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The Confrontation Clause in Search of a Paradigm: Has Public Policy Trumped the Constitution?

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Comment

The Confrontation Clause in Search of a Paradigm: Has Public Policy Trumped The Constitution?

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1. Ruth Friedman is a candidate for a J.D. at Pace University School of Law, class of 2002. She received a B.A. in history *magna cum laude* from Tufts University in 1979 and a Ph.D. in the History of American Civilization from Brandeis University in 1993. She thanks Pace Law School Professors Steven Goldberg, Bennett Gershman, and especially Michelle Simon for classes and discussions that contributed to this article and Peter Wilson and the PLR associates whose efforts have truly improved this essay. She would also like to thank former colleagues in the Lawrence University Freshman Studies Program as well as her students at Lawrence for their many discussions about Thomas Kuhn's theory of paradigms and scientific revolutions. Finally, she is indebted to Steven and Sam, who interrupted, and Barry, who tried to limit the interruptions.

I. INTRODUCTION

Picture Raymond Burr in the role of Perry Mason conducting a dramatic cross-examination, O.J. Simpson's Dream Team challenging Mark Fuhrman's racial biases, or a local defense attorney asking subtle questions that destroy the credibility of a co-conspirator: a criminal defendant's constitutional right to challenge her accusers remains an irrefutable hallmark of American jurisprudence. Yet the actual legal force of the Confrontation Clause continues to provoke constant judicial disagreement. Recently, the United States Supreme Court decided *Lilly v. Virginia* in yet another attempt to refine modern interpretations of exactly what is meant by confronting one's accuser.[2] The Court, as it has with increasing frequency, issued a divided opinion,[3] though achieved unanimous support of its verdict.[4] Justice Scalia's opinion did more than offer an argument about confrontation, however. His succinct concurrence with the *Lilly* plurality decision identified, perhaps unwittingly, the problems of interpreting the Confrontation Clause in current American jurisprudence. Scalia held that the fact pattern in

2. Lilly v. Virginia, 527 U.S. 116 (1999) (plurality opinion).

3. Of course, more of the decisions have been close (such as 5-4) decisions rather than plurality decisions.

4. *See Lilly*, 527 U.S. at 119.

Lilly represented "a paradigmatic Confrontation Clause violation."[5] But what paradigm?

Over the last two centuries, and particularly since the inception of the Warren Court, Confrontation Clause jurisprudence has become less coherent, more fractured, and less predictable.[6] As evidenced by the Court's opinions in *Lilly*, even when the Justices agree that a governmental action violated a defendant's right to confront adverse witnesses, they fail to agree on the basis for their holdings. Although the *Lilly* Court agreed to reverse a capital conviction, and remand the case for reconsideration, the Justices delivered five distinct opinions in support of that "unanimous" judgment. In fact, the Court was not able to garner the support of more than four Justices for any single expression of the rationale behind the ultimate verdict. The Court, again, failed to offer American jurisprudence a paradigm for interpreting the Confrontation Clause. While Justice Scalia may have been certain that the *Lilly* matter was a violation on its face,[7] the twists and turns in interpreting the Confrontation Clause have failed to offer a reliable platform from which to make this or any future determinations.

The Court's struggle to decide *Lilly* exemplifies problems that are inevitable when a field or sub-discipline is unable to organize its knowledge according to a dominant paradigm. The *Lilly* decision and its lower court progeny suffer from the vastly divergent views of the Justices as to the proper interpretation of the Confrontation Clause. As an original provision of the Bill of Rights, the clause as written was intended to be a clear statement of individual rights and government's responsibilities; it was drafted as solace to anti-Federalists fearing the return of

5. *Id.* at 143 (Scalia, J., concurring).

6. This trend is clearly apparent in the Court's jurisprudential trend in the last decade. However, this article argues that the trend has been especially pervasive in Confrontation Clause jurisprudence.

7. Such a declaration by Justice Scalia would not be out of character. In a discussion of Scalia's use of tools such as *Webster's Dictionary* to arrive at his judicial pronouncements, David M. Zlotnick has noted that "in a few cases, the plain meaning has been so clear to Scalia that he has simply declared the definition he finds *obvious* without citation." David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1391 (1999).

centralized government[8] under the new Federal Constitution, as well as to protect the 1776's guarantee of "life, liberty and the pursuit of happiness."[9] However, interpreting these rights has become a staple of modern federal court litigation as jurists seek to understand what the founders intended, and how their intent can be applied in today's world.

Part I of this essay defines "paradigms" and their application to the emergence of disputes over Confrontation Clause jurisprudence. It further identifies the connection between the lack of a unifying paradigm and the prevalence of non-binding plurality opinions in our constitutional jurisprudence. When the nation's highest court is unable to agree on an interpretation of a particular rule of law or constitutional clause, jurisprudential disorder may ensue. Part II considers the historical background of confrontation. Since its inception, a fundamental conflict has existed between the several purposes of the right to confront as it posits a categorical right of protection against arbitrary government action but also is intended to guarantee defendants an effective truth-seeking process. This dichotomy has prevented the formation of a unified paradigm on which to base current policies and procedures. Part III examines the maturation of Confrontation Clause jurisprudence since 1960, arguing that conflicting public policy goals of protecting individual rights on the one hand and promoting efficient justice on the other have allowed for an increased identification of confrontation issues with hearsay concerns. In this era, two competing paradigm alternatives emerged to replace the traditional understanding of the Confrontation Clause, though neither has proved forceful enough to exist as the dominant paradigm. Part IV examines the Court's decision in *Lilly v. Virginia*, demonstrating the degree to which conflicting paradigms hinder rather than enable a clear understanding of constitutional agendas and frameworks. Part V contains a review and analysis of the most significant opinions issued by circuit courts on issues reached by *Lilly* since that decision. It offers clear evidence of the confusion left by the Supreme Court's inability to arrive at a clear paradigm for interpreting the Confrontation

8. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 536-37 (1972).

9. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Clause. Finally, Part VI concludes by offering a final look at the difficulty of protecting rights equally and effectively when fundamental structures of evaluation are lacking in judicial doctrine.

II. THE SIXTH AMENDMENT: A THEORY OF PARADIGMS AND THE POWER OF PRECEDENTS

The Sixth Amendment is clearly distinguishable from its fellow amendments. Directed at one body of litigation, criminal prosecutions, it remains the most procedurally oriented of the amendments.[10] The Sixth Amendment details the structure of the guaranteed speedy and public trial: to be judged by an impartial jury, in the jurisdiction "wherein the crime shall have been committed,"[11] after the accused has been "informed of the nature and cause of the accusation."[12] The criminally accused is guaranteed three rights designed to aid his efforts to present a defense: a compulsory process for obtaining witnesses in his favor, "the Assistance of Counsel for his defence,"[13] and "to be confronted with the witnesses against him."[14] The Sixth Amendment is the most precisely detailed of the first ten amendments to the Constitution, providing a clear expression of its drafters' vision and intent, or so it would seem.

Of all the phrases in the Sixth Amendment, the premise behind the Confrontation Clause appears obvious: every defendant in a criminal matter brought to trial in the United States is guaranteed the right "to be confronted with the witnesses against him."[15] However, the clause has been dramatically reinterpreted over time. One scholar recently claimed that the clause has simply become "another rule of evidence;"[16] another questioned whether the recent judicial renditions of confrontation have transformed the Bill of Rights into a "Bill of Prefer-

10. *See* U.S. CONST. amend. VI.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. U.S. CONST. amend. VI.
16. John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 GEO. WASH. L. REV. 191, 197 (1999).

ences."[17] This construction hardly represents the goal of James Madison, chief architect of the Bill of Rights, who sought to protect the right of fair proceedings that first the colonists, and then the Anti-Federalists, believed had been denied to them.[18] The shift, resulting in the Confrontation Clause being considered a rule of evidence, has been notable in constitutional jurisprudence. It represents a fundamental transformation in how a constitutional clause is perceived, enforced, and eventually diminished in power and prestige.

Scholars and jurists have found themselves pondering an increasing number of critical Confrontation Clause related cases over the last fifteen years. These cases have fallen into two categories. First, disputes related to interpretations of various rules of evidence having to do with hearsay exceptions. Second, disputes considering the direct issue of a defendant's right to confront witnesses against them at trial. The introduction of any out-of-court statements, affidavits, or other forms of unavailable declarant-based testimony is precisely what the Confrontation Clause originally sought to prevent.[19] Yet the judicial system regularly deals with ambiguities inherent in interpreting this policy. For an issue that seemed clear-cut to the founders, the interpretation of the Confrontation Clause has become an endeavor fraught with uncertainty and vagueness.[20]

A. *Defining "Paradigm"*

The lack of a clear paradigm for understanding the Confrontation Clause is likely a central cause of this jurisprudential uncertainty. The term "paradigm" became part of American popular and scholarly culture after the publication of Thomas

17. Robert H. King, Jr., *The Molested Child Witness and the Constitution: Should the Bill of Rights be Transformed into the Bill of Preferences?*, 53 OHIO ST. L.J. 49, 50 (1992).

18. *See* WOOD, *supra* note 8.

19. *See infra* Part II.

20. An indication of this confusion may be found in some of the scholarly essays written on this topic. *See* Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1013 (1998) (noting the instability of the Court's current Confrontation Clause doctrine); James B. Haddad, *The Future of Confrontation Clause Developments: What Will Emerge When the Supreme Court Synthesizes the Diverse Lines of Confrontation Decisions?*, 81 J. CRIM. L. & CRIMINOLOGY 77 (1990) (arguing that the future of the Court lies in finding a synthesis among the different lines of its Confrontation Clause decisions).

Kuhn's *The Structure of Scientific Revolutions* in 1962.[21] To Kuhn, a paradigm, defined as the overarching theories and assumptions that shape a field or discipline of study,[22] represents the acquisition of a body of facts and interpretations sufficiently advanced as to indicate maturity in a given intellectual endeavor.[23] A paradigm gains its status when it is "more successful than [its] competitors in solving a few problems that the group of practitioners [have] come to recognize as acute."[24] Once a paradigm is established, it offers a series of principles to aid in the comprehension of problems as well as the assimilation of new facts and concepts into the prevailing theories used by scholars in the discipline.[25] The paradigm, therefore, offers a map for understanding the world of a particular discipline as well as an approach for solving those difficulties that arise in its development and growth.

In explaining how scientists come to grasp new ideas, Kuhn explained that the shifts between paradigms are not linear, but rather are sudden "revolutions" that occur when a body of facts emerge that so challenge the past formulation as to render it virtually useless.[26] This process is not cumulative; it can only be achieved through the rejection and replacement of the previous paradigm.[27] Only then will a new paradigm or template for the understanding of a particular event or process emerge through a process that discards "previously standard beliefs or procedures and, simultaneously . . . [places] those components of the previous paradigm with others."[28] Kuhn argues that all paradigms are "socially constructed through a process of discussion and consensus-building about theories, experimental methods, instrumentation, and validation."[29] Most significantly, a paradigm offers criteria for formulating and testing an idea or

21. THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (3d ed. 1996).

22. *See* Jeffrey D. Kovac, *Science, Law, and the Ethics of Expertise*, 67 TENN. L. REV. 397, 399 (2000).

23. *See* KUHN, *supra* note 21, at 11.

24. *See id.* at 23.

25. *See id.* at 37, 56.

26. *See id.* at 65.

27. *See id.* at 84-85.

28. KUHN, *supra* note 21, at 66.

29. Erica Beecher-Monas, *The Heuristics of Intellectual Due Process: A Primer for Triers of Science*, 75 N.Y.U. L. REV. 1563, 1576-77 (2000).

principle.[30] Ideally, an emphasis on the principles behind a paradigm may bring some sense and predictability to the law.[31] Without a dominant paradigm, a discipline may be left devoid of any unifying principles upon which to rest its analyses.

B. *Shifting Paradigms in Confrontation Clause Jurisprudence*

The current state of Confrontation Clause jurisprudence, most recently expressed in *Lilly v. Virginia*,[32] is the clear result of conflicting paradigmatic models for the clause's interpretation. The traditional Confrontation Clause paradigm embraced the essential goals of the founders by providing for in-person testimony by adverse witnesses to limit the overarching power of prosecuting officials to enter into evidence testimony that was coerced and then not openly tested for accuracy.[33] That paradigm remained intact despite a variety of limited exceptions to the rule throughout the nineteenth and early twentieth centuries.[34]

However, in the last forty years, that paradigm has been challenged by facts and practices not easily assimilated into the traditional norms.[35] In particular, recent courts have revised and reiterated their understanding of the clause in the following categories of cases: those depending on the co-conspirator hearsay exception pursuant to Federal Rule of Evidence 801 (d)(2)(E);[36] those having to do with the admissibility of custodial confessions and whether they qualify under the "against penal interest" exception as embodied in Federal Rule of Evidence 803(b)(4);[37] those relating to the admission of hearsay testimony pertaining to child abuse victims, whether videotaped or from

30. *See id.* at 1577.

31. *See* Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775, 796 (2000). Persily and Cain apply this logic to an understanding of paradigms of American parties. However, I believe this sort of formulation helps both explain the problems in Confrontation Clause jurisprudence today as well as offers a solution to the conflicts for the future.

32. 527 U.S. 116 (1999).

33. *See infra* Part II & III.

34. *See infra* Part III.

35. *See id.*

36. *See infra* notes 193-218 and accompanying text.

37. *See id.* and accompanying text.

other sources;[38] and those involving testimony of minors and the elderly who are fearful of the consequences of testifying in court against those who might retaliate.[39] In deciding these cases, the Court generally relies on the amorphous term "public policy" whenever it holds that criminal defendants may be deprived of their constitutional rights to confront witnesses against them. Still, federal courts have not been able to develop a consistent and coherent paradigm of what that Confrontation Clause "public policy" actually is, or how it shapes the application of the right to confront in various judicial proceedings. Instead, two paradigm alternatives have emerged: on one hand, since the Supreme Court's decision in *Ohio v. Roberts*,[40] following the lead of *California v. Green*,[41] the Court has generally treated the Confrontation Clause and the hearsay rules of evidence as almost synonymous, interpreting their background and objectives as one.[42] This "confrontation/hearsay" paradigm tests violations of the Confrontation Clause according to the reliability/trustworthiness standards established in *Roberts*.[43] However, this proposed paradigm has never satisfied the demands of public policy and jurisprudence to present a clear model for Confrontation Clause decision making. In particular, issues such as the testimony of child sex abuse victims, distinguishing truly self-inculpatory statements against penal interest from those that are not, and co-conspirator's confessions continue to challenge just how far the Confrontation Clause is implicated in the reliability/trustworthiness test.[44]

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38. *See id.* and accompanying text.

39. Though not yet the issue in federal cases, two proposed extensions of the Confrontation Clause exceptions have appeared in the literature and in some state cases: protection for elder witnesses and for those testifying about gang violence. For discussions of these matters, see J. Steven Beckett & Steven D. Stennett, *The Elder Witness—The Admissibility of Closed Circuit Television Testimony After* Maryland v. Craig, 7 ELDER L.J. 313 (1999); Lisa M. Rogan, *The Price of Protecting Our Children: The Dilemma of Allowing Children to Testify as Key Witnesses to Gang Violence*, 20 J. JUV. L. 127 (2000); Meredith E. James, *Narrowing the Gap Between Florida's Hearsay Exceptions for Child Declarants and Elderly Declarants: Sections 90.803 (23) and 90.803 (24), Florida Statutes*, 55 U. MIAMI L. REV. 309 (2001).

40. Ohio v. Roberts, 448 U.S. 56 (1980).

41. California v. Green, 399 U.S. 149 (1970).

42. *See generally Roberts*, 448 U.S. 56.

43. *See infra* notes 116-137 and accompanying text.

44. *See, e.g.*, Maryland v. Craig, 497 U.S. 836, 847-49 (1990).

In the last ten years, Justice Scalia, joined by Justice Thomas,[45] has proposed another Confrontation Clause paradigm, often referred to as an "originalist view" of the clause.[46] This view purports to return Confrontation Clause jurisprudence to its foundation, arguing that the clause should only be invoked when a witness is directly testifying against a defendant or when the state is attempting to introduce into evidence ex parte documents prepared specifically for that purpose.[47] However, this paradigm also fails to take into account the many complexities embodied in modern jurisprudence, as well as the policy goals implicit in rendering timely and accurate convictions of guilty parties.[48]

With the nineteenth century paradigm outdated, and neither of the current paradigms satisfactory to meet the demands of the issues presented, the Court has generally failed to treat the whole body of Confrontation Clause cases uniformly.[49]

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45. That Justice Thomas has joined Justice Scalia in this line of cases is no surprise since Thomas' rate of concurrence with Scalia (80% between 1991 and 1995, for example) is higher than the rates of concurrence of any two other Justices on the Court. *See* SCOTT DOUGLAS GERBER, FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS 209 (1999).

46. *See, e.g.,* Cornelius M. Murphy, *Justice Scalia and the Confrontation Clause: A Case Study in Originalist Adjudication of Individual Rights*, 34 AM. CRIM. L. REV. 1243, 1245 (1997) (stating "Originalism . . . shuns the legal indeterminancy and result-oriented decisions associated with nonoriginalist approaches. . . .").

47. For further discussion on this issue, *see* Elkan Abramowitz, *Justice Thomas, Hearsay and the Confrontation Clause*, N.Y. L.J., March 3, 1992, at 3 (noting that Thomas suggests that the Confrontation Clause applies only to witnesses appearing at trial and is not implicated in hearsay at all).

48. In his concurrence in *United States v. Hubbell*, Justice Thomas, joined by Justice Scalia, develops this originalist line of thought in explaining the historical etymology of the word "witness." "Dictionaries published around the time of the founding included definitions of the term 'witness' as a person who gives or furnishes evidence. Legal dictionaries of that period defined 'witness' as someone who 'gives evidence in a cause.'" 530 U.S. 27, 50 (2000) (Thomas, J., concurring). Thomas and Scalia hold, therefore, that confronting an adverse witness would be confronting a person who gives or furnishes evidence since, unlike the complexities of our dictionaries, there seems to have been a uniform definition of the word "witness" at the time of the drafting of the Confrontation Clause.

49. Legal scholars have echoed this confusion. A few recent articles have attempted to draw lines between several of the major cases that have reflected on the Confrontation Clause. *See, e.g.*, John Douglass, *Beyond Admissibility, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 GEO. WASH. L. REV. 191 (1990); Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011 (1998); Joshua Dickinson, *The Confrontation Clause and the Hear-*

Without a clear understanding of the clause, the Court continues to argue over the policies implicated in allowing the denial of confrontation rights to criminal defendants. In fact, even when the Court does issue a "unanimous" verdict in deciding a confrontation case, its decision often involves multiple concurrences accompanying a plurality opinion as the Justices struggle to derive a clear understanding of the clause's real meaning and significance.[50] When the Court is unable to arrive at a reliable and applicable interpretation of one constitutional clause, thus muting the power of its arguments, it is likely that the same confusion will affect the judicial construction of other clauses of the Constitution.

C. *Plurality Opinions and the Problem of Precedents*

Supreme Court plurality opinions are an increasingly likely outcome of a clearly fractionated Court.[51] This is especially true in Confrontation Clause jurisprudence, where several of the most recent Confrontation Clause cases, including the most re-

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say Rule: The Current State of a Failed Marriage in Need of a Quick Divorce, 33 CREIGHTON L. REV. 763 (2000). However, most recent scholarship on issues raised in the debate over the Confrontation Clause has focused either on individual cases, or on cases relating to one of the topics noted above. *See, e.g.*, Cathleen J. Cinella, *Compromising the Sixth Amendment Right to Confrontation* – United States v. Gigante, 32 SUFFOLK U. L. REV. 135, 137 (1998) (examining the diminution of the right to confront by a federal judge's decision to extend the *Craig* rule for child witnesses to fearful witnesses in a New York racketeering trial); Leslie Morsek, Lilly v. Virginia*: Silencing the "Firmly Rooted" Hearsay Exception with Regard to an Accomplice's Testimony and its Rejuvenation of the Confrontation Clause*, 33 AKRON L. REV. 523, 547-48 (2000) (briefly describing the *Lilly* case's impact on confrontation jurisprudence). Scholars are not often dealing head-on with the broad question of the viability of the Confrontation Clause as a whole. The argument here is that an examination of policy issues behind the Court's decisions on confrontation will help bridge that gap, or at least explain why the inability to agree on a unifying paradigm allows courts to adopt public policy concerns in lieu of a predictable jurisprudence based on precedence.

50. The Supreme Court's recent decision in *Lilly v. Virginia*, 527 U.S. 116 (1999), exemplifies this trend with its unanimous decision followed by four separate opinions, concurring in part or in whole with Justice Stevens' decision and with the final reversal of the state's affirmation of the defendant's conviction. The Court's verdict in *Williamson v. United States*, 512 U.S. 594 (1994), a decision that skirted the confrontation issue though related to the issues within its jurisprudence, reflects a similar divide between the Justices. *See infra* Part IV.

51. *See generally,* Mark Alan Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419 (1992).

cent, *Lilly v. Virginia*, have been decided by plurality decisions rather than by any clear majority focused on rationale or policy.[52] Both the Court and legal scholars continue to struggle with the effect, both precedential and intellectual, of Supreme Court plurality opinions.[53] While legal scholars may ponder the intellectual impact of adopting tests such as the "narrowest grounds"[54] versus a legitimacy model[55] versus a hybrid version of traditional and more modern approaches to plurality[56] precedents, lower courts are forced to make their own assessments of the binding nature of plurality decisions.

III. HISTORICAL BACKGROUND OF CONFRONTATION IN CRIMINAL TRIALS

A. *Before the Bill of Rights*

A criminal defendant's right to confront adverse witnesses was not the invention of the drafters of the Bill of Rights. In fact, the historical antecedents to this right may date back to the ancient Hebrews, who reputedly required accusing witnesses to testify in front of the accused.[57]

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52. Several Supreme Court decisions have shaped this approach. *See* Marks v. United States, 430 U.S. 188 (1977); Nichols v. United States, 511 U.S. 738 (1994); O'Dell v. Netherland, 521 U.S. 151 (1997) and *supra* notes 49-51 and accompanying text.

53. For examples of recent legal scholarship on plurality opinions, see Thurmon, *supra* note 51; Adam S. Hochschild, *The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective*, 4 WASH. U. J.L. & POL'Y 261 (2000); Ken Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 CORNELL L. REV. 1593 (1992). The key Supreme Court case discussing the impact of plurality decisions, *Marks v. United States*, 430 U.S. 188 (1977), was decided in 1977. Although the Court seemed to abandon the *Marks* "narrowest grounds" test in *Nichols v. United States*, 511 U.S. 738 (1994), it returned to that analysis in *O'Dell v. Netherland*, 521 U.S. 151 (1997). In other words, even the Supreme Court remains unclear as how lower courts should interpret the highest court's inability to reach a majority opinion.

54. Thurmon, *supra* note 51, at 420.

55. Kimura, *supra* note 53, at 1604 ("This Note advocates the recognition of five categories of plurality decisions, each with different precedential implications.").

56. *See* Thurmon, *supra* note 51, at 451-56; *see also* Hochschild, *supra* note 53, at 286-87 (advocating a consideration of the "skeptical attitudes toward the Court popular during Chief Justice Jay's tenure" as a way of limiting the problems in interpreting plurality decisions).

57. *See* Brief for Amicus Curiae American Civil Liberties Union and the ACLU of Virginia for the Petitioner, Lilly v. Virginia, 527 U.S. 116 (1999) (No. 98-

This policy shifted by the Middle Ages when continental judicial systems began to limit the examination of witnesses to the exclusive use of written questions.[58] However, the English system of common law evidence clung to the confrontation of adverse witnesses throughout the sixteenth and seventeenth centuries, as evidenced by the writings of Shakespeare as well as statutes enacted under King Edward VI in 1552 and Queen Elizabeth I in 1558.[59] Still, some English courts chose not to follow this model. In particular, the equity courts and the court of the Star Chamber allowed evidence only by affidavit and through what we would consider hearsay.[60] The infamous and much-cited example of Sir Walter Raleigh's treason conviction serves as a reminder of the problems inherent in such an approach.[61] However, this evidence alone should not shape one's understanding of the historic purpose of the Confrontation Clause.

Historically, confronting adverse witnesses served purposes beyond banning the admissibility of testimony within ex parte affidavits.[62] In fact, a scholar has argued that the history of the common law took a fundamental turn in the early eighteenth century when it became more adversarial.[63] According to Ronald Jonakait, the history of confrontation as a testimonial requirement is far more fluid than other writers have

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5881), 1999 WL 901782 at *4 [hereinafter ACLU Lilly brief] (citing *Deuteronomy* 19:15-18).

58. *See id.* at *4-5 (citing C. VAN CAENEGEM, HISTORY OF EUROPEAN CIVIL PROCEDURE 19 (1972)).

59. Justice Breyer's discussion on this topic clearly shows a careful reading of the ACLU Lilly Brief. However, Breyer's abbreviated discussion of the history of confrontation in English law offers some additional source material as well. *See Lilly*, 527 U.S. at 140-41 (Breyer, J., concurring).

60. *See* ACLU Lilly Brief, *supra* note 57, at *5.

61. *See id.* at *9; *see also* Kenneth W. Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 99-100 (1972) (disputing the factual basis of the Raleigh trial mythology).

62. *See* White v. Illinois, 502 U.S. 346, 352 (1992).

63. Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 92-93 (1995). Jonakait argues that the Sixth Amendment did not simply constitutionalize the common law. He claims that the goal of the Sixth Amendment in fact was to "protect against federal encroachments," certainly a goal of many American revolutionaries. *Id.* at 112. *See also*, THE FEDERALIST PAPERS NO. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961) (concerning control of the gradual concentration of the several powers).

acknowledged.[64] For example, throughout the first half of the eighteenth century, New York courts not only admitted testimony through affidavit, they also prohibited defense cross-examination.[65] However, by the 1770s, New York courts began to take tentative steps that mandated the "essential components of an adversarial system," recognizing a fair trial could be more easily guaranteed by that method.[66] The courts of Virginia were even less circumspect. In the waning years of the colonial governments, Virginian lawyers were confronting witnesses not as a tool to ascertain reliability but rather as a method of advocacy for their criminal clients.[67]

B. *Developing a Constitutional Right to Confront*

The Constitutional Convention met from May through September 1787.[68] All accounts agree that there was little discussion of the need to confront adversarial witnesses during these extended deliberations.[69] Further, there was no direct mention of this topic in *The Federalist Papers*.[70] However, even in the earliest drafts of the Sixth Amendment, the right to confront witnesses was linked to the other criminal procedure clauses of this amendment. On June 8, 1789 Madison proposed the following:

> Fourthly. That in article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit: . . . In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the cause and nature of the accusation, to be confronted with his accusers, and the witnesses against him; to have a compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.[71]

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64. *See* Jonakait, *supra* note 63, at 116.

65. *See id.*

66. *See id.* at 117.

67. *See id.* at 118.

68. *See* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 *passim* (Adrienne Koch ed., 1966).

69. *See* Jonakait, *supra* note 63, at 120.

70. *See* THE FEDERALIST PAPERS NO. 51 *passim* (James Madison).

71. THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 385-86 (Neil H. Cogan ed., 1997).

The Confrontation Clause became an essential constituent of the Bill of Rights. Created to provide the ultimate protection against the return of uncontrollable and arbitrary power of the government over the people, the Sixth Amendment affirmed that protections existed even for a person accused of criminal activity. At the heart of these shields was the right to address and question one's accusers personally, putting adverse witnesses to the ultimate test of facing the persons he or she had accused. A sufficient number of states ratified the Bill of Rights by 1791, leaving the Sixth Amendment in virtually the same shape and form as in Madison's original proposal.[72] However, the Confrontation Clause would not rest long without reinterpretation.

Initially, the Confrontation Clause appeared to be a keystone of criminal procedure law, open to few, if any, exceptions. Admissions of out-of-court testimony were severely limited. In *Mima Queen v. Hepburn*,[73] Chief Justice Marshall first addressed the issue of hearsay evidence, refusing to admit a portion of a deposition discussing a petitioner's ancestor without proof that the ancestor was indeed deceased.[74] No significant challenges to this near-literalist view of the Confrontation Clause appeared for the most of the nineteenth century. Then, in 1895, a landmark case appeared that remains a central focus of Confrontation Clause litigation today.[75] With its decision in *Mattox v. United States*, the Court ushered in a new era of Confrontation Clause policy, one that began to look beyond the literal language of the clause and, eventually, to distance it from the original goals of its designers.[76]

C. *The* Mattox *Decision*

In 1891, Clyde Mattox was tried and convicted of the murder of John Mullen, a crime that took place "within that part of the Indian Territory . . . under the exclusive jurisdiction of the United States, and within the exclusive jurisdiction of this

72. *See* U.S. CONST. amend. VI.
73. Mima Queen v. Hepburn, 11 U.S. (7 Cranch) 290 (1813).
74. *See id.* at 296.
75. Mattox v. United States, 156 U.S. 237 (1895).
76. *See id.* at 243.

court."[77] After the original conviction was reversed and the case remanded, the defendant was convicted again in 1893.[78] The defendant again appealed his conviction. The District Court had, he claimed, refused to "permit the defendant to introduce the testimony of two witnesses to impeach the testimony of one of the deceased witnesses, upon the ground that the proper foundation had not been laid."[79] Since the deceased witnesses met an "unavailability" requirement (later codified as one of the exceptions to the inadmissibility of hearsay evidence),[80] "a transcribed copy of the reporter's stenographic notes of their testimony . . . supported by his testimony that it was correct, was admitted to be read in evidence, and constituted the strongest proof against the accused."[81] Since this testimony could not be "questioned," petitioner Mattox contended that he was denied his Sixth Amendment right to be able to confront the witnesses against him.[82] The Court affirmed the conviction based on the challenged evidence, foreshadowing modern treatments of the Confrontation Clause in two ways: it heralded a policy that moved away from the original intent of the clause; and it was a divided decision, with three Justices dissenting from the majority.[83]

The petitioner argued that "reasons of convenience and necessity which excuse a departure from the ordinary course of procedure in civil cases cannot override the constitutional provision in question."[84] However, the Court held that the circumstances surrounding the original testimony argued in favor of admissibility.[85] Citing a series of state and federal cases, the Court opined that this new precedent would present "no hardship upon the defendant to allow the testimony of the deceased witness to be read."[86] Noting that the historical object of the Confrontation Clause was to prevent "depositions or *ex parte* af-

77. *Id.* at 238 (Shiras, J., dissenting).
78. *Id.*
79. *Id.* at 238-39.
80. *See Mattox*, 156 U.S. at 240.
81. *Id.* at 240.
82. *Id.*
83. *Id.* at 250-51.
84. *Id.* at 240.
85. *See Mattox*, 156 U.S. at 241.
86. *Id.* at 242.

fidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness," the Court detailed the dual benefits of this approach:

> [T]he accused has an opportunity, not 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. There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness . . . .[87]

Despite this admonition, the Court held that occasional exceptions are acceptable in the interest of public policy.[88] The Court articulated a public policy that still weighs heavily: "The 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."[89] With one swipe of the pen, the Sixth Amendment's guarantee of confrontation had suddenly been designated an "incidental benefit."[90] Justice Brown noted that although the Court was

> bound to interpret the Constitution in the light of the law as it existed at the time it was adopted . . . [a] technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant.[91]

As long as the petitioner had once had the opportunity to cross-examine an adverse witness, his constitutional protections had been preserved.

The dissenting Justices took issue with this policy. Agreeing that this issue had no settled law behind it, Justice Shiras noted that "it must not be overlooked that the primary object of the trial is not to vindicate the truth or consistency of witnesses, but to determine the guilt or innocence of the accused."[92] The dissent did not disagree with the admission of the testimony

87. *See id.* at 242-43.
88. *Id.* at 243.
89. *Id.*
90. *Mattox*, 156 U.S. at 243.
91. *Id.*
92. *Id.* at 257 (Shiras, J., dissenting).

from the previous trial. It did, however, dispute the Court's ruling that the petitioner was not allowed to introduce evidence to impeach that testimony.[93] In other words, if the evidence was admitted, the defendant had the right to treat it as he would all other adverse evidence and retain the right to rebut it. In essence, Justice Shiras warned that when an exception to the Confrontation Clause is necessary, it should be limited to only the narrowest exception required; otherwise, the proceedings should continue according to all other rights and responsibilities accorded a criminal defendant.[94]

D. *Post*-Mattox *Refinements*

In the years that followed, the Supreme Court continued to reinterpret the limits of the Confrontation Clause. In 1899, the Court held in *Kirby v. United States*[95] that written evidence adverse to the defendant was not admissible unless a witness presenting the document could be confronted in court.[96] The Court used *Motes v. United States*[97] to remind prosecutors of their responsibility to make all reasonable efforts in order to produce adverse witnesses at trial. Otherwise, a defendant's right of confrontation must trump any public policy goals of securing a conviction.[98] Then, in 1926 the Supreme Court announced its decision in *Salinger v. United States.*[99] In appealing his mail fraud conviction, the petitioner in *Salinger* argued that the admission of hearsay evidence against him (letters, bank deposit slips and book entries)[100] was "in derogation of his right under that Amendment to be confronted with the witnesses against him."[101] The Court's holding against the petitioner is notable for two reasons. First, it announced that "[t]he purpose of that provision [Confrontation Clause] . . . is to continue and preserve that right, and not to broaden it or disturb the excep-

93. *Id.* at 260.
94. *Id.* at 260-61.
95. 174 U.S. 47 (1899).
96. *Id.* at 55.
97. 178 U.S. 458, 474 (1900).
98. *See* Motes v. United States, 178 U.S. 458 (1900).
99. 272 U.S. 542 (1926).
100. *Id.* at 547.
101. *Id.* at 545, 547.

tions."[102] Since "[t]he present contention attributes to the right a much broader scope than it had at common law," the Court refused to sustain the petitioner's claim.[103] Second, another characteristic of Confrontation Clause decisions surfaced. Confrontation Clause violations would only be determined after a painstakingly methodical analysis of the evidence on a case-by-case basis. Harkening to future opinions that would permit the admission of evidence deemed collateral to the main issue but still considered sufficiently necessary and trustworthy so that it should be admitted despite the Confrontation Clause, the Supreme Court carefully detailed its understanding of which bank deposits and letters were admissible against the plaintiff's protests and which were not.[104]

By the end of this period of Confrontation Clause interpretation, the paradigm seemed clear. The Court had demonstrated a strong preference for the apparent intent of the original clause, with a few exceptions only when absolutely necessary. But no pattern of open exceptions or broad interpretations of the clause was yet apparent.

IV. A MATURING CONFRONTATION CLAUSE

For more than forty years after the *Salinger* decision, the Supreme Court heard few significant Confrontation Clause cases, an unsurprising fact considering this was during an era when the Court was generally uninterested in the rights of criminal defendants. In contrast, the Warren Court's increased focus on individual rights eventually led to decisions such as *Miranda v. Arizona*[105] and *Gideon v. Wainwright*[106] in the mid-1960s. Soon thereafter, defendants began to fight more vigorously for their right to confront. By the end of the Warren years, the Court began to set the standards for the mandates of the Confrontation Clause: what it required, what access to evi-

102. *Id.* at 548.

103. *Id.*

104. *Salinger*, 272 U.S. at 547.

105. 384 U.S. 436, 467 (1966) (establishing the so-called Miranda rights to protect the accused from inadvertently incriminating himself in violation of his Fifth Amendment rights).

106. 372 U.S. 335, 344 (1963) (establishing an indigent defendant's right to counsel).

dence was required, and when evidence was both necessary and trustworthy.[107] The original intent of the Confrontation Clause became muddied amid the concerns for the truth-seeking goals of confrontation. The pursuit of confrontation was seen overwhelmingly as a truth-seeking venture rather than a defendant's categorical right. Under this paradigm, courts found it easier to allow exceptions to the Confrontation Clause, as long as other forms of verification were possible. However, these efforts were still strictly limited. For example, in 1974, the Court held in *Davis v. Alaska*[108] that state policy considerations, such as the confidentiality of the identity of juvenile offenders, was not enough to abrogate the rights guaranteed by the Confrontation Clause of the Sixth Amendment.[109]

In 1975, the adoption of the Federal Rules of Evidence helped refine the Court's application of hearsay exceptions. Within the next decade, the Confrontation Clause became intertwined with considerations over the admissibility of hearsay evidence. Policy in enforcing the rules and protecting the confrontation rights guaranteed by the Sixth Amendment has evolved accordingly. However, this evolution has been accompanied by confusion as courts appear unable to distinguish between the constitutional requirements of confrontation and the admissibility standards for hearsay evidence. Although the traditional confrontation paradigm no longer sufficed, no new paradigm was able to unilaterally fill that void.

A. *Modern Mandates of the Confrontation Clause*

The first major focus of the more modern confrontation litigation was a renewed consideration of the clause's mandate. The Sixth Amendment guarantees that a criminal defendant will "be confronted with the witnesses against him."[110] In the late 1960s, the Court held that this was a right of opportunity, not a guarantee of action, affording the courts below an opportunity to admit evidence without necessarily guaranteeing a de-

107. Among the few cases of significance to this consideration in the 1960s was *Douglas v. Alabama*, 380 U.S. 415, 418 (1965), which incorporated the Confrontation Clause of the Sixth Amendment to the States.

108. 415 U.S. 308 (1974).

109. *Id.* at 320.

110. U.S. CONST. amend. VI.

fendant's right to confront adverse witnesses in some situations. In both *Barber v. Page*[111] and *Berger v. California*,[112] the Court held that prosecutors must make good-faith efforts to produce adverse witnesses; however, once those efforts are deemed good-faith, albeit unsuccessful, the unconfronted adverse testimony could be admitted without violating a constitutional right.

Seventeen months after *Berger*, the High Court handed down a decision in *California v. Green*[113] that announced a fundamental shift in Confrontation Clause jurisprudence. Reflecting upon *Mattox v. United States*,[114] Justice White noted that the history of the Confrontation Clause permits the admission of a declarant's out-of-court statements when the declarant is a testifying witness subject to cross-examination, "the greatest legal engine ever invented for the discovery of truth."[115] In holding that an out-of-court statement, even if given under circumstances that would not assure accuracy, is admissible when a witness was testifying in court,[116] Justice White erased a critical line between hearsay evidence and the Confrontation Clause. Accuracy and reliability were now deemed the critical reasons for confrontation. Although White noted that the Court did not find the Confrontation Clause to be identical to hearsay and its exceptions,[117] his opinion opened the door for precisely this interpretation of the constitutional right to confront.

California v. Green[118] led inexorably to the pivotal decision in *Ohio v. Roberts*[119] a decade later. *Roberts* remains the landmark rule on the opportunity to cross-examine required by

111. 390 U.S. 719, 724-25 (1968). In *Barber*, no such good faith efforts were made to obtain the witness' presence at trial other than to ascertain that the witness was in federal prison.

112. 393 U.S. 314, 315 (1969) (retroactively applying holding in Barber v. Page, 390 U.S. 799 (1968)).

113. 399 U.S. 149 (1970).

114. 156 U.S. 237 (1895).

115. *Green,* 399 U.S. at 158 (citations omitted).

116. *Id.* at 159.

117. *Id.* at 155. However, Justice Harlan's concurrence did strike a warning note as to the danger of any implication that hearsay and confrontation were merged. "If 'confrontation' is to be equated with the right to cross-examine, it would transplant the ganglia of hearsay rules and their exceptions into the body of constitutional protections." *Id.* at 173 (Harlan, J., concurring).

118. 399 U.S. 149 (1970).

119. 448 U.S. 56 (1980).

the Constitution. *Roberts* presents the oft-cited and applied two-prong test for the admissibility of testimony when a court deems that evidence reliable although the declarant is unavailable.[120] Since *Roberts*, the Court has embellished and developed this test, but has not strayed from the fundamental beliefs behind it: public policy mandates that apparently trustworthy evidence be introduced at trial, even if the defendant is not able to examine the witness presenting the testimony.[121]

In *Ohio v. Roberts*,[122] the Court decided whether a defendant's right to confront witnesses against him was violated by the admission of preliminary hearing testimony of a witness who did not appear at trial.[123] A witness who had provided critical testimony at the defendant's preliminary hearing on charges of using stolen credit cards did not appear at the defendant's trial, which resulted in his conviction.[124] The defendant claimed the witness' testimony did not have sufficient indicia of reliability to be admitted without cross-examination.[125] The prosecution argued that its issuance of five separate subpoenas for four different trial dates, all of which remained unanswered, satisfied the "unavailability" requirement necessary to allow for the introduction of preliminary examination testimony pursuant Ohio Revised Code Annotated section 2945.49.[126] The prosecution's burden was to make a showing that it made a good faith effort to secure the absent witness' presence in order to secure the testimony's admission as necessary.[127]

In its decision, the Court chose to link the Confrontation Clause and the hearsay rules of evidence, tightening the analytical relationship between the two separate bodies of law.[128] Acknowledging that the Confrontation Clause reflects a preference for face-to-face confrontation at trial, the Court nevertheless held that "competing interests, if closely examined

120. *Id.* at 65.

121. *See supra* Part IIA.

122. 448 U.S. 56 (1980).

123. *Id.* at 58.

124. *Id.* at 58-59.

125. *Id.* at 61.

126. *See id.* at 59; *see also* OHIO REV. CODE ANN. § 2945.49 (1975).

127. *Roberts,* 448 U.S. at 60 (citing Barber v. Page, 390 U.S. 719, 722-25 (1968)).

128. *See id.* at 62.

may warrant dispensing with confrontation at trial."[129] The Court clearly articulated the policy driving this balancing test: "every jurisdiction has a strong interest in effective law enforcement, and in the development and precise formulation of the rules of evidence applicable in criminal proceedings."[130] The Confrontation Clause was now treated as if it were a rule of evidence with its ultimate objective to further effective prosecutions and convictions.[131]

Roberts provided a two-prong test for the admissibility of non-confrontable testimony into evidence.[132] According to *Roberts*, the Sixth Amendment mandates a "rule of necessity."[133] Only if a witness is truly unavailable may the evidence be considered despite its hearsay quality.[134] The second prong seeks to protect the "trustworthiness" of that evidence, even if the declarant is unavailable for cross-examination, a process designed to protect the ultimate "integrity of the fact-finding process."[135] In its search for "indicia of reliability," the Court noted that the trier of fact must be afforded "a satisfactory basis for evaluating the truth of the prior statement" . . ."[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."[136] In this way, the Sixth Amendment's imperative that evidence be in "substantial compliance with the purposes behind the confrontation requirement" could be met.[137]

The *Roberts* test became the standard for Confrontation Clause analysis as well as for hearsay reliability tests, offering a dramatic challenge to the traditional confrontation paradigm.

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129. *Id.* at 63, 64 (citations omitted).

130. *Id.* at 64.

131. The *Roberts* court acknowledged that there had been "an outpouring of scholarly commentary" over the court's attempt to reconcile the Confrontation Clause and the hearsay rules. However, the Court asserted that no "commentator [has] demonstrated that prevailing analysis is out of line with the intentions of the Framers of the Sixth Amendment." *Id.* at 66 n.9.

132. *Roberts*, 448 U.S. at 65.

133. *Id.*

134. *Id.*

135. *Id.* at 64 (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973)).

136. *Id.* at 65-66.

137. California v. Green, 399 U.S. 149, 166 (1970).

Even Justice Brennan's dissent[138] in *Roberts* differed with the majority only on the application of the new test, not on its merits.[139] While reaffirming the standards set by *Mattox*, *Barber*, and other critical cases on the Confrontation Clause, the *Roberts* Court accepted that the admissibility of evidence under the Confrontation Clause should be tested in much the same manner established for the hearsay rules of evidence.[140] Still, the dissent did not ignore this aberration from the demands of the Confrontation Clause, cautioning that "good-faith efforts" to make witnesses available must be seriously made and evaluated.[141] Otherwise, the dissent warned, courts would challenge the invocation of the *Barber* court that "[t]he right of confrontation may not be dispensed with so lightly."[142]

Eight years later, *Coy v. Iowa*[143] further refined the right of confrontation. In many respects, *Coy* represents a return to the traditional paradigm of the Confrontation Clause. Writing for the majority, Justice Scalia held that the defendant's right to confront adverse witnesses was denied when a screen was placed between the defendant and the child sexual assault victims who were testifying.[144] Constitutional confrontation "guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."[145] Scalia held that the right to confront adverse witnesses was essential in perpetuating a system of justice "in which the perception as well as the reality of fairness prevails."[146] Therefore, despite the potential trauma that might affect the complaining witnesses, two thirteen-year old girls who had allegedly been sexually assaulted by the defendant, the Court held that placing a screen between the wit-

138. Brennan was joined in his dissent by Marshall and Stevens. *Roberts,* 448 U.S. at 77.

139. *See* Ohio v. Roberts, 448 U.S. 56, 77 (Brennan, J. dissenting).

140. *See id.* at 65-66.

141. *Id.* at 80.

142. *Id.* at 82 (quoting *Barber*, 390 U.S. at 725).

143. Coy v. Iowa, 487 U.S. 1012 (1988).

144. *Id.* at 1021.

145. *Id.* at 1016 (citations omitted).

146. *Id.* at 1018-19 (citations omitted).

nesses and the defendant violated the Confrontation Clause's guarantee.[147]

However, Scalia's very literal approach to the Confrontation Clause[148] was qualified both by Justice O'Connor's concurring opinion (in which she was joined by Justice White) and by Justice Blackmun's dissent (in which he was joined by Chief Justice Rehnquist).[149] Justice O'Connor sought to open the confrontation door with respect to child abuse victims.[150] In fact, Justice O'Connor states that "nothing in today's decision necessarily dooms such efforts by state legislatures to protect child witnesses."[151] Paving the way for the Court's subsequent decision in *Maryland v. Craig*,[152] O'Connor indicated a willingness to dispense with face-to-face confrontation when policy mandates the protection of child witnesses, often the only witnesses to their own abuse.[153] Justice Blackmun's dissent indicated a willingness to take this one step further, asserting that the conviction should have been upheld.[154] Reaffirming the Court's holding in *Kentucky v. Stincer*,[155] Justice Blackmun wrote that "the essence of the right protected is the right to be shown that the accuser is real and the right to probe accuser and accusation in front of the trier of fact."[156] Blackmun advocated a further expansion of exceptions to the Confrontation Clause,[157] essentially endorsing the reliability/trustworthiness paradigm opened by *California v. Green*.[158]

In deciding *Coy*, a divided Court indicated the extent to which the old paradigm of confrontation had failed to encompass the facts of this case, and also that no new unifying paradigm had appeared to establish a revision of Confrontation

147. The Court noted that the screen would have allowed the defendant to dimly perceive the witnesses but prevent the witnesses from seeing the defendant at all. *Id.* at 1015.

148. *Coy*, 487 U.S. at 1013.

149. *Id.* at 1022-35.

150. *Id.* at 1022 (O'Connor, J., concurring).

151. *Id.* at 1023.

152. *See infra* notes 219-231 and accompanying text.

153. *Coy*, 487 U.S. at 1022.

154. *Id.* at 1025 (Blackmun, J., dissenting).

155. 482 U.S. 730, 736 (1987).

156. *Coy*, 487 U.S. at 1026 (Blackmun, J., dissenting).

157. *Id.*

158. 399 U.S. 149 (1970).

Clause jurisprudence. By the time of the *Coy* decision, it was clear that the traditional paradigm was in jeopardy, not able to account for the challenges raised by contemporary criminal activity and prosecutorial desires for conviction. Scalia's emphasis on an "originalist" or "plain meaning" interpretation of the Confrontation Clause left no room for consideration of the rights of individual witnesses. Nor does Scalia's interpretive philosophy accommodate the desire of law enforcement and prosecutors to bring defendants to justice whose actions may already have so traumatized a victim as to make it virtually impossible for that person to participate in face-to-face confrontation. On the other hand, Scalia's opinion protects, in an absolutist manner, the right of a defendant to confront his accuser.[159] Scalia, therefore, stands for the categorical right of confrontation rather than the reliability/trustworthiness model that had been emerging since the *Roberts* decision just eight years hence. The O'Connor concurrence and the Blackmun dissent, however, foreshadowed the next series of confrontation cases the Court would consider.

B. *A Paradigm of Allegorical Confrontation*

By the late 1980s, the Court seemed increasingly willing to find a defendant's right to confront adverse witnesses as a right that could be satisfied by allegory as well as by actual face-to-face confrontation. This trend, evincing a clear preference for criminal convictions over an individual's right to confront, appears in several lines of cases. Two lines predominate: cases deriving from Federal Rule of Evidence 801(d)(2)(E), the co-conspirator hearsay exemption;[160] and cases deriving from child abuse prosecutions.[161] In both categories, the demands of "public policy," defined differently, and sometimes amorphously, have regularly outweighed the absolute right of confrontation in criminal trials.

In 1970, the Court opened the door to the acceptance of co-conspirator out-of-court statements with its verdict in *Dutton v. Evans*.[162] Five years later, the Federal Rule of Evidence codi-

159. *See Coy*, 487 U.S. at 1017.
160. *See infra* notes 162-198 and accompanying text.
161. *See infra* notes 199-239 and accompanying text.
162. Dutton v. Evans, 400 U.S. 74 (1970).

fied this verdict in Federal Rule of Evidence 801(d) (2) (E).[163] However, it was not until the Court's decision in *United States v. Inadi*,[164] that it became clear that even the unavailability showing required in *Roberts* would not be required as a condition to the admission of out-of-court statements of nontestifying co-conspirators whose statements otherwise satisfy Federal Rule of Evidence 801(d)(2)(E).[165]

Perhaps the most significant component of the *Inadi* decision is its assertion that the unavailability test actually detracts from the Confrontation Clause's supposed mission "of [advancing] the truth-determining process."[166] In *Inadi*, the petitioner had been convicted of conspiring to manufacture and distribute methamphetamine.[167] As part of their case, the prosecution successfully introduced into evidence five recorded telephone conversations made between various participants in the drug conspiracy.[168] On appeal, the petitioner challenged the admission of the statements of a co-conspirator that had implicated him, arguing that the prosecution had failed to demonstrate the unavailability required as a precondition to being excepted from the Confrontation Clause.[169] The Supreme Court held that this unavailability requirement was not mandated by the Sixth Amendment in the case of a co-conspirator's testimony, largely because this evidence dealt with issues different than those found in *Ohio v. Roberts,* from which the unavailability standard is derived.[170] The *Inadi* Court therefore dramatically limited the *Roberts* rule to an analysis of unavailability with regard to the presentation of prior testimony at a new trial.[171]

In *Inadi*, Justice Powell opines that in the case of co-conspirator's evidence, the statements made in the course of and in

163. An Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. 93-595, § 1, 88 Stat. 1938 (1975).

164. 475 U.S. 387 (1986).

165. *Id.* at 400.

166. *Id.* at 396.

167. *Id.* at 388-89.

168. *Id.* at 390.

169. *Inadi,* 475 U.S. at 390-91.

170. *Id.* at 392-94 (stating "The Confrontation Clause analysis in *Roberts* focuses on those factors that come into play when the prosecution seeks to admit testimony from a prior judicial proceeding in place of live testimony at trial.").

171. *See id.* at 393.

furtherance of the conspiracy are actually more reliable than those made as a witness at trial.[172] "Even when the declarant takes the stand, his in-court testimony seldom will reproduce a significant portion of the evidentiary value of his statements during the course of the conspiracy."[173] Therefore, according to Justice Powell, "[t]here appears to be little, if any, benefit to be accomplished by the . . . unavailability rule" in this case.[174] Drawing upon the "better evidence" rule as found both in common law and the Federal Rules of Evidence, the Court therefore refused to defend the "unavailability rule because it does not actually serve to exclude anything, unless the prosecution makes the mistake of not producing an otherwise available witness."[175] Powell's decision therefore betrayed a new twist in the policy objectives elucidated in Confrontation Clause disputes. Requiring a rule of unavailability for the admission of co-conspirator statements would, in Powell's opinion, put an unwarranted, and unncessary burden on the prosecution.[176] To meet the unavailability standard, a prosecutor would be forced to specifically identify and locate each declarant and attempt to procure him for trial, "even if neither the prosecution nor the defense wished to examine the declarant at trial."[177] Powell found that the protection this system would offer was "marginal" and that "the Confrontation Clause does not embody such a rule."[178] Therefore, confrontation was not mandated in this type of situation.

In his dissent, Justice Marshall[179] saw the issue differently:

> [T]he Court today holds that the Clause is not offended when the prosecution fails to make even the slightest effort to produce for cross-examination the authors of the out-of-court statements with which it hopes to convict a defendant. Because I cannot share the majority's implicit faith that the camaraderie of a criminal conspiracy can substitute for in-court cross-examination to guarantee

172. *See id.* at 395.
173. *Id.*
174. *Inadi*, 475 U.S. at 396.
175. *Id.*
176. *See id.* at 399.
177. *Id.*
178. *Id.*
179. Justice Brennan joined in this dissent. *Inadi,* 475 U.S. at 400 (Marshall, J., dissenting).

> the reliability of conspiratorial statements, I can neither accept the majority's analysis nor stand silent while the values embodied in the Sixth Amendment are so cavalierly subordinated to prosecutorial efficiency.[180]

Marshall passionately argued that the statements made in the process of a conspiracy should be considered unreliable, not inherently reliable: "[t]hat a statement was truly made 'in furtherance' of a conspiracy cannot possibly be a guarantee, or even an indicium, of its reliability."[181] The root of the co-conspirator exemption is presumably not because of a belief in their special reliability but rather because of their supposed position as substantive law since "every statement of co-conspirators . . . is thus a verbal act admissible against each conspirator as if it had been his own."[182] Marshall found that this agency theory, labeled by the Federal Rules Advisory Committee as "at best a fiction,"[183] "[speaks] not at all to the Confrontation Clause's concern for reliable fact-finding."[184] Marshall reaffirms "the critical importance of cross-examination in the truth-seeking process."[185] Hence, the dissent here displays a very different understanding of the Confrontation Clause and its purposes:

> [T]he Framers, had they the prescience, would surely have been as apprehensive of the spectacle of a defendant's conviction upon the testimony of a handful of surveillance technicians and a very large box of tapes recording the boasts, faulty recollections, and coded or ambiguous utterances of outlaws. The Court's decision helps clear the way for this spectacle to become a common occurrence. I dissent.[186]

A year later, the Court's decision in *Bourjaily v. United States*[187] enhanced a prosecutor's freedom to introduce out-of-court statements when made by co-conspirators. In *Bourjaily*, the Court made three important decisions: one, it lowered the standard of proof required to demonstrate an out-of-court declarant's participation in the conspiracy to the preponderance of

180. *Id.* at 401.
181. *Id.* at 404.
182. *Id.* at 405-6.
183. *Id.* at 406.
184. *Inadi,* 475 U.S. at 406.
185. *Id.*
186. *Id.* at 411.
187. 483 U.S. 171 (1987).

the evidence standard;[188] two, it allowed bootstrapping, or the consideration of proffered hearsay statements in determining the declarant's membership in the conspiracy;[189] and three, it did not mandate any inquiry into the independent indicia of reliability of a statement required by the Confrontation Clause.[190] Writing for the Court, Chief Justice Rehnquist claimed that the admissibility of co-conspirators' statements was established over a century and a half ago.[191] Furthermore, he found that "[t]o the extent that these cases have not been superseded by the Federal Rules of Evidence, they demonstrate that the co-conspirator exception to the hearsay rule is steeped in our jurisprudence."[192] This "firmly . . . rooted" exception therefore puts statements such as these "outside the compass of the general hearsay exclusion."[193]

The dissent disagreed vociferously with the majority in ways that reflect upon contemporary interpretations of the Confrontation Clause. Justice Blackmun, joined by Justices Brennan and Marshall, decried the majority's willingness to allow the "abandonment of the independent-evidence requirement," fearing it would "eliminate one of the few safeguards of reliability that this exemption from the hearsay definition possesses."[194] Furthermore, Blackmun admonished the Court for avoiding "a determination whether any 'indicia of reliability' support the co-conspirator's statement, as the Confrontation Clause surely demands."[195] The *Bourjaily* dissenters noted with astonishment the move by the majority to "simultaneously remove[ ] from the exemption one of the few safeguards against unreliability that it possesses."[196] To avoid the Confrontation Clause by "conjuring up the 'firmly rooted hearsay exception' as some benign genie" could not "extricate the Court from its inconsistent analysis."[197] The dissent was not alone in finding the

188. *Id.* at 175.
189. *Id.* at 181.
190. *Id.* at 183.
191. *Id.*
192. *Bourjaily*, 483 U.S. at 183.
193. *Id.*
194. *Id.* at 186.
195. *Id.*
196. *Id.* at 201 (Blackmun, J., dissenting).
197. *Bourjaily*, 483 U.S. at 201 (Blackmun, J., dissenting).

majority's willingness to accept co-conspirator-declarant's testimony virtually unheeded. Since *Bourjaily*, every circuit has held that there must be some showing of independent corroborating evidence in support of the reliability of the out-of-court statements proffered by the prosecution in these cases.[198]

In the same year that the Court handed down *Bourjaily*, it had the opportunity to revisit the child sex abuse witness question left open by Justice O'Connor's concurrence in *Coy*.[199] In 1987 the Court decided *Pennsylvania v. Ritchie*,[200] in which it decided whether a child's confidential Children and Youth Services file should remain confidential or if the state's failure to disclose it would violate the confrontation rights of an accused sex offender. In other words, "to what extent [does] a State's interest in the confidentiality of its investigative files concerning child abuse . . . yield to a criminal defendant's Sixth and Fourteenth Amendment right to discover favorable evidence" and the right to confront adverse witnesses?[201] The petitioner had been charged with various sexual offenses against his minor daughter.[202] During pretrial discovery, he had served Children and Youth Services ("CYS"), a protective service agency, with a subpoena, seeking access to the records concerning his daughter.[203] CYS failed to honor the subpoena.[204] Appealing his criminal conviction, the petitioner claimed that in "denying him access to the information necessary to prepare his defense, the trial court interfered with his right of cross-examination "by undermin[ing] the Confrontation Clause's purpose of increasing the accuracy of the truth-finding process at trial."[205]

Justice Powell responded, holding that the Court had no desire to "transform the Confrontation Clause into a constitution-

198. *See, e.g.*, United States v. Sepulveda, 15 F.3d 1161, 1181-82 (1st Cir. 1993); United States v. Tellier, 83 F.3d 578, 580 (2d Cir. 1996); United States v. Clark, 18 F.3d 1337, 1342 (6th Cir. 1994); United States v. Garbett, 867 F.2d 1132, 1134 (8th Cir. 1989); United States v. Silverman, 861 F.2d 571, 577-78 (9th Cir. 1988); United States v. Blakey, 960 F.2d 996, 998-99 (11th Cir. 1992); United States v. Beckham, 968 F.2d 47, 51 (D.C. Cir. 1992).

199. *See supra* notes 150-53 and accompanying text.

200. 480 U.S. 39 (1987).

201. *Id. at* 42-43.

202. *Id.* at 43.

203. *Id.*

204. *Id.*

205. *Ritchie*, 480 U.S. at 51-52 (citations omitted).

ally compelled rule of pretrial discovery."[206] The Confrontation Clause was not violated by the withholding of the CYS file; "it only would have been impermissible for the judge to have prevented Ritchie's lawyer from cross-examining the daughter."[207] The right to confront was reserved for witnesses, not for acquiring information in discovery, a procedural matter.

The Court heard *Kentucky v. Stincer*[208] in 1987 and again moved to protect child witnesses, holding that preventing the defendant from attending a competency hearing of the two young victims in this case had not violated his right to confront.[209] Since the defendant was fully availed of his right to cross-examine witnesses adverse to him in the trial, his exclusion from a pre-trial procedure was deemed not in violation of the Sixth Amendment.[210] In making this decision, the Court displayed a willingness to consider abridging an individual's constitutional right for the assumed broader "good" of a criminal conviction.

Justice Marshall, joined by Justices Brennan and Stevens, dissented, marveling at the Court's apparent ignorance of the significance of the Confrontation Clause.[211] Without explanation, Justice Marshall noted the majority Court had limited the interest of the Confrontation Clause to simply that of cross-examination, not the other purposes it served.[212] Marshall assailed the Court's willingness to consider a defendant's right to confront satisfied with "nothing more than an opportunity to cross-examine these witnesses *at some point* during his trial" claiming that this was an "analytical blinder[ ]" that prevented a defendant from exercising his or her constitutional right of confrontation appropriately.[213] Quoting from the Court's decision in *Lee v. Illinois*,[214] Marshall reminded the Court that "the constitutional guarantee of the right of confrontation serves certain 'symbolic goals' as well . . . '[t]he Confrontation Clause ad-

206. *Id.* at 52.
207. *Id.* at 54.
208. 482 U.S. 730 (1987).
209. *Id.* at 740.
210. *Id.* at 745.
211. *Id.* at 748 (Marshall, J., dissenting).
212. *See id.*
213. *Stincer*, 482 U.S. at 748-49 (1987) (Marshall, J., dissenting).
214. 476 U.S. 530 (1986).

vances these goals by ensuring that convictions will not be based on the charges of unseen and unknown—and hence unchallengeable—individuals.'"[215] Here, Marshall appeared to reaffirm other significant ideals embodied within the right to confront, particularly its role in quieting the overarching power of government to act in arbitrary ways in order to achieve convictions.

However, despite warnings such as Marshall's, the Court with *Maryland v. Craig*,[216] firmly reduced the power of the Confrontation Clause to a guarantee that its central concern was simply "to ensure the reliability of the evidence against a criminal defendant."[217] The Court announced that "though we reaffirm the importance of face-to-face confrontation with witnesses appearing at trial, we cannot say that such confrontation is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers."[218] The facts of *Maryland v. Craig* provided the Court with the opportunity some of the Justices had sought to open the bounds of the Confrontation Clause.[219] A six-year old girl had allegedly been sexually abused repeatedly while attending a pre-kindergarten and kindergarten center owned by the defendant.[220] The State of Maryland claimed that there was convincing evidence that the child would be traumatized further by having to face her attacker,

215. *Stincer*, 482 U.S. at 751 (Marshall, J., dissenting) (quoting *Lee*, 476 U.S. at 540).

216. 497 U.S. 836 (1990).

217. *Id.* at 845. The Court made particular note that the respondent Maryland was supported by numerous amicus curiae briefs in support of its statute protecting the child abuse victims. *Id.* at 839.

218. *Id.* at 849-50.

219. This action provoked a rush of scholarly outpouring. Whereas many articles were supportive of the Court's move toward apparent protection of minors who were sex abuse victims, some argued that the Court's actions may have hurt those it intended to protect. *See* Briana L. Schwalb, *Child Abuse Trials and Confrontation of Traumatized Witnesses*, 26 HARV. C.R.-C.L. L. REV. 185, 194-98 (1991); Jacqueline Beckett, *True Value of the Confrontation Clause: Study of Sex Abuse Trials*, 82 GEO. L.J. 1605, 1636-37 (1994). Legal scholars also have been concerned with the reliability of children as witnesses, especially when traumatized either by abuse or even the allegations of abuse. *See, e.g.*, Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 CORNELL L. REV. 33, 103-06 (2000) (recommending videotaping of all interviews with children who may be called as witnesses to verify their credibility or suggestibility).

220. *Craig*, 497 U.S. at 840.

and that the trauma would likely hinder her ability to testify in front of him.[221] Since a Maryland statute allowed child victims of alleged sex abuse to testify against their accusers through one-way close-circuit television without having to see the accused, the defendant was denied an opportunity to confront his accusers, although he remained in electronic communication with his counsel throughout the proceedings.[222] The Court found the Maryland statute constitutional.[223] Though face-to-face confrontation reflects values at the core of the Confrontation Clause, "it is not the *sine qua non* of the confrontation right."[224] The public policy was clear: in cases where a child would be traumatized by seeing her alleged attacker, especially to the extent that the trauma might impair the child's testimony, the Confrontation Clause does not prohibit alternative procedures of the rigorous adversarial testing designed to preserve "the essence of effective confrontation."[225]

Joining in dissent was an unlikely quartet: Justices Scalia, Brennan, Marshall and Stevens.[226] Strange bedfellows, perhaps, but together these Justices sought to return the Confrontation Clause jurisprudence to a more traditional paradigm in order to satisfy the perceived intent of the founders "that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court."[227] Criticizing the majority for "recharacterizing" the right to confront as only one of many elements embedded within the Confrontation Clause, Scalia again emphasized his belief that the Sixth Amendment explicitly protects the right to a face-to-face confrontation of one's accusers.[228] Strikingly, however, Scalia moved slightly away from his categorical view of confrontation to take into account some of the Court's past decisions on confrontation. He appeared to endorse the *Roberts* unavailability and reliability tests, indicating that his

221. Brief for Petitioner, Maryland v. Craig, 497 U.S. 836 (1990) (No. 89-478), 1990 WL 505648, at *5-6 (March 2, 1990).

222. *Craig*, 497 U.S. at 840-842.

223. *Id.* at 860.

224. *Id.* at 847.

225. *Id.* at 857.

226. *Id.* at 860.

227. *Craig*, 497 U.S. at 861 (Scalia, J., dissenting).

228. *Id.* at 862.

quarrel with the majority in part rests on their failure to impose this standard upon the Maryland statute.[229] Although Scalia was not on the Court for the *Roberts* decision, Justices Marshall, Brennan and Stevens had all dissented in that opinion.[230] In the *Craig* dissent, Scalia and his fellow dissenters seemed willing to endorse this analysis, at least tangentially, for the purpose of demonstrating just how far from the intent of the founders the Court had strayed. The Court, Scalia noted, had "no authority to question" the value of confrontation, yet had done so in its opinion.[231] Scalia was willing to concede that although the Maryland statute was "virtually constitutional" for the sake of argument, it was not actually so, and therefore should not have been upheld as such.[232]

By 1991, federal prosecutors eagerly embraced a very narrow construction of the Confrontation Clause in an amicus brief in support of the state of Illinois in *White v. Illinois*.[233] In *White*, even the most traditionalist members of the Court, Scalia and Thomas, held back from a decision that would have "virtually eliminate[d] its [Confrontation Clause's] role in restricting the admission of hearsay testimony."[234] Writing for the majority, Chief Justice Rehnquist returned the Court to "steer a middle course" recognizing once again that hearsay rules and the Confrontation Clause were designed to protect similar values and stem from the same roots.[235] However, Rehnquist's opinion continued to challenge the hearsay/confrontation paradigm in that it, in the words of Justice Thomas, "unnecessarily . . . complicated and confused the relationship between the constitutional right of confrontation and the hearsay rules of evidence."[236] The Court decided this case, which determined whether evidence admissible under the spontaneous declaration and medical examination exceptions require unavailability, without a lengthy discussion of the relationship between hearsay and confronta-

229. *See id.* at 865-66.

230. Ohio v. Roberts, 448 U.S. 56, 77 (1980) (Brennan, J., dissenting).

231. *Craig*, 497 U.S. at 869-70.

232. *Id.* at 870.

233. 502 U.S. 346, 352 (1992).

234. *White*, 502 U.S. at 352.

235. *Id.* at 352-53 (citations omitted).

236. *Id.* at 358 (Thomas, J., concurring).

tion. Thomas[237] emphasized, however, that the Confrontation Clause applied only to those witnesses testifying in court or through affidavits, depositions or confessions, "made in contemplation of legal proceedings."[238] Admitting that "[t]here is virtually no evidence of what the drafters of the Confrontation Clause intended it to mean," Thomas argued for the narrowest possible interpretation of a categorical right to confront.[239]

By the early 1990s, therefore, Confrontation Clause jurisprudence was a muddied waters. The traditional paradigm of the nineteenth and early twentieth centuries was long past. Justices Scalia and Thomas had proposed a new paradigm based on one appraisal of the intent of the founders, even while they admitted that there was little evidence evincing that intent. Justice O'Connor, supported at times by Chief Justice Rehnquist, had refined the *Roberts* standard for opening the bonds of confrontation. Justice O'Connor's paradigm was focused more on protecting vulnerable witnesses (as in *Craig*) whereas Rehnquist's concern revolved around convictions based on other methods of ensuring reliability (as in *Bourjaily*). Finally, the remaining guarantors of individual liberties, for example Brennan and Stevens, straddled the paradigms, concurring with Scalia on the categorical requirements of confrontation but leaning towards a trustworthiness paradigm such as the *Roberts* standard. These divergent paradigms offered little guidance for future decisions, either in lower courts or for the Supreme Court itself. By the end of the 1990s, the Court's confrontation with the Sixth Amendment could only continue to offer confusion in lieu of a paradigm.

V. *LILLY V. VIRGINIA*: WHEN A UNANIMOUS JUDGMENT MEANS ANYTHING BUT UNANIMITY

On December 4, 1995, when three Virginia men embarked upon a drunken escapade that resulted in the abduction and murder of a bystander, they could hardly have imagined that their names would end up known for the reopening of a consti-

237. Justice Scalia joined Justice Thomas in his concurrence. *Id.* at 358.
238. *Id.* at 364.
239. *White,* 502 U.S. at 359.

tutional debate.[240] When Virginia officials took and then entered into evidence an in-custody statement of defendant Benjamin Lilly's brother Mark, considered by the government to be a statement against penal interest and by the defendant as an intrusion upon his constitutional rights of confrontation, the Court again had an opportunity to resolve disputes over the interpretation of the Confrontation Clause.[241] However, despite a unanimous decision of the nine Justices, the *Lilly* opinion was hardly a unified opinion.

A plurality of Stevens, Souter, Ginsburg and Breyer agreed on six parts of the opinion, joined by Justice Scalia in three sections and by Justice Thomas only in two.[242] Justice Breyer filed an independent concurring opinion, while Justices Scalia and Thomas each filed opinions concurring in part and concurring in the judgment.[243] Finally, Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy, filed an opinion that concurred with the Court's judgment but strongly differed with Stevens' reasoning behind the decision.[244] At the heart of the differences were the Justices' different interpretations of the Confrontation Clause as well as the policies that underlay its application to the present circumstances. These differences continue to reflect the consequences of the lack of a consistent paradigm for confrontation cases.[245]

240. *See* Lilly v. Virginia, 527 U.S. 116, 120 (1999).

241. *See* Brief for Petitioner, Lilly v. Virginia, 527 U.S. 116 (1999) (No. 98-5881), 1998 WL 928305, at *23 (Dec. 22, 1998) [hereinafter Lilly Petitioner Brief]; Brief for Respondent, Lilly v. Virginia, 527 U.S. 116 (1999) (No. 98-5881), 1999 WL 47109, at *17 (February 1, 1999) [hereinafter Lilly Respondent Brief].

242. *See Lilly*, 527 U.S. at 119.

243. *See id.*

244. *See id.* at 144.

245. The *Lilly* decision has already been followed by scholarly commentary. Some have argued that *Lilly* may have settled the "against penal interest" question. *See* Benjamin E. Rosenberg, *The Future of Codefendant Confessions*, 30 SETON L. REV. 516, 540 (2000). Others see the plurality's division of "against penal interest" statements into three classes instructive in deciding whether or not a statement is firmly rooted and therefore beyond Confrontation Clause analysis. *See* Kim Mark Minix, Lilly v. Virginia: *Answering the Williamson Question – Is the Statement Against Penal Interest Exception "Firmly Rooted" Under Confrontation Clause Analysis?*, 51 MERCER L. REV. 1343, 1355-56 (2000).

A. *The Facts in* Lilly v. Virginia

On their face, the facts of *Lilly* present the prototype of why the right to confront is the preferred form of truth-seeking. All parties to the case agree that on the evening of December 4, 1995, petitioner Benjamin Lilly, along with his brother Mark and Gary Wayne Barker, embarked upon a twenty-four-hour binge which included heavy drinking and marijuana use by both Mark and Barker.[246] The three men broke into one home and stole three weapons, a safe, and a quantity of liquor.[247] They then visited a friend, drank the stolen liquor and two of men, Mark and Barker, smoked marijuana.[248] After being asked to leave, the three drove to a trailer park, rented a room, and continued to imbibe throughout the night.[249] The following day, December 5, the drinking and wandering continued.[250] Later, the men stopped to fire the stolen firearms at some geese, then returned to the trailer park where they unsuccessfully attempted to trade the pistol for more marijuana.[251] Thereafter, they drove to a bar, where Mark and Barker unsuccessfully attempted to sell a pistol and a rifle.[252] In the early evening, the trio's car broke down in front of a convenience store.[253] An innocent man, DeFilippis, happened to be standing by his car outside the convenience store when the drunken trio arrived.[254] After robbing the convenience store the men kidnapped him, drove to a secluded area, and required him to strip.[255] DeFilippis was then shot to death with the pistol.[256] Shortly thereafter, the trio robbed another store and approximately forty-five minutes later attempted to rob one more convenience store.[257] On their escape from that store, the trio's car again broke down.[258] When police arrived on the scene, petitioner Benjamin Lilly re-

246. *Lilly*, 527 U.S. at 120.
247. *Id.*
248. Petitioner Brief at *4, *Lilly*, *supra* note 241.
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.* *5.
253. Petitioner Brief at *5, *Lilly*, *supra* note 241.
254. *Id.*
255. *Id.*
256. *Lilly*, 527 U.S. at 120.
257. *See* Petitioner Brief at *5, *Lilly*, *supra* note 241.
258. *See id.*

mained in the car and was taken into custody (the police held him in the car for two more hours), but Mark and Barker fled.[259] The police apprehended them soon after their escape.[260]

After taking all three men into custody, police questioned each of them separately.[261] Benjamin Lilly did not mention the murder to the police.[262] He did claim, however, that Mark and Barker forced him to participate in the robberies.[263] Mark and Barker provided investigators with somewhat different accounts of the crime spree but each maintained that Benjamin had both masterminded the robberies and killed DeFilippis.[264]

Throughout his interrogation, which took place over two periods between 1:30 a.m. and 2:53 a.m. on December 6, Mark continually emphasized how drunk he had been during the entire crime spree.[265] He also admitted that he stole liquor twice during that period, that he had handled a gun earlier in the day, and that he had been present during the more serious thefts and the homicide.[266] The police informed Mark that he would be charged with armed robbery and threatened that if he failed to break "family ties," he might be "dragged" into a life sentence by his brother.[267] Mark then insisted that Benjamin had instigated the carjacking and that he (Mark) "didn't have nothing to do with the shooting."[268]

Mark refused to testify as a witness at Benjamin's trial, invoking his Fifth Amendment privilege against self-incrimination.[269] The government then sought to introduce into evidence Mark's in-custody statements that implicated Benjamin as the instigator of the crime, and, most importantly, the triggerman in the homicide.[270] Mark's identification of Benjamin as the killer was critical to the Commonwealth's capital case against Benjamin. Under Virginia's capital murder statute, the trigger-

259. *See id.*
260. *See id.*
261. *Lilly*, 527 U.S. at 121.
262. *Id.*
263. *Id.*
264. *Id.* at 120-21.
265. *Id.* at 121.
266. *Lilly*, 527 U.S. at 121.
267. *Id.*
268. *Id.*
269. *Id.*
270. *See* Petitioner Brief at *7, *Lilly*, *supra* note 241.

man is deemed so culpable as to merit the death penalty.[271] Benjamin was eventually convicted of robbery, abduction, carjacking, possession of a firearm by a felon, and four charges of illegal use of a firearm, as well as capital murder, for which he received a death sentence.[272] Without Mark's statement, petitioner claimed, Benjamin might not have been sentenced to death.

The convictions and sentences were affirmed by the Virginia's Supreme Court on the grounds that Mark's statements were against penal interest and were reliably established by other evidence and therefore fell within an exception to the Virginia hearsay rule.[273] The Virginia high court also held that Mark's statements had "sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule" and therefore satisfied the requirements of the Confrontation Clause.[274] Believing that the Virginia decision might represent a significant departure from "our Confrontation Clause jurisprudence," the United States Supreme Court granted certiorari.[275]

B. *The* Lilly *Court's Attempt at a Rule*

The United States Supreme Court considered four issues raised in the Virginia court's verdict: (1) the admissibility of Mark's statement as a statement against penal interest; (2) whether the statement fell within a firmly rooted exception to the hearsay rule; (3) whether the statement met the *Roberts* trustworthiness standard; and (4) whether the imposition of special conditions upon an in-custody statement against penal interest could ever make it admissible within the requirements of the Confrontation Clause.[276] These considerations revolved around the issues central to the last quarter-century's debate over the Confrontation Clause: should the right of confrontation be considered either categorical or simply to assure truth-finding and therefore expendable when other "truth" guarantees

271. *See* VA. CODE ANN. § 18.2-18 (1995).
272. *Lilly*, 527 U.S. at 122.
273. *See id.*
274. *Id.* (citations omitted).
275. *Id.* at 123.
276. *See id.* at 116, 122, 125, 130, 135.

suffice, or has the right to confrontation essentially become no more than another rule of evidence and therefore subject to amendment whenever "justice" allows?

Just five years after the Court's decision in *Williamson v. United States*,[277] the *Lilly* facts returned the Justices to a consideration of whether the reliability of a statement against penal interest was "so firmly rooted" in the common law that it did not violate the Confrontation Clause.[278] The *Williamson* Court had held the alleged statement against penal interest was not "truly self-inculpatory" to the extent that it would provide sufficient indicia of reliability because the declarant's confession, especially the parts that implicated the defendant, did little to subject the declarant to criminal liability.[279] Hence, although the *Williamson* Court did warn against accepting confessions unless they were "truly self-inculpatory," it did not rule on the Confrontation Clause claim raised by the defendant, finding such a ruling unnecessary given the Court's holding on the unreliability of the evidence.[280]

Conversely, the government argued in *Lilly* that Mark's in-custody statement need not be subjected to a reliability test since the statement met the standards of admissibility as a "firmly rooted exception" to hearsay rules.[281] The Commonwealth asserted that "[t]here can be no question today but that the hearsay exception for statements against penal interest qualifies for firmly rooted status."[282] A plurality of the *Lilly* Court disagreed, holding that "accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule."[283] The Court reasoned that the

277. 512 U.S. 594 (1994).

278. *See Lilly*, 527 U.S. at 134.

279. *Williamson*, 512 U.S. at 604.

280. *See id.* at 605 (stating "In light of this disposition, we need not address Williamson's claim that the statements were also made inadmissible by the Confrontation Clause . . . in particular we need not decide whether the hearsay exception for declarations against interest is 'firmly rooted' for Confrontation Clause purposes.").

281. Respondent Brief, *Lilly*, *supra* note 241, at 24, 27.

282. *Id.* at 27. Respondent cited the statutes of twenty-nine states codifying rules of evidence admitting statements against penal interest in the manner of FED. R. EVID. 804(b)(3) as well as abundant case law supporting those statutes. *Id.* at 27 n.5, 28.

283. *Lilly*, 527 U.S. at 134.

"against penal interest" exception was clearly distinguishable from previously recognized "firmly rooted exceptions."[284] Generally, the other exceptions rely on an assumption that accuracy may be deemed to accompany statements made "without a motive to reflect on the legal consequences of one's statement, and in situations that are exceptionally conducive to veracity."[285]

Although a plurality of four Justices, Stevens, Souter, Ginsberg, and Breyer, held that the statement against penal interest generally should not be considered "firmly rooted," three Justices, Rehnquist, O'Connor and Kennedy, disagreed with the finality of this proclamation.[286] Though the Chief Justice agreed with the plurality's judgment reversing the Virginia Supreme Court, he did so on the grounds that Mark Lilly's in-custody statement was the type of assertion that must be "viewed with 'special suspicion' given a codefendant's 'strong motivation to implicate the defendant and to exonerate himself.'"[287] However, the Chief Justice firmly refused to foreclose the possibility that statements against penal interest, including even those inculpating codefendants, may fall within a firmly rooted exception to the hearsay rule.[288] Fearing that such a blanket ban might preclude critical reliance on in-custody confessions and therefore hinder many possibly successful prosecutions, Rehnquist asserted that a consideration of whether or not truly self-inculpatory statements against penal interest might indeed fall within a "firmly rooted exception" definition is necessary.[289] In effect, his opinion appears to support a broadening exception that would admit into evidence a declarant's genuinely self-inculpatory custodial statements that also inculpate a codefendant.

Moreover, Rehnquist advocated a paradigm that favors prosecutorial goals over the rights of individual defendants. Rehnquist relied on the Court's holding in *Dutton v. Evans*,[290] which recognized that a declarant's statements to a fellow prisoner, obviously custodial in nature, bear sufficient indicia of re-

284. *Id.* at 126.
285. *Id.*
286. *Id.* at 144 (Rehnquist, J., concurring).
287. *Id.* at 144, 146.
288. *Lilly*, 527 U.S. at 147 (Rehnquist, J., concurring).
289. *Id.* at 146.
290. 400 U.S. 74, 89 (1970).

liability such that it could be placed before a jury without confrontation of the declarant.[291] However, Rehnquist's use of *Dutton* fails to take into account the specific circumstances that made that particular statement admissible under the Confrontation Clause. The statement admitted in *Dutton* was one of identification by a declarant of a defendant of whom the declarant already had personal knowledge.[292] Moreover, there was clear evidence in *Dutton* that the declarant's personal knowledge had already been established by another witness' testimony and by the declarant's prior conviction.[293] Further, the *Dutton* Court had held that the possibility that the declarant's statement was based on faulty recollection "is remote in the extreme."[294] Finally, the declarant's statement was spontaneously made and clearly against his penal interest.[295] Therefore, Rehnquist's use of the *Dutton* analogy here must be treated as suspect and was likely shaped by his clear intent to promote a policy favoring a broader line of exceptions to the Confrontation Clause than the *Lilly* plurality would allow.[296]

Both the plurality opinion and the Rehnquist-O'Connor-Kennedy concurrence delved into the applicability of a *Roberts*-type test in circumstances like the *Lilly* case.[297] In other words, seven of nine Justices continued to merge the Confrontation Clause issue with a consideration akin to hearsay exceptions. This assumption was questioned by Justice Breyer, although he accepted that such a deliberation should probably be left "open for another day."[298] Breyer's concurrence did, however, outline the parameters of the debate.[299] Relying heavily on the ACLU's amicus brief, Breyer argued that the current hearsay-based Confrontation Clause test was too narrow because it might authorize admission of out-of-court statements that were prepared as trial testimony as long as such statements fell into any one of

291. *See Lilly,* 527 U.S. at 147 (Rehnquist, J., concurring).
292. *See Dutton,* 400 U.S. at 88.
293. *See id.*
294. *Id.* at 89.
295. *See Lilly*, 527 U.S. at 148 (Rehnquist, J., concurring).
296. *See id.*
297. *See id.*
298. *Id.* at 140, 142-43 (Breyer, J., concurring).
299. *See id.* at 141.

a number of "well-recognized hearsay rule" exceptions.[300] However, he also noted that the current test was "arguably too broad" in subjecting the admission of any relevant hearsay statement to rigorous constitutional analysis even if that statement was "only tangentially related to the elements in dispute, or was made long before the crime occurred and without relation to the prospect of future trial."[301] Breyer remained troubled by the lack of a coherent and reliable paradigm under which to evaluate whether evidence violates a defendant's confrontation right but was unable to outline a solution to the dilemma.

Both the plurality opinion and the Rehnquist concurrence eventually shifted the terms of their discussions to a consideration of a *Roberts* analysis.[302] However, the opinions differed sharply in their adoption of portions of the *Roberts* two-pronged test. The plurality focused on the Virginia Supreme Court's assessment of the reliability of Mark Lilly's statements within the "context of the facts and circumstances under which [they were] given."[303] Stevens rejected such a determination, however. Stevens found it "highly unlikely" that the presumptive unreliability of accomplices' confessions that inculpate one another could ever be effectively rebutted when such statements are given under conditions that replicate the traditional confrontation concerns of ex parte affidavit practice.[304] Hence, the plurality found Mark's confession not to be sufficiently reliable as to make it appropriate to waive Benjamin's right to confrontation.[305] "[N]either the words that Mark spoke nor the setting in which he was questioned provides any basis for concluding that his comments regarding petitioner's guilt were so reliable that there was no need to subject them to adversarial testing in a trial setting."[306] The plurality therefore implicitly endorsed the *Roberts* test for reliability, but found that Mark's testimony did not meet the standards enunciated previously by the Court.

300. *Lilly*, 527 U.S. at 141 (Breyer, J., concurring).

301. *Id.* at 142.

302. *See id.* at 135 (Stevens, J., plurality opinion); *id.* at 148 (Rehnquist, J., concurring).

303. *Id.* at 135.

304. *Lilly*, 527 U.S. at 137 (Stevens, J., plurality opinion).

305. *Id.*

306. *Id.* at 139.

Hence, the paradigm of the Confrontation Clause as a rule of evidence remained intact.

The Rehnquist concurrence also pointed towards a *Roberts* analysis, but with different intent. Rehnquist noted that neither of the lower courts had analyzed Mark's confession under the second prong of the *Roberts* test; moreover, the state court's *Roberts* analysis met the demands of the state's hearsay rules, not the Confrontation Clause.[307] Hence, Rehnquist too endorsed a merged view of Confrontation Clause and hearsay exception jurisprudence. The Chief Justice clearly believed the plurality had overstepped its bounds, reaching an issue that had not been considered by the lower courts.[308] Asserting that the trial judge was in a better position to evaluate "whether a particular statement given in a particular setting" was sufficiently reliable such "that cross-examination would add little to its trustworthiness," Rehnquist held that broad exceptions to the Confrontation Clause and hearsay rule should be accepted if so determined by a lower court judge.[309]

Justices Thomas and Scalia presented an additional paradigm for Confrontation Clause analysis. Along with offering his own concurrence, Justice Thomas supported the Chief Justice's argument that using in-custody accomplice statements that incriminate a defendant does not by definition violate the Confrontation Clause.[310] Referring to his view of the Court's "original understanding of the Confrontation Clause," Thomas warned against "freez[ing] our jurisprudence by making trial court decisions excluding such statements virtually unreviewable."[311]

The Thomas and Scalia concurrences in *Lilly* reflect their mutual attempts to return Confrontation Clause jurisprudence to their particular concepts of the "original" intent of the Confrontation Clause. Scalia's characterization of the admission of Mark Lilly's statement as "a paradigmatic Confrontation Clause violation"[312] reflected his agreement with Justice

307. *See id.* at 148 (Rehnquist, J., concurring).
308. *See id.*
309. *Lilly*, 527 U.S. at 149 (Rehnquist, J., concurring).
310. *See id.* at 143 (Thomas, J., concurring).
311. *Id.* at 144.
312. *Id.* at 143 (Scalia , J., concurring).

Thomas' judicial philosophy that the Confrontation Clause "extends to any witness who actually testifies at trial and is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial material, such as affidavits, depositions, prior testimony, or confessions."[313] These statements represent Scalia and Thomas' attempts to return the Confrontation Clause to one of its original purposes: to prevent the use of testimony by affidavit, as was accepted in English equity courts.[314] By reaffirming Thomas' position in *White*, Scalia's and Thomas' concurrences in *Lilly* continue in a vein of Confrontation Clause jurisprudence that one scholar has deemed "intellectually consistent, historically accurate, and constitutionally sound."[315] But consistent, accurate, and sound with regard to what? Scalia remains unrelenting in his quest to return the Confrontation Clause to what he believes to be its "original intent." Five months after the *Lilly* decision was handed down, he authored a scathing dissent to the Court's denial of certiorari in a Confrontation Clause case that originated in Texas. Joined by Justice Thomas, Scalia reminded the Court that "I dissented in *Craig*, because I thought it subordinated the plain language of the Bill of Rights to the 'tide of prevailing current opinion.'"[316] He reaffirmed his faith in the plain meaning of the Bill of Rights, noting that when the Court "does take . . . a step into the dark it has an obligation . . . to clarify as soon as possible the extent of its permitted departure."[317] Preventing a child victim of sex abuse from testifying even though the witness wanted to do so (as the petitioner had alleged), did more than water down the right of confrontation; it instead very well may have "washed [it] away."[318]

The history of the intent behind the Confrontation Clause is far from precise. Despite the number of times the clause has undergone reinterpretation and refocus in the more than two

313. *Id.* at 143 (Thomas, J. concurring) (quoting from his own concurrence in *White v. Illinois*, 502 U.S. 346, 365 (1992)).

314. *See supra* note 63.

315. *See* 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, 802 (2000).

316. Marx v. Texas, 528 U.S. 1034, 1035 (1999).

317. *Id.*

318. *Id.* at 1038.

centuries since the Constitution's ratification, justices and scholars continue to ponder the true place and role of confrontation in the American judicial process. The *Lilly* Court's plurality plus four concurring opinions precisely marks the various lines of Confrontation Clause jurisprudence as it now stands. It also has left lower courts without any clear benchmark to follow.

VI. CIRCUITS IN SEARCH OF A RULE

As is often the case when lower courts are left to rely on a plurality decision of the Supreme Court, the Courts of Appeals have been forced to extract whatever rule of law they can from the High Court's divided reasoning in *Lilly*. Recognizing the limited precedential value of a plurality opinion, the courts have generally applied the *Lilly* holdings in a narrow manner, seeking a balance between the need to extend the Court's ruling where necessary while acknowledging the many issues left undecided by that case.[319] In doing so, the courts of appeals have chosen the *Marks* "narrowest grounds" test, lacking an overarching paradigm that would help them evaluate potential violations of the Confrontation Clause.[320] The courts most frequently find themselves considering questions about the admissibility of statements against penal interest made by declarants who are involved in some sort of governmental process. Without direct guidance from the United States Supreme Court, the courts of appeals are forced to distinguish for themselves between situations in which the Confrontation Clause is violated and those where it is not.

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319. Regular searches for Courts of Appeals cases have been completed using Westlaw™. This article does not examine any federal district court cases since they lack the precedential value of the cases decided by the circuit court. For similar reasons, this article also does not rely on any unpublished cases decided by the circuit courts. The last search was completed on October 26, 2001, the day on which United States v. Ramirez, 271 F.3d 611, 613 (5th Cir. 2001) (holding *Lilly* rule preventing admission of custodial statement against penal interest was not applicable in sentencing hearings) was decided. Obviously, the circuits are just beginning to absorb the *Lilly* holding and its implications. The analysis that follows is therefore only a preliminary view of a line of thought in process.

320. Ronald Marrero has also noted that the highly fractured rationale contained within the *Lilly* decisions has left lower courts will no clear reasoning to follow. *See* Ronald Marrero, Lilly v. Virginia*: Plurality Gets It Half Right*, 10 TEMP. POL. & CIV. RTS. L. REV. 185, 206 (2000).

Several circuits have clearly asserted that custodial statements made against the declarant's penal interest which also implicate another person do not meet the particularized guarantees of trustworthiness that the *Lilly* Court held necessary to meet the requirements of the Confrontation Clause.[321] However, even as they adopt that one clear statement in *Lilly*, the courts find themselves limiting the *Lilly* holding to a very narrow rule of law, avoiding a broader extension of the rule than is necessary. In *United States v. Castelan*, for example, the Seventh Circuit noted that the fact that the declarant's confession to law enforcement officers during a custodial interview should be considered as "but one factor implicating the reliability of his statements."[322]

In *United States v. Photogrammetric Data Services, Inc.* the Fourth Circuit refused to read *Lilly* broadly enough to prevent the admission of an accomplice's hearsay statement whenever "the government [had been] involved in the statement's production."[323] Since there was "no [ ] attempt [ ] to shift or spread blame to another," the court held the statement to be admissible.[324]

However, the circuits have also found reason to admit some statements against penal interest that were made in circumstances involving government officials. A series of Second Circuit cases have held that plea allocutions, even if they implicate others, possess the particularized guarantees of trustworthiness that make them admissible in a codefendant's trial. In *United States v. Gallego*, the Second Circuit held that portions

321. *See, e.g.*, United States v. Westmoreland, 240 F.3d 618, 627 (7th Cir. 2001), *reh'g and reh'g en banc denied,* Nos. 99-1491 and 00-1348, 2001 U.S. App. LEXIS 6036 (7th Cir. April 9, 2001) (affirming that "particularized guarantees of trustworthiness do not exist with respect to statements made while in police custody") (citations omitted); United States v. Shea, 211 F.3d 658, 669 (1st Cir. 2000), *cert. denied sub nom.* Shea v. United States, 331 U.S. 1154 (February 20, 2001) (reaffirming *Lilly*'s holding against custodial statements against penal interest under the circumstances of that case, although those circumstances inapposite to the instant case). *See also* United States v. Gomez, 191 F.3d 1214, 1221-22 (10th Cir. 1999) (holding that statements indirectly referring to defendant that were made during declarants' detention at police station fall within the *Lilly* ruling, although the court declined "to venture forth where the Supreme Court itself has thus far refused to tread.").

322. 219 F.3d 690, 695 (7th Cir. 2000).

323. 259 F.3d 229, 245 (4th Cir. 2001).

324. *Id.*

of the declarant's plea allocution were properly admitted at his codefendant's trial solely as evidence of a conspiracy.[325] The court affirmed the district court's holding that the declarant's allocution possessed "'particularized guarantees of trustworthiness,' rendering it 'sufficiently trustworthy' to justify its admission at trial."[326] Other Second Circuit cases have helped refine this rule. In *United States v. Petrillo*,[327] the appellate bench refused to grant a new trial for the defendant, a securities trader, who claimed that the admission of his codefendant's plea allocution denied him his constitutional right to confront adverse witnesses.[328] The court held that the previously admitted plea allocutions were "accompanied by such 'particularized guarantees of trustworthiness' that cross-examination would have added little to an evaluation of their reliability."[329] This was particularly the case where the admitted plea allocutions had been redacted "so that they did *not* inculpate the defendant."[330] The Second Circuit remains cognizant of the need to limit the presumption of unreliability of custodial statements announced in *Lilly* to facts similar to that case. In *United States v. Dolah*,[331] the court noted that accepting arguments that the *Lilly* rule should extend to "government involvement" too broadly would "render inadmissible virtually all hearsay statements against interest on the theory that the Government played a role in the declarant's unavailability by declining to confer use immunity."[332] Moreover, the Seventh Circuit has recently adopted the Second Circuit's interpretation of the admissibility of plea allocations under *Lilly*, noting that as long as the admissions do not raise the same core concerns of the traditional *ex parte* affidavit process, they can be considered reliable.[333] The mere fact that a defendant pleads guilty to receive a "good deal" does not automatically imply that he lied about his guilt.[334]

325. 191 F.3d 156, 168 (2d Cir. 1999), *cert. denied sub nom.* Martinez v. United States, 528 U.S. 1127 (2000).
326. *Id.* at 167 (citations omitted).
327. 237 F.3d 119 (2d Cir. 2000).
328. *See id.* at 122.
329. *Id.*
330. *Id.* at 122.
331. 245 F.3d 98 (2d Cir. 2001).
332. *Id.* at 104-5.
333. United States v. Centracchio, 57 F.3d 518, 528 (7th Cir. 2001).
334. *Id.* at 529.

Similarly, at least one circuit has held that grand jury testimony against a declarant's penal interest that implicates a defendant may be admitted into testimony unaffected by the *Lilly* holding.[335] Accused with her husband of burning down their convenience store in an effort to defraud their insurer, the petitioner in *United States v. Papajohn* challenged the admissibility of her stepson's grand jury testimony implicating her in the crime.[336] Distinguishing this case from *Lilly*, while noting in an aside that "since only four Justices concurred in the part of the opinion on which Ms. Papajohn relies, it does not bind us," the Eighth Circuit held that the facts surrounding the grand jury testimony satisfied the "equivalent circumstantial guarantees of trustworthiness" test under Federal Rule of Evidence 807.[337] The declarant was not treated as a suspect in the crime, and therefore did not have the same incentive to shift the blame that was apparent in *Lilly*.[338] Still, the court noted that "it can almost always be said that a statement made by a declarant that incriminates another person in a crime will make it less likely that the declarant will be charged for that crime."[339] The Eighth Circuit stated, however, that the relative trustworthiness the declarant's statement is always "a matter of degree," and that the defendant in this case had not been able to demonstrate that the declarant had a clear incentive to lie in this case.[340]

The circuits have dealt with only a few other categories of cases based on the *Lilly* decision. There have been several decisions confirming that *Lilly* was only applicable to statements made with government involvement: statements to one's girl-

335. United States v. Papajohn, 212 F.3d 1112, 1119-20 (8th Cir. 2000), *reh'g and reh'g en banc denied*, No. 99-3417NISC, 2000 U.S. App. LEXIS 13572 (8th Cir. June 13, 2000).

336. The witness had a complicated history in front of the grand jury. He appeared three times. First, he asserted that he had no knowledge of the person who burned the store; in his second appearance, he stated that the defendant and her husband conspired to burn the store, and during his third appearance, he claimed his Fifth Amendment right to remain silent. Defendant Papajohn challenged the admissibility of statements made at his second appearance in front of the grand jury. *Id.* at 1116-17.

337. *Id.* at 1118-19.

338. *Id.*

339. *Id.*

340. *Papajohn*, 212 F.3d at 1118-19.

friend, father, or cellmate are not covered by the limitation established in *Lilly*.[341] Similarly, hearsay statements admitted at a sentencing hearing are not bound by the *Lilly* holding since "[a] defendant's confrontation rights at sentencing are severely restricted."[342] Finally, the Second Circuit has held that a hearsay waiver by misconduct pursuant to Federal Rules of Evidence 804(b)(6) is also not a *Lilly* issue since implicit in the *Lilly* analysis is a presumption that the defendant has never waived his right to confront the witness against him.[343]

The circuits, at least thus far, have sought to limit the *Lilly* rule to its narrowest application. A recent treatise's observation that all nine Justices have indicated to some extent "that admission of custodial statements to law enforcement personnel against penal interest . . . whether or not they constitute[ ] a confession," violates the Confrontation Clause rights of another defendant if admitted at his trial without cross-examination is not an indication of the limitation of that holding.[344] Without any clear paradigm to follow, the circuits are left to develop their own rules of law, providing little sense of precedent or reliability for those who follow. The Supreme Court may have "heightened" the standards for the admissibility of accomplices' statements at a codefendant's trial, but only when limited to facts quite similar to those in the *Lilly* case.[345]

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341. *See* United States v. Tocco, 200 F.3d 401, 416 (6th Cir. 2000) (holding that father's statements to son were admissible and did not violate the rule established in *Lilly*); United States v. Westmoreland, 240 F.3d 618, 627-28 (7th Cir. 2001) (statements made to family members and cellmates are considered trustworthy and admissible); United States v. Boone, 229 F.3d 1231, 1234 (9th Cir. 2000), *cert. denied sub nom.* Herd v. United States, 531 U.S. 1170 (2001) (statements in confidence to girlfriend not inadmissible under *Lilly*).

342. United States v. Ramirez, 271 F.3d 611, 613 (5th Cir. 2001) (quoting United States v. Rodriguez, 897 F.2d 1324, 1328 (5th Cir. 1990), *cert. denied*, 498 U.S. 857 (1990)).

343. United States v. Dhinsa, 243 F.3d 635, 655 (2d Cir. 2001), *cert. denied*, 122 S.Ct. 219 (2001).

344. United States v. Castelan, 219 F.3d 690, 695 (7th Cir. 2000) (quoting 31 MICHAEL H. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 6742 (2d ed. 2000)).

345. Though arguing that the *Lilly* standard of admissibility is a heightened one, Sarah Heisler agrees that some of the federal courts have limited the impact of the *Lilly* rule. *See* 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, 870 (2000).

VII. CONCLUSION

Clearly, the Confrontation Clause remains a constitutional statement absent a guiding paradigm. However, the competing paradigmatic models are clear and becoming consistent, at least as set out in the *Lilly* decision:

First: Justices Thomas and Scalia clearly advocate a return to their version of the historical intent of the clause. Hence, their imposition of the need for confrontation on a trial is limited to "witnesses" before the court and out-of-court testimony offered specifically with the intention of providing evidence for a court proceeding. Obviously, Mark Lilly's testimony demanded the protection of confrontation for defendant Benjamin. But the Thomas/Scalia restrictions, though clear, may be limited by their categorical approach to confrontation. Moreover, their approach fails to develop precisely what form that confrontation should take. Under this categorical approach, must confrontation be face-to-face, or must it be at trial? Such questions, fundamental to the jurisprudence of modern confrontation decisions, prevents the Scalia/Thomas philosophy from becoming the dominant paradigm in these cases.

Second: Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy, return considerations of the applicability of the right to confront to a consideration of reliability. In particular, Rehnquist warns that the plurality's "blanket ban on government's use of accomplice statements that incriminate defendants" goes much too far in the direction of excluding evidence that may indeed prove valuable in securing accurate and necessary conviction. Placing faith in the *Roberts* test for reliability, Rehnquist simply would have remanded the *Lilly* conviction for a trustworthiness assessment, seeing no need for any clarification for the role and intention of the right of confrontation in the judicial proceedings. Rehnquist and others therefore have proposed a paradigm that is flexible and able to assimilate many of the nuances and distinctions necessary for a paradigm to succeed. However, the confrontation/rule of evidence paradigm proposal fails to dominate because it makes the yet-refutable assumption that confrontation and hearsay essentially revolve around the same considerations, shifting the focus of this analysis solely to reliability. Though this paradigm has grown in strength over the last twenty years, it fails to take into

account the issues raised by the Scalia/Thomas paradigm formulation and therefore has been unable to dominate the confrontation landscape.

Third: Justice Breyer, although participating in the plurality opinion authored by Justice Stevens, warns that the Court's recent trend in confrontation cases rests on a possibly fallacious assumption: that hearsay and the Confrontation Clause are virtually one and the same. In so doing, Breyer's concurrence adopts significant portions of the argument advocated in the ACLU amicus brief filed in this matter. No circuit court has referred to Breyer's position in any of its decisions.[346]

Therefore, despite the increasing clarity within and between the positions, there seems to be declining hope for any resolution or agreement. Instead, the paradigms continue to clash, offering divided decisions and no guidance for lower courts throughout the federal and state judicial systems. Confrontation Clause jurisprudence continues to search for principles and perhaps even meaning. Moreover, there is little indication that any further Supreme Court consideration of the matters is likely in the near future. None of the circuit cases relying on *Lilly* have been granted certiorari to the High Court; those who have petitioned for certiorari have had it denied. Further, of the briefs currently on file[347] for cases pending before the Court, only two even mention the words "Confrontation Clause" and none rely on the substantive holding in the *Lilly* decision.[348] As such, until a new paradigm arises, multiple defendants may lose their rights to confront adverse witnesses

346. Natalie Kijurna has advocated Breyer's adoption of the ACLU categorical approach as not only the most logical, but also one "necessary to save the right to confrontation and untangle the web of confrontation-hearsay analysis that is currently plaguing the courts." *See* Natalie Kijurna, Lilly v. Virginia*: The Confrontation Clause and Hearsay – "Oh What a Tangled Web We Weave . . .",* 50 DEPAUL L. REV. 1133, 1189-90 (2001). However, there is no indication, either at the United States Supreme Court or in the appellate courts, that this offers a paradigm acceptable to the other Justices of the High Court. Each Justice seems to have policy considerations so distinct from the others that it is difficult to see how Breyer's view could ever satisfy those competing demands.

347. At least of those available on-line as of October 26, 2001.

348. *See* Brief of Petitioner, Burford v. United States (No. 99-9073), 2000 WL 1718517, at *19-20 (Nov. 30, 2000). This brief discusses the standard of review used by the *Lilly* plurality, but not the substantive ruling regarding the defendant's right to confront his brother.

and public policy is left without any benchmarks of confrontation on which to rely. Articulations of various policies may cause federal and state jurists at various levels to extend or diminish the protections of a constitutional clause without any clear direction from the nation's highest court. *Stare decisis* fails in its mission when there is no true precedent to follow. At this point in the history of Confrontation Clause jurisprudence, this has become the rule rather than the exception.