Rehnquist, C.J., concurring). While he generally agreed with the Court that sworn examinations before justices of the peace were largely excluded under common law, even that rule had some exceptions. Id. (Rehnquist, C.J., concurring). Furthermore, the common law was less clear on the admissibility of unsworn testimonial statements (which under the Court’s Crawford standard would include confessions during police interrogations). Id. (Rehnquist, C.J., concurring).

335. Id. at 1376-77 (Rehnquist, C.J., concurring). The Chief Justice further noted that the right of confrontation, while a “truly important” principle, was never considered absolute. Id. at 1377-78 (Rehnquist, C.J., concurring) (quoting Mattox v. United States, 156 U.S. 237, 243 (1895) for the century-old proposition that “[t]he law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.”).

336. Id. at 1376-77 (Rehnquist, C.J., concurring) (recognizing that “cross-examination is a tool used to flesh out the truth, not an empty procedure,” which promotes reliability in criminal trials). The Court and the Chief Justice thus both agreed that the Clause’s ultimate goal is reliability of the evidence. Compare id. (Rehnquist, C.J., concurring) with id. at 1373. However, while the Court stated that there is no substitute for cross-examination, the Chief Justice believed that certain hearsay is so reliable that cross-examination would be superfluous, a proposition consistent with the Court’s long-standing precedent. Id. at 1377-78 (Rehnquist, C.J., concurring); see also Lilly v. Virginia, 527 U.S. 116, 139 (1999); Idaho v. Wright, 497 U.S. 805, 822-23 (1990). He credited the Court for excluding at least some hearsay exceptions from its analysis of “testimonial” material, such as business and official records, because “to hold otherwise would require numerous additional witnesses without any apparent gain in the truth-seeking process.” Crawford, 124 S. Ct. at 1378. (Rehnquist, C.J., concurring). Interestingly, the Court’s basis for excluding these types of hearsay is wholly different, reasoning that certain hearsay exceptions were so well-established at the time of the Constitution’s founding that the Framers must have intended to exclude them from the confrontation right. Id. at 1367.

337. Id. at 1378 (Rehnquist, C.J., concurring).

338. Id. (Rehnquist, C.J., concurring).

339. See id. (Rehnquist, C.J., concurring). The five justices who changed their positions from Lilly to join the majority in Crawford were not the only ones to switch sides: the Chief Justice had joined the dissenters in Wright, which argued that corroboration by other evidence and interlocking confessions could be used to find reliability under the Confrontation Clause. Wright, 497 U.S. at 827, 832 (Kennedy, J., dissenting, joined by the Chief Justice, Justice White, and Justice Blackmun).
Court’s holding that an accomplice confession could be admitted on the basis that it interlocked with the defendant’s own confession. 340

Moreover, the Chief Justice felt the Court should not so easily overlook the rule of *stare decisis*, which commands adherence to past precedent in order to promote consistent development of the law. 341 Furthermore, the Court’s new rule failed to provide critical definitions for the tens of thousands of prosecutors who need specific and immediate answers on when a statement is “testimonial.” 342

VI. CONCLUSION: CRAWFORD’S IMPACT AND AN UNCERTAIN FUTURE FOR CONFRONTATION DOCTRINE

If the reliability-focused *Roberts* Test could be considered an amorphous framework that produced inconsistent and unpredictable results, it is unlikely that the Court’s current position in *Crawford* has helped matters much. 343 It seems that the Court has announced a “non-standard,” which cuts the lower courts loose, unable to anchor to past confrontation precedent. 344

A. “Testimonial” and “Police Interrogations”

The lower courts must chart their own course in the new waters of the Court’s “testimonial” approach, designing their own ad hoc standards to determine when a statement is “testimonial” and deciding on a case-by-case basis when certain hearsay is subject to the restraints of the Sixth Amendment. 345

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340. See *Crawford*, 124 S. Ct. at 1378 (Rehnquist, C.J., concurring).
341. Id. (Rehnquist, C.J., concurring). Justice Scalia’s majority opinion in *Crawford* never mentioned the principle of *stare decisis* amid the Court’s readiness to overrule a case decided twenty-four years ago. See generally id. Remarkably, less than a year prior, Justice Scalia criticized the majority in *Lawrence v. Texas*, 539 U.S. 558 (2003), for not giving due regard to *stare decisis* and for its “readiness to reconsider a decision rendered a mere 17 years ago in *Bowers v. Hardwick.*” Id. at 586 (Scalia, J., dissenting).
342. *Crawford*, 124 S. Ct. at 1378 (Rehnquist, C.J., concurring) (reminding the Court that “[r]ules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner”).
343. See *People v. Moscat*, 777 N.Y.S.2d 875, 877-78 (N.Y. Crim. Ct. 2004) (criticizing the Court for not providing further guidance to the lower courts as to what types of statements are “testimonial” and noting that the Chief Justice’s criticisms of the Court in his concurring opinion are “apt,” if not “understated”).
344. See id. at 879 (doubting whether it could rely on the Court’s previous holding in *White* to affirm the admission of an excited utterance made to a 911 operator, but having minimal direction from the Court on whether the statement was testimonial and thus whether it should apply the Court’s new rule).
345. See Note by Professor Ohlbaum, 1 OHLBAUM ON THE PENNSYLVANIA RULES OF EVIDENCE 2 (2004) (noting that federal and state courts will have to review and revise its analyses in some cases when determining the admissibility of different types of hearsay falling under the 804(b) exceptions, which typically admit testimonial-type statements). One New York court also noted that trial courts

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Regarding accomplice confessions, it seems the Court provided enough clarity to determine that confessions made in a classic custodial police station interrogation will be barred by the Confrontation Clause absent a prior opportunity for cross-examination and unavailability of the declarant.\(^3\)\(^4\)\(^6\)

However, the Court’s ambiguous position on the definition of “interrogation” necessarily elicits the question of what exactly constitutes a police “interrogation” and thus whether an accomplice statement is “testimonial”: What if the accomplice does not know he is a suspect, but rather believes he is just providing useful information to the police (or for that matter, to an undercover officer) — is it the accomplice who must consider himself “interrogated” or is it from the police perspective?\(^3\)\(^4\)\(^7\) What happens when the accomplice is not “in custody” but gives his statement to a third party still believing that the information could eventually be used at trial?\(^3\)\(^4\)\(^8\) Moreover, is it still a “law enforcement” interrogation when an Internal Revenue Service agent, Securities and Exchange Commission investigator, or other similar law enforcement agent asks the questions?\(^3\)\(^4\)\(^9\) How many and what kind of questions do the police have to ask before it is considered an interrogation?\(^3\)\(^5\) What if the police at the time do not believe the information will be useful at trial, but later decide to use it at trial?\(^3\)\(^5\)\(^1\)

must now “work out” the meaning and application of the Court’s new Confrontation Clause principles. See Moscat, 777 N.Y.S.2d at 876. Lower courts have already begun deciding on a case-by-case basis whether statements are testimonial or not. Compare Moscat, 777 N.Y.S.2d at 879-80 (deciding that calls to a 911 operator are not testimonial), and Hammon v. State, 809 N.E.2d 945, 952 (Ind. Ct. App. 2004) (deciding that statements made by a victim at the scene of an incident in response to informal questions by the responding officer are not testimonial), with Moody v. State, 594 S.E.2d 350, 354 (Ga. 2004) (deciding that statements made by witnesses during an officer’s field investigation are testimonial), and United States v. Saner, 313 F. Supp. 2d 896, 902 (S.D. Ind. 2004) (deciding that statements made by a suspect, not in custody and in response to a prosecutor’s questions, are testimonial).

346. Note by Professor Ohlbaum, supra note 345; see also Davis v. United States, 848 A.2d 596, 599 (D.C. 2004) (noting that an accomplice confession taken during police interrogations fit within the Court’s definition of testimonial); State v. Allen, 2004 Ohio App. LEXIS 2764, at *15 (Ohio Ct. App. June 17, 2004) (admitting an accomplice custodial confession where the facts were “not distinguishable from Crawford”); Hale v. State, 139 S.W.3d 418, 421 (Tex. Ct. App. 2004) (noting that an accomplice’s “written statement made to police during custodial interrogation constitutes testimonial evidence” and was thus inadmissible without a prior opportunity for cross-examination).

347. See State v. Clark, 598 S.E.2d 213, 219 (N.C. Ct. App. 2004) (noting that the defendant claimed that statements made by a witness who was not a suspect in the crime, but that were made to police during a field investigation, violated his confrontation rights).

348. See People v. Cervantes, 12 Cal. Rptr. 3d 774, 782-83 (Cal. Ct. App. 2004) (recognizing that a non-custodial accomplice confession to a neighbor with the reasonable belief that the neighbor would report it to the police could qualify under one of the Court’s proffered definitions of testimonial).

349. See Saner, 313 F. Supp. 2d at 902 (involving questioned of an accomplice by an attorney from the Antitrust Division).

350. See Hammon, 809 N.E.2d at 952 (distinguishing simple police questioning from interrogation, which is commonly defined as “questioning formally or officially”) (quoting THE AMERICAN HERITAGE COLLEGE DICTIONARY 711 (3d. ed. 2000)).

351. See Crawford v. Washington, 124 S. Ct. 1354, 1378 (2004) (Rehnquist, C.J., concurring) (noting that the Court, by declining to adopt firm standards or definitions for its new “testimonial” rule, leaves questions unresolved for the thousands of federal and state prosecutors who need the rules now in order to apply them in criminal prosecutions throughout the country today).
While the Court announced that it is proposing a better rule, questions regarding the admissibility of accomplice confessions, let alone the plethora of other types of hearsay, remain unresolved.\(^{352}\)

The waters are also muddied with respect to admitting accomplice confessions that are not made in a custodial setting.\(^{353}\) It is not inconceivable that lower courts will be inconsistent in their determinations of when certain accomplice confessions are testimonial in custodial settings, let alone non-custodial settings.\(^{354}\)

Furthermore, even if a court determines that an accomplice confession is non-testimonial, there is no indication whether and to what degree non-testimonial statements are subject to Confrontation Clause scrutiny.\(^{355}\) Four members of the Court who joined Justice Scalia in *Crawford* held the position only five years earlier in *Lilly* that applying the Confrontation Clause only to testimonial statements was too narrow a reading of the Clause.\(^{356}\)

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352. *See id.* at 1368. The admissibility of some forms of hearsay remains intact. *See* 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 802.05(3)(d) (2d ed. 2004) (finding admissions by defendants and their agents likely remain admissible after *Crawford*, as well as statements made during the course and in furtherance of a conspiracy). However, aside from accomplice confessions, the Court's imprecision in its *Crawford* standard calls for guesswork with respect to other forms of hearsay. *Id.* It is unclear whether statements by victims or witnesses made to police officers during their field investigations are testimonial. *Compare id.* § 802.05(e) (noting that statements by victims, such as those of domestic violence, made to police upon their arrival at the home are likely testimonial), *with Hammon*, 809 N.E.2d at 952 (finding that statements given in response to police questioning after the police respond to the scene of the incident are not testimonial). At least two commentators disagreed on whether the dying declaration exception to the Clause, established in *Mattox*, remained in tact. *Compare Walsh & Scott III, supra* note 314, at 39 (*Crawford* "specifically leaves intact dying declarations"), *with* Note by Professor Ohlbaum, *supra* note 345 (remarking that the Court "did not decide whether the Sixth Amendment incorporates an exception for testimonial dying declarations."). While the *Crawford* majority mentioned business and official records as non-testimonial statements, the Court did not address whether official police records prepared in anticipation of trial could be considered testimonial. *See* WEINSTEIN & BERGER, *supra*, at § 802.05(3)(e). Moreover, recordings of 911 telephone calls, typically admissible under an excited utterance exception, are likely to provide close cases. *Id.; see also* People v. Moscat, 777 N.Y.S.2d 875, 877-80 (N.Y. Crim. Ct. 2004) (grappling with the question of whether a victim's call to a 911 operator, a civilian police employee, is testimonial).

353. *See Walsh & Scott III, supra* note 314, at 39 (observing that the Court left open the question of whether "casual remarks would be testimonial if overheard by a police officer in some official setting").

354. *See id.* (noting that "the Court did not clearly define testimonial statements," which will pose "obvious problems" in criminal cases); *see also* People v. Cervantes, 12 Cal. Rptr. 3d 774, 782 (Cal. Ct. App. 2004) (recognizing that a non-custodial confession made in confidence to a third person could qualify under one of the Court's suggested standards for "testimonial" if the accomplice reasonably believed his confession would later be used at trial, but finding that the confession was non-testimonial because it was not similar to the "primary examples" of testimonial statements given in *Crawford*).

355. *See* WEINSTEIN & BERGER, *supra* note 352, at § 802.05(4)(a).

simplify the Confrontation Clause’s application, arguing that it should not concern non-testimonial hearsay and there should be no constitutional scrutiny with respect to its admissibility.\textsuperscript{357} However, it is not entirely clear whether \textit{Crawford} actually provides that narrowed application and even leaves open the possibility that \textit{Roberts} may still apply to non-testimonial statements.\textsuperscript{358}

While this is yet another issue that needs resolution,\textsuperscript{359} the Court seemed to imply that regardless of whether hearsay law alone determines the admissibility of non-testimonial statements or if the \textit{Roberts} Test is still applied to those statements, both approaches would be acceptable under the Confrontation Clause.\textsuperscript{360} Were the Court to accept a division in Confrontation Clause analysis with its new \textit{Crawford} approach applying only to testimonial hearsay and the \textit{Roberts} Test continuing to apply to non-testimonial hearsay, then the Court’s past confrontation precedent might still have some vitality.\textsuperscript{361}

\section*{B. Unavailability and a Prior Opportunity to Cross-Examine}

The lower courts have the advantage of precedent, both preceding and following \textit{Roberts}, to establish when a declarant is unavailable.\textsuperscript{362} Where accomplice confessions are at issue, the accomplice is usually rendered unavailable because he invokes his Fifth Amendment right against self-
incrimination. Because it is clear that invoking the Fifth Amendment renders a declarant unavailable, courts are unlikely to struggle much with this requirement.

However, the lower courts may struggle with the requirement of a defendant’s prior opportunity to cross-examine the declarant. The Crawford Court emphasized that the Constitution prescribes cross-examination as a necessary tool to test the reliability of testimonial statements, but how strenuous or extensive does the prior cross-examination need to be in order to satisfy the Constitution’s mandate? Does the defendant need to have had a similar motive and opportunity to cross-examine the declarant? For example, defendants in certain criminal procedures may not have as strong a motive to develop the declarant’s testimony through cross-examination where the prosecution’s burden of proof is lower. Consider preliminary hearings, where the prosecution often need only show probable cause, the defendant may reserve his cross-examination energies for trial where the prosecution’s burden of proof is considerably higher. Moreover, admitting a transcript of a prior cross-examination by someone other than the defendant who had a similar motive and opportunity to cross-examine the declarant could arguably be sufficient. One such example would be a codefendant who vigorously cross-examines a declarant accusing both defendants of the crime at the codefendant’s separate trial.

364. The Douglas Court’s determination that invocation of the Fifth Amendment leads to unavailability has not been challenged. See Douglas, 380 U.S. at 420. But see State v. Crawford, 54 P.3d 656, 658-60 (Wash. 2002) (spending a good portion of its opinion discussing whether the defendant Crawford had waived his right of confrontation by invoking the marital privilege and addressing the issue of whether invoking the marital privilege rendered Sylvia Crawford unavailable for Confrontation Clause purposes), cert. granted, 539 U.S. 914 (2003), rev’d by 124 S. Ct. 1354 (2004).
365. See Crawford, 124 S. Ct. at 1367-74 (determining that the defendant must have had a prior “adequate opportunity to confront the witness,” i.e., cross-examination, but failing to define the parameters of an “adequate” prior opportunity for cross-examination) (emphasis added).
366. Id. at 1373.
367. Evidence law addresses this concern in its hearsay exception for prior testimony. See Fed. R. Evid. 804(b)(1) (requiring that, to admit prior testimony, the declarant must be unavailable and the party against whom the hearsay was offered must have had “an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination”).
368. See Cal. Penal Code § 866 (Deering 2004) (noting that the defendant may cross-examine witnesses at a preliminary hearing, but the prosecution need only establish probable cause that the defendant has committed the felony in order to try the defendant).
369. See Fed. R. Evid. 804(b)(1) (declaring that a cross-examination by a predecessor in interest with a similar motive and opportunity to cross-examine the declarant is sufficient to satisfy the hearsay exception for prior testimony).
C. The Interlock Theory May Still Have Vitality in the Harmless Error Analysis

An additional area the Court did not address is the harmful error analysis with which it seemed to struggle in Bruton, Lee, Wright, and other cases involving corroborating evidence, especially the interlocking confession issue.\textsuperscript{370} The Crawford Court skipped altogether any evaluation of whether a violation of the defendant’s confrontation rights resulted in harmless error, because the State did not contest the issue.\textsuperscript{371} It should not be so readily assumed from Crawford that the Court has summarily dismissed the idea that an interlocking confession may go to the issue of harmless error. The Court made clear that it was doubtful at best whether Sylvia’s statements interlocked with the defendant’s own confession and alluded to the harmful effect of their admission at trial.\textsuperscript{372} Therefore, perhaps some vitality remains in the notion raised by the Court’s earlier cases that an accomplice confession that adequately interlocks with the defendant’s own confession may render a confrontation violation harmless.\textsuperscript{373}

On the whole, it appears the Court has strengthened a defendant’s confrontation rights by mandating cross-examination of declarants who give testimonial statements and limiting the prosecution’s ability to bring key evidence that may have been readily admissible under the Roberts framework.\textsuperscript{374} Consequently, prosecutors may not be able to proceed to trial

\textsuperscript{370} See supra notes 171-73 and accompanying text discussing whether the interlocking confession issue is one of reliability for admissibility purposes or an issue to be addressed in a harmless error analysis.

\textsuperscript{371} Crawford, 124 S. Ct. at 1359 n.1. Although Crawford rejected the use of interlock to determine the admissibility of the accomplice confession, courts continue to look to the presence of corroborating evidence to determine whether a Confrontation Clause violation was harmless error. \textit{See}, e.g., Hale v. State, 139 S.W.3d 418, 422 (Tex. Ct. App. 2004) (citing Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986), for the harmless error factors: "the importance of the witness’s testimony; whether the testimony was cumulative; the presence or absence of evidence corroborating or contradicting material points of the witness’s testimony; the extent cross-examination was permitted; and the overall strength of the [prosecution’s] case").

\textsuperscript{372} See Crawford, 124 S. Ct. at 1373 (discussing the critical differences between Sylvia and the defendant's custodial statements the night the police questioned them, and emphasizing the prosecutor's reliance on Sylvia's statements to refute the defendant's self-defense claim).

\textsuperscript{373} See Idaho v. Wright, 497 U.S. 805, 824 (1990) (noting that corroborating evidence could be used for the harmless-error analysis and suggesting that the Lee Court indicated that interlock between the defendant's and accomplice's confessions may support a finding of harmless error); Lee v. Illinois, 476 U.S. 530, 545-46 (1986) (focusing on the harmfulness of admitting the accomplice confession that did not sufficiently interlock); Bruton v. United States, 391 U.S. 123, 127-28 (1968) (addressing the concern that admission of an uncorroborated confession by a codefendant added "substantial, perhaps even critical, weight to the Government's case").

\textsuperscript{374} See United States v. Saner, 313 F. Supp. 2d 896, 897-902 (S.D. Ind. 2004) (excluding a non-custodial confession made by the accomplice against his penal interest without shifting or spreading blame to the defendant—statements that likely would have carried sufficient particularized guarantees of trustworthiness under Roberts); see also WEINSTEIN & BERGER, supra note 352, at § 802.05(3)(e)(g) (noting that the Confrontation Clause now bars the admission of statements that were traditionally admissible under Roberts without cross-examination, including accomplice confessions that do not directly implicate the defendant, grand jury testimony, and perhaps statements by domestic violence victims to the police, certain police records, 911 calls, and statements by child sexual abuse victims to law enforcement officers).

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without the ability to admit critical hearsay evidence. On the other hand, if the Court has limited the Confrontation Clause analysis to testimonial statements only, Crawford may restrict a defendant’s confrontation rights with respect to non-testimonial statements, providing no constitutional analysis to those statements that are admissible under hearsay laws.

The Court should be credited for its response to increasing concerns with a problematic Roberts Test. Crawford appears to have resolved the prevalent critique that the Confrontation Clause was too closely tied to hearsay law, at least with respect to testimonial hearsay where hearsay exceptions play no role in determining its admissibility under the Clause. The Court has also focused the Confrontation Clause analysis on testimonial statements, as commentators and members of the Court had long advocated.

The Court’s bright-line rule to exclude testimonial statements in the absence of unavailability and a prior cross-examination may well prove to be a simpler test in application and produce more consistent results in confrontation cases. In the meantime, the Court’s position in Crawford is a prime example of the “amorphous” standard, which the Court critiqued

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375. See People v. Moscat, 777 N.Y.S.2d 875, 879-80 (N.Y. Crim. Ct. 2004) (determining that the prosecution would not be able to proceed to trial if the 911 call by the domestic violence victim qualified as a testimonial statement).

376. While few and far between, the Roberts framework did result in cases where hearsay, otherwise admissible under hearsay laws, was precluded on Sixth Amendment grounds. See, e.g., Wright, 497 U.S. at 819-24 (holding that hearsay statement was admissible under the state’s residual exception, but it failed to meet the Roberts Test requirement of particularized guarantees of trustworthiness, precluding its admission under the Confrontation Clause).

377. See Crawford, 124 S. Ct. at 1371-72 (citing several lower court cases which have admitted accomplice confessions under the Roberts Test, even though the Lilly Court announced that it was "highly unlikely" that accomplice confessions were admissible under Roberts; see also Kirst, supra note 1, at 104-44 (discussing cases following Lilly, which demonstrate that the Roberts Test was inconsistently applied among the lower courts to admit and preclude accomplice confessions).

378. See supra notes 64-76 and accompanying text (discussing this critique); Crawford, 124 S. Ct. at 1370 (severing the Sixth Amendment’s link to the “vagaries of the rules of evidence” with respect to testimonial statements); WEINSTEIN & BERGER, supra note 352, at § 802.05(3)(c) (stating that, under Crawford, hearsay exceptions no longer have the significance they once did under the Roberts Test). However, those who would apply the Clause to all forms of hearsay may be disappointed with the Court’s seeming position that the hearsay law and not the Confrontation Clause may be the defendant’s only protection against admissibility of non-testimonial hearsay. See Jonakait, supra note 74, at 589-611 (suggesting that the Confrontation Clause apply to all forms of hearsay that could be “misweighed” by the jury).

379. See supra note 126 and accompanying text (discussing criticisms for the Court’s linkage of hearsay law and the Confrontation Clause). However, the new standard in Crawford remains a rule governing the admissibility of hearsay, and thus, does not address the problem of confronting hearsay that happens to be admitted under the Crawford standard. See Douglass, supra note 74, at 195-97 (calling for alternative methods to confront hearsay once it has been admitted at trial).

380. See Crawford, 124 S. Ct. at 1374 n.10 (noting that the Court’s new stance will cause only “interim uncertainty,” while the Roberts Test is “inherently, and therefore permanently, unpredictable”).
Notably, inconsistent application of the *Roberts* Test was a primary argument by the Court for abrogating *Roberts* but the Court’s indefinite stance raises doubts as to whether its new position is preferable to the *Roberts* Test, which courts had been applying for over two decades.

Without definite standards for determining when a statement is "testimonial," what constitutes a "police interrogation," when the defendant has had an "adequate" prior opportunity for cross-examination, and whether non-testimonial statements are subject to constitutional scrutiny, the lower courts will continue to struggle with the admissibility of accomplice confessions, not to mention the multitude of other forms of hearsay, which prosecutors across the country seek to introduce in criminal trials every day. It remains to be seen whether and when the Court will solidify a standard that will prove more workable for lower courts to apply.

Kjirstin Graham

381. See id.

382. See id. at 1371 (citing inconsistent results from the lower courts in their determinations of what renders a statement "reliable").

383. See id. at 1378 (Rehnquist, C.J., concurring) (noting that lower courts will have to "guess" at the scope of the *Crawford* majority's new rule, calling it a "mistaken change of course").

384. See id. (Rehnquist, C.J., concurring) (stating that the majority's ruling "casts a mantle of uncertainty over future criminal trials").

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