



Fall 9-1-1999

Lilly v. Virginia 119 S. Ct. 1887 (1999)

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlucdj>



Part of the [Law Enforcement and Corrections Commons](#)

Recommended Citation

Lilly v. Virginia 119 S. Ct. 1887 (1999), 12 Cap. DEF J. 157 (1999).

Available at: <https://scholarlycommons.law.wlu.edu/wlucdj/vol12/iss1/11>

This Casenote, U.S. Supreme Ct. is brought to you for free and open access by the Law School Journals at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Capital Defense Journal by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

Lilly v. Virginia

119 S. Ct. 1887 (1999)

I. Facts

The defendant, Benjamin Lee Lilly ("Lilly"), petitioned the United States Supreme Court for writ of certiorari from the Supreme Court of Virginia's decision affirming his capital murder conviction and death sentence for the murder of Alexander V. DeFilippis ("DeFilippis").¹ The murder of DeFilippis was one of the final events of a crime spree fueled by drugs and alcohol undertaken by Lilly, his brother Mark Lilly ("Mark"), and Mark's roommate, Gary Wayne Barker ("Barker"), over a two-day period. The men abducted DeFilippis, stole his car, and one of the men shot him.²

Upon apprehending the men, the police questioned them separately. In the midst of interrogation, the police asked questions encouraging Mark to name Lilly as the triggerman and stated that unless Mark "broke 'family ties,' [Lilly] 'may be dragging [him] right into a life sentence.'"³ During the course of questioning, Mark admitted his participation in most of the crimes, but specifically named Lilly as the triggerman in the murder of DeFilippis. At Lilly's trial, Mark was called by the Commonwealth to testify. Mark refused to testify, invoking his Fifth Amendment privilege against self-incrimination.⁴ The Commonwealth then offered Mark's recorded statement that contained his confession and named his brother as triggerman. Although the statement was hearsay, the trial court admitted it as a declaration of an unavailable witness against the declarant's penal interest. The trial court rejected Lilly's objection that this admission violated his Sixth Amendment right to confront the witnesses against him.⁵

1. Lilly v. Commonwealth, 499 S.E.2d 522 (Va. 1998). For more detailed facts of the underlying case, see Matthew Mahoney, Case Note, 11 CAP. DEF. J. 207 (1998) (analyzing Lilly, 499 S.E.2d 522).

2. Lilly v. Virginia, 119 S. Ct. 1887, 1892 (1999).

3. *Id.* at 1892 (citation omitted).

4. *Id.* at 1892-93. See U.S. CONST. amend. V. The Fifth Amendment to the United States Constitution reads, in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." Mark was able to invoke his Fifth Amendment privilege because he had not yet been tried for his participation in the crime spree. If Mark had taken the stand to testify regarding Lilly's actions in the murder, he would have been placed in a position in which he could be questioned regarding his own guilt. These statements could then have been used against him in later proceedings.

5. Lilly, 119 S. Ct. at 1893. See U.S. CONST. amend. VI. The Sixth Amendment reads, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be

On direct appeal, the Supreme Court of Virginia affirmed Lilly's conviction and sentence. Specifically, the Supreme Court of Virginia concluded that the trial court correctly admitted Mark's statement into evidence as a statement against penal interest. The court rejected Lilly's claim that admission of Mark's statement violated the Sixth Amendment.⁶ In so doing, the court relied on *White v. Illinois*,⁷ in which the United States Supreme Court stated that "[w]here the proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied."⁸ The court further concluded that statements against penal interest of an unavailable witness are admissible as within a "firmly rooted" objection. The court also found that the facts of the case proffered guarantees of reliability.⁹

II. Holding

The United States Supreme Court unanimously reversed the decision of the Supreme Court of Virginia. In its plurality opinion, the Court held that the admission of Mark's statement violated Lilly's Confrontation Clause rights. The Court remanded the case to the Virginia courts for harmless error review.¹⁰

III. Analysis / Application in Virginia

A. Analysis by the Court

The plurality opinion first noted the right of the accused, in all criminal prosecutions, to be confronted with the witnesses against him under the Sixth and Fourteenth Amendments to the United States Constitution.¹¹

confronted with the witnesses against him"

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

7. 502 U.S. 346 (1992).

8. *White v. Illinois*, 502 U.S. 346, 356 (1992).

9. *Lilly*, 499 S.E.2d at 534. The court felt that the statement was reliable when considered in context because (1) "Mark Lilly was cognizant of the import of his statements and that he was implicating himself as a participant in numerous crimes," and (2) "elements of [his] statements were independently corroborated" by other evidence offered at trial. *Id.*

Also in that opinion, but not considered by the Supreme Court, the Supreme Court of Virginia found the admission of testimony that Lilly refused to submit to gunpowder residue tests and the admission of portions of the medical examiner's report to be harmless error in light of other evidence admitted at trial. This other evidence consisted of (1) Barker's testimony naming Lilly as the triggerman, (2) Chief Whitsett's testimony of his conversation with Lilly in which he had asked Lilly what a murderer looked like, to which Lilly allegedly replied "me," (3) dried blood on the back of Lilly's pant leg, and (4) Mark's statement. *Id.* at 535-36. Lilly's petition for writ of certiorari with respect to his Sixth Amendment Confrontation Clause issue was granted by the Supreme Court of the United States. *Lilly*, 119 S. Ct. at 443.

10. *Lilly*, 119 S. Ct. at 1901.

11. *Id.* at 1893. See U.S. CONST. amends. VI, XIV.

This right exists in order to ensure the reliability of evidence used in criminal prosecutions by subjecting it to the adversarial process, including cross-examination.¹² In order to assess whether Lilly's Sixth Amendment right was violated by the admission of Mark's statement at trial, the Court used the two-pronged test for hearsay admissibility which it created in *Ohio v. Roberts*.¹³

The *Roberts* test provides that the admission of hearsay does not violate the Confrontation Clause if it (1) falls under a firmly rooted hearsay exception or (2) has particularized guarantees of trustworthiness.¹⁴ Applying the first prong of this test, the Court in *Lilly* recognized that accomplice statements do not fall within a "firmly rooted" exception to the hearsay rule merely because portions of the confession may incriminate the accomplice himself and, in that respect, may be "against penal interest."¹⁵ The Court noted that classifying statements simply as "against penal interest" yielded a class of statements that would be too numerous for meaningful Confrontation Clause analysis.¹⁶ Specifically, the Court stated that, in order to adequately ascertain whether the statement falls within a firmly rooted exception, courts must undertake further examination of Supreme Court jurisprudence specific to the type of statement within the "against penal interest" umbrella.¹⁷

The Court concluded that there are three situations in which litigants attempt to use statements against penal interest: (1) voluntary admissions against the declarant; (2) exculpatory evidence offered by a defendant claiming that the declarant committed or was a participant in the offense; and (3) evidence offered by the prosecution to establish the guilt of an alleged accomplice of the declarant.¹⁸ The Court affirmed the validity of allowing the first type of statements into evidence when the declarant is the sole defendant.¹⁹ The Court recognized that the second situation involves statements introduced by a defendant to exculpate himself; the defendant's

12. *Lilly*, 119 S. Ct. at 1894.

13. 448 U.S. 56 (1980).

14. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

15. *Lilly*, 119 S. Ct. at 1899.

16. *Id.* at 1895.

17. *Id.* at 1894-98.

18. *Id.* at 1895.

19. *Id.* at 1895-96. The Court here discussed the problem initially addressed by the Court in *Bruton v. United States*, 391 U.S. 123 (1968), in which two codefendants, Bruton and another, were tried jointly and convicted. The confession of Bruton's non-testifying codefendant was admissible against the codefendant, but the jury was instructed not to use it in considering the guilt of Bruton. Despite this instruction, the Court found that the threat to Bruton's Sixth Amendment Confrontation Clause rights entitled him to a new trial. The Court in *Lilly* further noted how, in more recent post-*Bruton* cases, it has found the classification of an accomplice's confession as a statement against penal interest inadequate to admit the statement against another person. *Lilly*, 119 S. Ct. at 1896.

Sixth Amendment confrontation rights are not implicated by *his* introduction of the declarant's statement because it is, of course, the defendant's own choice to introduce it.²⁰ The Court then considered the third category of statements against penal interest, the category into which Mark's statements fit.²¹ The Court noted that this category of hearsay is inherently unreliable. The Court stated that its cases have clearly and consistently viewed statements of an accomplice which shift or spread the blame to a defendant as outside the realm of trustworthy hearsay; thus, the Court found them not to fall within a firmly rooted hearsay exception.²²

Referring to the second *Roberts* factor for admissibility of this type of hearsay, the Court evaluated whether it was convinced that "the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility."²³ The Court emphasized that statements of this type are especially suspect and are carefully evaluated for validity and reliability.²⁴ The reliability indicia advanced by the Supreme Court of Virginia in this case were summarily dismissed as non-persuasive and insufficient to overcome the presumption of unreliability.²⁵

B. Implications for Lilly

The Court remanded the case to the Supreme Court of Virginia for harmless error review, which was probably complicated by the Supreme

20. *Lilly*, 119 S. Ct. at 1896. The Court did recognize that these statements would be admissible if the circumstances surrounding them provided assurance of reliability. *Id.*

21. *Id.* at 1897. The concurrence in judgment by Chief Justice Rehnquist points out that the labeling of Mark's statements as "against penal interest" was not completely valid since the sections implicating Lilly were "quite separate in time and place" from the statements against Mark's penal interest. *Id.* at 1904 (Rehnquist, J., concurring).

22. *Id.* at 1897-98. It is important to note what this case does *not* stand for. Not all confessional statements by accomplices which implicate other actors in the criminal activity are barred from evidentiary admission. The presumption that statements of this type are "inherently unreliable" may be overcome by proof of indicia of reliability and trustworthiness. *Id.* at 1900.

23. *Id.* at 1900 (quoting *Idaho v. Wright*, 497 U.S. 805, 820 (1990) (internal quotation marks omitted)).

24. *Id.*

25. *Id.* at 1900. The Court found the fact that other evidence corroborated the statements was wholly irrelevant as the reliability of the declarant is in no way dependent upon or causally related to the other evidence presented at trial. The Court further found unpersuasive the fact that Mark's *Miranda* warnings were read to him prior to giving his statement because the motivation to spread the guilt for a crime is not extinguished by the reading of such rights. *Id.* The Court was equally unpersuaded by Mark's awareness of the criminal consequences of his statement, since the statement given was not wholly against Mark's penal interest, but instead contained statements which shifted the guilt for the capital crime to Lilly. The Court found these proffered indicia of reliability insufficient to meet the burden needed to overcome Lilly's right of confrontation. Lastly, the Court noted the suspect circumstances under which Mark was questioned (*i.e.*, time of day, inebriation, leading questions). *Id.*

Court of Virginia's earlier findings of harmless error. At Lilly's trial, Barker's testimony and Mark's statement identified Lilly as the triggerman.²⁶ In addition, the Commonwealth also introduced the following items of evidence: (1) Chief Whitsett's testimony that Lilly said a murderer looked like "me" (Lilly); (2) testimony that Lilly refused to submit to a gunpowder residue test; (3) dried blood on the back of Lilly's trousers; and (4) portions of a medical examiner's report.²⁷ The admissibility of Barker's statement was never questioned. Each of the other items of evidence was admitted over Lilly's objection. In its original opinion, the Supreme Court of Virginia found Mark's statement admissible.²⁸ The court also held that evidence about the blood on the back of Lilly's trousers was admissible although the blood had never been tested even to determine its human origin.²⁹ It was against this background that the court evaluated the gunpowder residue evidence and medical examiner's report. The court assumed that Lilly's refusal to submit to the gunpowder residue test was inadmissible, but held its admission harmless error in light of the admissible evidence already in the case.³⁰ Essentially the same holding was applied to the medical examiner's report.³¹

In conducting the harmless error review mandated by the United States Supreme Court, the Supreme Court of Virginia had to first determine what evidence, excluding Mark's statement, was properly admitted into evidence. It was only against that background that the effect of Mark's statement could be assessed because harmless error review must be based solely upon properly admitted evidence. The purpose for conducting harmless error review is to assess whether a new trial is warranted due to the effect, if any, of erroneously admitted evidence on the verdict. In order to make this assessment, courts look to the other evidence proffered by the Commonwealth during trial. If a court were to look to all evidence admitted at trial, including erroneously but harmlessly admitted evidence, a case hypothetically could contain all erroneously admitted evidence, each piece of which seemed harmless when considered in light of the other pieces of harmlessly admitted evidence. This does not fulfill the purpose of harmless error review, which seeks a basis for the conviction within the properly admitted evidence. Thus, the gunpowder residue evidence and medical examiner's report, the admissions of which were harmless error when evaluated in light

26. *Lilly*, 499 S.E.2d at 528-32.

27. *Id.* at 535-36.

28. *Id.* at 533-34.

29. *Id.* at 535-36.

30. *Id.* at 535.

31. *Id.* at 536. Lilly challenged the admission of portions of the medical examiner's report because of references within the report to tests which were not performed by the proponent of the report. *Id.*

of Mark's statement, needed to be excluded from consideration. This left Barker's testimony, Chief Whitsett's testimony, and the dried blood as the basis upon which the harmlessness of the admission of Mark's statement had to be measured. The court needed to find that the admission of Mark's statement was harmless beyond a reasonable doubt, meaning that it had to determine beyond a reasonable doubt that the admission did not have a "substantial or injurious effect or influence in determining the jury's verdict."³²

The Supreme Court of Virginia released its decision on November 5, 1999.³³ The court determined that the admission of Mark's statement was *not* harmless error, reversing his conviction for capital murder and the related firearm charge, and remanding the case for a new trial.³⁴ In making its decision the court recognized both the "beyond a reasonable doubt" standard under which harmless error review is to be judged as well as the importance of tainted evidence in the prosecution's case.³⁵ The court emphasized the lack of physical evidence presented by the Commonwealth to support the finding that Lilly was the triggerman.³⁶ The court noted that the evidence advanced by the Commonwealth to support a finding of harmless error, with the exception of Barker's testimony, only connected Lilly with the crime spree and participation in the activity leading to DeFillipis's murder, but not with triggerman activity.³⁷ This evidence may have supported a finding of first degree murder, but it was insufficient to sustain a conviction for capital murder. The court also recognized that the familial tie between Mark and Lilly probably increased the credibility of Mark's testimony in the eyes of the jury.³⁸

On remand for a new trial, Lilly's case is likely to be very different. Barker's testimony will, of course, be available. Mark, who has been convicted of his charges³⁹ will no longer be able to claim a Fifth Amendment privilege and will be available to the Commonwealth. However, at

32. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)) (internal quotation marks omitted).

33. *Lilly v. Commonwealth*, Nos. 972385, 972386 (Va. Nov. 5, 1999).

34. *Id.* The court affirmed Lilly's conviction for the carjacking, robbery, abduction, and the four related firearm charges. Lilly's counsel conceded that the evidence presented at trial was sufficient to support these charges. The dissenting justices based their argument for harmless error on these concessions, in that the evidentiary support for these affirmed charges was the same as that for the reversed charges. These justices argued that if the evidence was sufficient to support the affirmed charges, it was sufficient to support all of the charges. *Id.* (Kinser, J., and Compton, J., dissenting).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. See Michael Hemphill, *Killer's Case Reaches Justices - Brother's Confession Led to Death Sentence*, THE ROANOKE TIMES, Nov. 10, 1998, at A1.

his own sentencing hearing, Mark recanted his assertion that Lilly was the triggerman.⁴⁰ As for the remaining "incriminating" evidence, the blood on Lilly's trousers (if the pants are still available for testing) may prove not of human origin. In addition, the gunpowder residue and medical examiner evidence may be inadmissible.

C. Implications for Virginia Capital Practice

Implications of this case for general Virginia capital practice are three-fold. This case holds primary benefit for capital cases in which a defendant is the alleged triggerman and accomplice statements which spread or shift guilt are vital to the Commonwealth's case. Section 18.2-18 of the Virginia Code generally proscribes capital murder convictions and sentences of death for actors other than the triggerman.⁴¹ This exception provides a tremendous incentive for those who try to use the triggerman exception as a defense by implicating others as the triggerman. Given the ruling in *Lilly*, defense counsel should be cognizant of the rights that the Sixth Amendment guarantees. Should the declarant of any such self-serving statement not be available to the Commonwealth for testimony, the statements are not admissible.⁴² Any objection at the trial level to the admission of a statement similar to Mark's should be couched in Confrontation Clause terms. Further, the trisecting by the Court of possible "against penal interest" situations holds importance if the Commonwealth attempts to place into evidence statements which do not fall directly within the admissible categories or meet the requisite indicia of reliability set out for each.

A second import of this case for Virginia is drawn from the Court's analysis of the second prong of the *Ohio v. Roberts* test. This discussion indicated the willingness of the Court to recognize the duty of appellate courts, including state courts, to undertake seriously their own analysis of the indicia of reliability in each individual case.⁴³ Hence, should a court

40. *Id.*

41. The code language, in relevant part, reads as follows: "[E]xcept in the case of a killing for hire under the provisions of subdivision 2 of § 18.2-31 or a killing pursuant to the direction or order of one who is engaged in a continuing criminal enterprise under the provisions of subdivision 10 of § 18.2-31, 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.*" VA. CODE ANN. § 18.2-18 (Michie 1999) (emphasis added).

42. *Lilly*, 119 S. Ct. at 1900. Such statements are inadmissible *unless* the Commonwealth can independently establish "particularized guarantees of trustworthiness" such that adversarial testing would not significantly add to the statement's reliability per the second prong of *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). However, the Court noted that it is highly unlikely that the presumptive unreliability attaching to this type of statement can be effectively rebutted. *Lilly*, 119 S. Ct. at 1900.

43. *Lilly*, 119 S. Ct. at 1900. *But see id.*, 119 S. Ct. at 1905-06 (Rehnquist, J., concurring) (rejecting the analysis of the second *Roberts* factor due to belief that the Supreme Court of

violate a defendant's Sixth Amendment Confrontation Clause rights by allowing weak indicia of reliability to justify admission of hearsay, a defendant may seek redress and reconsideration in an appellate court. Further, due to the Court's recognition of the improbability of satisfying this reliability criteria in accomplice hearsay statements of this type, trial and appellate courts may be less hasty in allowing hearsay of this nature in at trial.⁴⁴

The third implication this decision holds for Virginia capital practice is the Court's chastisement of the Supreme Court of Virginia for the substandard analysis performed in this case. The Court expressed concern that "[the Supreme Court of Virginia's] decision represented a significant departure from [the Court's] Confrontation Clause jurisprudence."⁴⁵ This case should alert the Virginia courts in death penalty cases that the United States Supreme Court *will* step in to correct state courts when there is such unconstitutional application of the law.⁴⁶

Kimberly A. Orem

Virginia had not reached a decision on this factor, therefore finding remand for this consideration a more appropriate remedy).

44. *Id.* at 1900.

45. *Id.* at 1893.

46. See also William S. Geimer, *Two Decades of Death: Trashing the Rule of Law in Virginia*, 11 CAP. DEF. J. 293 (1999) (discussing the illogical application of the rule of law in Virginia capital cases).