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# Lilly v. Commonwealth
# 499 S.E.2d 522 (Va. 1998)

## *I. Facts*

The defendant, Benjamin Lee Lilly ("Lilly"), brought this direct appeal challenging his capital murder conviction and sentence of death for the murder of Alexander V. DeFilippis ("DeFilippis").[1] The Supreme Court of Virginia recited the evidence presented at trial in the light most favorable to the Commonwealth. The court relied on facts derived mainly from testimony of Gary Wayne Barker ("Barker"), a participant in the criminal activity leading up to and following the murder, and an out-of-court statement made by the defendant's brother, Mark Lilly.[2] Mark Lilly's statement admitted his role as an accomplice but identified Benjamin Lilly as the triggerman. The trial court admitted this statement as an exception to the rule against hearsay and rejected a claim that the statement violated the Confrontation Clause of the Sixth Amendment to the United States Constitution.[3]

On December 4, 1995, Lilly, Barker and Mark Lilly were drinking and smoking marijuana at Lilly's house. The threesome decided to go to a friend's house. Finding no one at their friend's home, the three men broke into the house and stole a safe, liquor and several guns. After opening the safe and dividing its contents, they drove to Radford and unsuccessfully attempted to trade the stolen guns for marijuana. They then drove to Blacksburg to spend the night at an acquaintance's house, all the while continuing to drink and smoke marijuana.[4]

On the following day the three men awoke and left Blacksburg, driving on the back roads near Shawsville and Elliston. Traveling back to Blacksburg, they again attempted to trade the stolen guns for marijuana. Later, driving in the vicinity of Heathwood, their car broke down close to a convenience store. After removing the liquor and guns from the car, they approached the convenience store. Once at the store, Lilly approached DeFilippis as DeFilippis inspected a tire on his car. Carrying one of the guns, Lilly ordered DeFilippis into the car and called for Mark Lilly and Barker to join him. Lilly drove the car away from the convenience store and took DeFilippis's wallet.[5]

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1. Lilly v. Commonwealth, 499 S.E.2d 522, 529-537 (Va. 1998), *cert. granted*, Lilly v. Virginia, No. 98-5881, 1998 WL 596783 (U.S. Nov. 9, 1998).

2. *Lilly*, 499 S.E.2d at 528.

3. *Id.* at 534. *See* U.S. CONST. amend. VI. The United States Supreme Court has granted certiorari to hear Lilly's Sixth Amendment claim. Lilly v. Virginia, No. 98-5881, 1998 WL 596783 (U.S. Nov. 9, 1998).

4. *Id.* at 528.

5. *Id.*

Lilly drove to a deserted area on the New River near Whitethorne and ordered DeFilippis out of the car. Mark Lilly, carrying one of the stolen handguns, and Barker joined Lilly and DeFilippis. Lilly ordered DeFilippis to strip to his underwear and walk away from the car. The three men threw DeFilippis's clothes in the river and returned to the car. Lilly then allegedly took the handgun from Mark Lilly, ran up to DeFilippis and shot him four times. Three of the four shots hit DeFilippis in the head, causing his death.[6]

Leaving the body untouched, Lilly returned to the car amid questions from the other two men as to the purpose of the killing. Stating his unwillingness to return to prison, Lilly said that he killed DeFilippis because DeFilippis could identify him. The three men then bought beer with DeFilippis's money and drove to the McCoy River to dispose of evidence linking them to the murder.[7] From the McCoy River, they drove to a little store in Giles County, robbing the store of money and merchandise.[8]

Determining that they would need more money if they were going to be "on the run," they headed to another store where Barker and Mark Lilly entered the store for the purpose of robbing it. The owner broke up the robbery, and the two fled with Lilly as the owner pursued. The owner of the store ended his pursuit when Barker fired one of the guns into the air. Soon after the robbery attempt the car broke down and, as they removed the stolen goods from the vehicle, police officers arrived, quickly apprehending Lilly and Barker.[9]

Lilly was indicted for the murder of DeFilippis on April 1, 1996.[10] Following numerous pre-trial motions and discovery requests, jury selection began on October 15, 1996, lasting four days.[11] The trial commenced on October 21 and concluded with a guilty verdict on all counts.[12] The penalty phase commenced on October 28 and the jury returned a recommendation of the death sentence. The trial court imposed the death sentence by final order on March 7, 1997.[13]

## *II. Holding*

The Supreme Court of Virginia found no error below and, after performing its perfunctory proportionality review, upheld the conviction and sentence.[14]

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6. *Lilly*, 499 S.E.2d at 528.

7. *Id.* Nonetheless, the three retained the murder weapon in addition to the other stolen guns.

8. *Id.*

9. *Id.* at 528-29.

10. *Lilly*, 499 S.E.2d at 527.

11. *Id.* at 527-28.

12. *Id.* at 528. Lilly was charged with abduction, robbery, car-jacking, murder in the commission of a robbery, use of a firearm in the commission of the murder, and possession of a firearm after previously being convicted of a felony.

13. *Id.*

14. *Lilly*, 499 S.E.2d. at 537-38.

### *III. Analysis/Application in Virginia*

Commendably, Lilly raised numerous claims on appeal, preserving many for later federal review. Some of the claims were rejected summarily by the court on the basis of its previous decisions.[15] The court's resolution of other claims involved well-settled law, or turned on facts peculiar to this case, or provided little guidance or explanation of use to counsel in the future.[16] Consequently, only two important claims will be analyzed in this summary.

#### *A. Federal Confrontation Clause*

The admission of Mark Lilly's hearsay statement identifying his brother as the shooter is the issue upon which the United States Supreme Court has granted certiorari.[17] Lilly asserted that the admission into evidence of his brother's statement violated his right to confrontation since the declarant was not present in court for cross-examination.[18] The court held that a defendant's right to confront a witness at trial is not absolute and that Mark Lilly's statement was "sufficiently clothed with indicia of reliability [to be] . . . placed before a jury."[19] The Supreme Court of Virginia correctly recited the general proposition of law that when a state hearsay exception falls within the realm of a firmly-rooted

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15. *Id.* at 529. The court rejected the following claims based on its prior precedent: failure of the trial court to order the Commonwealth to provide a bill of particulars (in general and with regard to the aggravating factors which the Commonwealth planned to rely on at the penalty phase) and the unconstitutionality of the Virginia death penalty statute.

16. *Id.* at 529-537. These claims included: denial of counsel's request to ask questions directly of the venire during voir dire; denial of claims that under *Simmons v. South Carolina*, 512 U.S. 154 (1994), prospective jurors could be educated on a convicted capital murderer's ineligibility for parole if sentenced to life in prison; the trial court's refusal to grant a penalty phase instruction directing the jury to consider "residual doubt" of guilt in considering the sentence. *Id.* at 529, 537.

The court also denied Lilly's claims relating to change of venue, objecting to the presentation of a videotape of the crime scene, objecting to the audio presentation of Mark Lilly's tape recorded statement instead of a reading of the transcript, and objecting to a statement made by Chief Whitsett prior to the Chief's notice to Lilly of the right against self-incrimination and the right to counsel. *Id.* at 531-535.

The court further held that the trial court did not commit error in denying defense counsel's objection to the use of prejudicial graphic photos; objection to admission of evidence of Lilly's refusal to submit to a gunpowder test; objection to admission of an unidentified bloodstain. *Id.* at 532, 535.

The court also reviewed and dismissed the following claims: the admission of a medical examiner's report containing hearsay material; the refusal to admit a statement of co-defendant Barker; the refusal to strike Barker's testimony when he violated a court order prohibiting him to read about the case; the refusal of defendant's jury instruction on voluntary intoxication and premeditation; the refusal to grant a mistrial after prosecutorial misconduct and court disparagement of defense counsel. *Id.* at 536-37.

The court also performed its boilerplate proportionality review pursuant to Sections 17-110.1(C)(1) and (2) of the Virginia Code and declined to reduce the sentence. *Id.* at 537.

17. Lilly v. Virginia, No. 98-5881, 1998 WL 596783 (U.S. Nov. 9, 1998).

18. *Lilly*, 499 S.E.2d. at 534.

19. *Id.*

federal exception to the hearsay rule, admission of the hearsay evidence without providing the opponent the opportunity to cross-examine the declarant will not violate the Sixth Amendment.[20] The Supreme Court of Virginia further held that the admitted statement was a declaration against the penal interests of the declarant, Mark Lilly, fulfilling a well-established hearsay exception on both the state and federal level.[21]

It is at this point the court erred. The court's holding might be valid in a non-capital trial, but in this capital case proper analysis should have continued, exploring the true nature of Mark Lilly's statement. In the context of a Virginia capital murder case, Mark Lilly's statement was not a declaration against his penal interests, but in fact a self-serving statement. Section 18.2-18 of the Virginia Code provides that only the trigger man may receive a capital murder conviction and sentence of death.[22] The code states "an accessory before the fact or principal in the second degree to a capital murder shall be indicted, tried, convicted and punished as though the offense were murder in the first degree."[23] If Ben Lilly was the trigger man, then Mark, as an accessory, could not be convicted of capital murder, much less be eligible for a sentence of death. Although the statement was a declaration against his penal interest in the most general sense, Mark's insulation of himself from the ultimate penalty, or even from mandatory life without parole, could hardly be more self-serving in reality. In relation to the most important aspect of this crime, the death penalty, Mark Lilly's statement lacked the required indicia of reliability.

The United States Supreme Court held in *Williamson v. United States*,[24] relying on Rule 804(b)(3) of the Federal Rules of Evidence,[25] that a non-self-inculpatory statement, even when made within a broader, generally self-inculpatory narrative, is not admissible under hearsay exceptions.[26] The Court continued by cautioning the lower courts that such statements required special consideration when the statement implicated someone else, drawing attention to the case of co-defendant's statements due to a defendant's strong motivation to implicate others while exonerating himself.[27] In *Williamson*, the petitioner also claimed a violation of the Confrontation Clause[28] due to his inability to cross the co-defendant when the trial court admitted co-defendant's statement into evidence.[29] The Court

20. *Id.* (citing White v. Illinois, 502 U.S. 346, 356 (1992)).

21. *Id.*

22. VA. CODE ANN. § 18.2-18 (Michie Supp. 1998).

23. *Id.*

24. 512 U.S. 594 (1994).

25. Fed. R. Evid. 804(b)(3).

26. Williamson v. United States, 512 U.S. 594, 600-01 (1994).

27. *Id.* at 601.

28. U.S. CONST. amend. VI. The Confrontation Clause reads "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Id.*

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

decided the *Williamson* case based on Rule 804(b)(3) of the Federal Rules of Evidence, choosing not to make a constitutional holding. But the court did state 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."[30] Thus, the Court employed familiar rules of appellate decision making, basing its ruling on non-constitutional grounds where possible. There is little doubt, however, that *Williamson* would also have prevailed on Sixth Amendment grounds.

The admissibility of co-defendant's statements often arises in Virginia capital murder cases with multiple defendants, in large part due to Virginia's trigger man statute.[31] Virginia Capital Case Clearinghouse will be happy to provide counsel confronted with this issue with the brief from this case, examples of motions filed in connection with this claim and any further assistance desired. It is far from certain, of course, but Lilly's Confrontation Clause claim should prevail in the United States Supreme Court.

### *B.* Simmons v. South Carolina[32] *and Jury Awareness of Parole Ineligibility*

Lilly sought, by pretrial motion, to inform prospective jurors concerning Lilly's ineligibility for parole if convicted of capital murder and sentenced to life in prison rather than death.[33] Lilly relied on *Simmons v. South Carolina's* holding that defendants are entitled to inform jurors of this fact.[34] The Supreme Court of Virginia found no error in the trial court's denial of the motion. In denying the motion, the trial court held that the proper point for the presentation of such information was the penalty phase of the trial.[35]

Counsel's efforts are to be commended, but there may be a better way to frame this matter. In a case where meaningful voir dire is actually permitted pursuant to VA. CODE § 8.01-358,[36] the question of juror qualifications arises

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30. *Id.*

31. VA. CODE ANN. § 18.2-18 (Michie Supp. 1998).

32. 512 U.S. 154 (1994).

33. Lilly's motion used the unfortunate term "educate," which is not recommended. What Lilly sought to discuss is a legitimate matter touching the qualifications of a prospective capital juror.

34. Lilly v. Commonwealth, 499 S.E.2d. 522, 529 (Va. 1998) (citing Simmons v. South Carolina, 512 U.S. 154, 162 (1994)).

35. *Id.*

36. VA. CODE ANN. § 8.01-358 (Michie 1992). Section 8.01-358 states:

> [t]he court and counsel for either party shall have the right to examine under oath any person who is called as a juror therein and shall have the right to ask such person or juror directly any relevant question to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; and the party objecting to any juror may introduce any competent evidence in support of the objection; and if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for the trial of that case.

under *Wainwright v. Witt*,[37] *Morgan v. Illinois*,[38] and *Ross v. Oklahoma*.[39] These cases, in short, require jurors to consider evidence in mitigation and not to hold pro-death penalty views so strongly that their ability to follow the law would be substantially impaired. Defendant's parole ineligibility is relevant to both aspects of that qualification inquiry. No pre-trial motion should be necessary. The court should allow defense counsel to ask prospective jurors questions regarding this issue.

Matthew Mahoney

*Id.*

37. 469 U.S. 412 (1985).
38. 504 U.S. 719 (1992).
39. 487 U.S. 81 (1988).