The Hearsay Exception for Declarations against Penal Interest Is Not Firmly Rooted in Pennsylvania Law, Making the Use of Extrajudicial Statements Made by a Non-Testifying Accomplice a Violation of the Defendant's Sixth Amendment Right to Confront Witnesses: Commonwealth v. Robins

David H. Cook

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The Hearsay Exception for Declarations Against Penal Interest is not Firmly Rooted in Pennsylvania Law, Making the Use of Extrajudicial Statements Made by a Non-Testifying Accomplice A Violation of the Defendant’s Sixth Amendment Right to Confront Witnesses: Commonwealth v. Robins

CRIMINAL LAW – TRIAL – HEARSAY EVIDENCE – STATEMENTS BY CONSPIRATORS – RIGHT OF THE ACCUSED TO CONFRONT WITNESSES – The Pennsylvania Supreme Court held that the admission into evidence of extrajudicial statements made by a non-testifying accomplice violated the Confrontation Clause of the Sixth Amendment.


In June 1995, a burglary occurred at Coins and Computers, a collectibles store located in Dormont, PA.1 Based on a tip placing a white van in front of the store near the time of the burglary, the police canvassed local car rental agencies, making inquiries into recently rented vans.2 Because of the interviews, the police learned that John Wayne Robins had recently rented white vans on two separate occasions.3 Based on the information gleaned from one interview, the police obtained a search warrant for Robins’ home.4 Although denying any involvement in the burglary, Robins confirmed renting the two vans, claiming he did so for a

1. Commonwealth v. Robins, 812 A.2d 514, 516 (Pa. 2002). Approximately $500,000 worth of goods was taken from the store’s safe. Id.
2. Id. After a news report of the burglary, a citizen told the police that he saw “at least two men carrying items to a white van parked in front of the shop during the probable time of the incident.” Id.
3. Id. The police received this information from a local Rent-A-Wreck employee. Id. The employee told police that Robins had first rented a white van five days before the burglary. Id. He also said that Robins returned that van three days later (two days before the burglary), expressing dissatisfaction with the number of side windows on the van. Id. Robins then rented a second white van which had no windows on the side panels. Id.
4. Id. At Robins’ home, the police found various locksmithing tools and manuals and a police scanner, all legally in Robins’ possession. Id.
friend, Barry Auman, who needed a van to move certain personal items.\textsuperscript{5}

Approximately one year after the burglary, Joseph Downey, an inmate at the Allegheny County Jail, identified Auman as one of the perpetrators of the Coins and Computers burglary.\textsuperscript{6} In exchange for his release, Downey agreed to participate in a sting operation against Auman.\textsuperscript{7} After both Downey and Auman were released from jail, Downey arranged a meeting in a hotel room between Auman and a purported buyer of Auman's stamps in June of 1996.\textsuperscript{8} Prior to the meeting, the police equipped the hotel room with recording equipment and placed a hidden microphone on Downey.\textsuperscript{9} While en route to the rendezvous, Auman told Downey that he was under the influence of a narcotic, having just recently injected himself.\textsuperscript{10} Once in the room, Auman, acting to confirm his possession of the stamps, discussed various details of the burglary.\textsuperscript{11} Without mentioning Robins by name, Auman did mention that a friend had rented the van used in the burglary from Rent-A-Wreck.\textsuperscript{12} No exchange of money or stamps occurred during the meeting, but Auman did promise to make the stamps available for the buyer's perusal before finalizing the sale.\textsuperscript{13} Before consummating the sale, however, Auman phoned the prospec-

\textsuperscript{5} Id. Robins stated that Auman, lacking a valid driver's license, could not rent the van on his own. Id.

\textsuperscript{6} Robins, 812 A.2d at 516. In May 1996, Auman was incarcerated for driving under the influence, and he and Downey shared the same cellblock. Id. During their confinement, Downey claimed that Auman admitted responsibility for the Coins and Computers burglary. Id. Downey also said that although Auman did not directly implicate others, Auman did relate details that indirectly implicated a confederate. Id. at 516-17. Among the various details Auman apparently told Downey were "references to a partner who was a locksmith, rented the van, lived in [the] South Side, and had a pool in his backyard." Id. at 517. Auman also purportedly stated that he still had $250,000 worth of stamps taken from the burglary. Id.

\textsuperscript{7} Id. at 517.

\textsuperscript{8} Id. While still incarcerated, Downey and Auman had made the preliminary agreements. Id.

\textsuperscript{9} Id.

\textsuperscript{10} Id.

\textsuperscript{11} Robins, 812 A.2d at 517. Despite acquiescing to repeated requests for more detail by Downey and the undercover detective, Auman occasionally expressed concern that in relaying the details of the incident he was implicating himself in the burglary. Id. In fact, Auman went so far as to ask whether the conversation was being recorded. Id. at 517 n.4. Auman also expressed some hesitancy at proffering pictures of the stolen stamps and noted that the stamps could not be peddled in the public market, since they were traceable by the police. Id.

\textsuperscript{12} Id.

\textsuperscript{13} Id.
tive buyer, telling him that the stamps were no longer available. Following this conversation, the police arrested Auman and then arrested Robins.

Although Auman and Robins were originally scheduled for a joint trial, Auman pled guilty before the trial commenced, leaving only the conspiracy to commit burglary charge against Robins. Prior to trial, Robins filed a motion, arguing that both Auman’s jailhouse declaration and his hotel room statements were inadmissible hearsay. Moreover, Robins contended that Auman’s statements fell outside the coconspirator exception to the hearsay evidence rule. The Commonwealth countered that Auman’s statements were, in fact, admissible under the coconspirator exception to the hearsay rule. The Commonwealth also contended that Auman’s statements were admissible over hearsay and Confrontation Clause challenges because they were declarations against Auman’s own penal interest. While the trial judge rejected the coconspirator exception to hearsay evidence, he did accept the Commonwealth’s “against penal interest” theory. As a

14. Id. Auman claimed that he could not locate the stamps. Id.
15. Id.
16. Robins, 812 A.2d at 517. As a result of the guilty plea, Auman was convicted and sentenced for burglary and related offenses. Id.
17. Id. at 518. Robins argued that Auman’s “statements were inadmissible as hearsay and challenged any assertion by the Commonwealth that they qualified for admission pursuant to the coconspirator exception to the hearsay rule.” Id. As defined by the Federal Rules of Evidence, “hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” FED. R. EVID. 801(c).
18. Id. According to the Federal Rules of Evidence, “a statement by a coconspirator of a party during the course and in furtherance of the conspiracy” is not hearsay. FED. R. EVID. 801(d)(2)(E).
19. Id. The Commonwealth argued that since some of the statements were directed at the sale of stolen goods, these statements were intended to further an ongoing conspiracy. Id.
20. Id. Under the Federal Rules of Evidence, a statement against penal interest made by an unavailable witness is not to be excluded by the hearsay rule. FED. R. EVID. 804(b)(3). In relevant part, 804(b)(3) reads as follows:
A statement which was at the time of its making . . . so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. FED. R. EVID. 804(b)(3).
21. Robins, 812 A.2d at 518. The trial court held that the Commonwealth failed to establish an ongoing conspiracy, since the burglary occurred more than a year ago. Id.
22. Id. In support of admittance, the trial court cited Bruton v. United States, which, under certain circumstances, permitted redacted statements made by a non-testifying coconspirator in a joint trial. Bruton v. United States, 391 U.S. 123 (1968), cert. denied,
result, the trial court allowed Downey to testify regarding Auman's jaihouse statements, but prohibited Downey from testifying to Auman's statements implicating Robins, either directly or indirectly.\(^2\) Regarding the recorded hotel room statements, the court permitted the jury to hear a redacted version of the recording.\(^2\)

At the conclusion of the jury trial, Robins was convicted.\(^2\) Robins appealed, contending that the inclusion of Auman's statements violated his right to cross-examine the witness as guaranteed by the Sixth Amendment to the United States Constitution and Article 1, Section 9 of the Pennsylvania Constitution.\(^2\) On appeal, the Superior Court of Pennsylvania affirmed Robins' conviction in a memorandum decision.\(^2\) Having initially granted allocatur,\(^2\) the Supreme Court of Pennsylvania remanded the case back to the Superior Court to determine whether Auman's inculpatory statements offended Robins' right to cross-examine witnesses against him.\(^2\)

The Superior Court reaffirmed Robins' conviction on remand.\(^2\) Despite accepting Robins' position that Auman's "against penal interest" statements did not fit within a firmly rooted exception to the hearsay rule, the Superior Court found that the trial court's

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\(^2\) 397 U.S. 1014 (1970). Although accepting the Commonwealth's proposition, the trial court limited the admissible statements to declarations that directly implicated Auman. Id. Because Auman's statements incriminating Robins were not sufficiently adverse to Auman's penal interests, the court precluded those statements. Id.

\(^{23}\) Id.

\(^{24}\) Id. at 517. Like Downey's testimony, statements tending to incriminate Robins were erased from the tape. Id.

\(^{25}\) Id. at 519. Robins was sentenced to five to ten years of incarceration and restitution of $220,000. Id.

\(^{26}\) Robins, 812 A.2d at 519. In pertinent part, the Sixth Amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him." U.S. CONST. amend. VI. The relevant portion of Article I, Section 9 of the Pennsylvania Constitution reads as follows: "In all criminal prosecutions, the accused has the right... to be confronted with the witnesses against him..." PA. CONST. art. I, §9.

\(^{27}\) Robins, 812 A.2d at 519. A memorandum decision is one in which the court "gives the ruling (what it decides and orders done), but no opinion (reasons for the decision)." BLACK'S LAW DICTIONARY 984 (7th ed. 2000).

\(^{28}\) Robins, 812 A.2d at 519. In Pennsylvania, allocatur is a word used "to denote permission to appeal." BLACK'S LAW DICTIONARY 75 (7th ed. 2000).

\(^{29}\) Robins, 812 A.2d at 519 (citing Lilly v. Virginia, 527 U.S. 116, 120 (1999)). According to the Pennsylvania Supreme Court, Lilly stood for the proposition that "certain inculpatory statements [made] by a non-testifying coconspirator offended a defendant's right of confrontation." Id.

\(^{30}\) Id.
careful redactions provided Robins ample Sixth Amendment protection. 31

The Supreme Court of Pennsylvania again granted allocatur to determine whether, as declarations against penal interest, Auman's statements manifested sufficient indicia of reliability to obviate Sixth Amendment concerns. 32 In an opinion authored by Justice Cappy, 33 the majority found Auman's statements lacked the required markers of credibility to overcome a Sixth Amendment challenge. 34

The court began its exegetical inquiry with a brief summary of the parties' opposing contentions. 36 According to Robins, Auman's statements against his penal interest did not qualify as a firmly rooted exception to the hearsay rule as established by the United States Supreme Court in Lilly v. Virginia. 36 Moreover, because Auman's jailhouse statements to Downey were little more than the jailhouse braggadocio common among criminals, they failed to demonstrate the kind of independent reliability necessary to circumvent the Sixth Amendment. 37 Robins also contended that the government involvement in procuring the hotel room statements further undermined the trustworthiness of Auman's statements, since the government's goal was not to elicit truthful information but only to encourage an expedient delineation of events. 38 Last, Robins also argued that Auman's narcotic fugue necessarily detracted from the inherent credibility of his statements. 39

In contrast, the Commonwealth argued that the non-custodial setting of Auman's statements, and the fact that Auman made the declarations to someone he thought he could trust, effectively dis-
tung these facts from *Lilly*.

Alternatively, the Commonwealth argued that self-inculpatory, non-custodial, extrajudicial statements should qualify as a firmly rooted exception to the hearsay rule. And should such statements not qualify as firmly rooted, the Commonwealth alternatively claimed that the circumstances attending Auman’s statements evidenced the kind of reliable indicia necessary to ameliorate Sixth Amendment concerns.

Regarding Auman’s narcotic injection, the Commonwealth deferred to the trial court’s rejection of the argument.

Having summarized the competing contentions, the court turned to a brief explication of Confrontation Clause mandates. Based on established Confrontation Clause jurisprudence, the majority noted that the Confrontation Clause exhibits a strong preference for cross-examination, because direct, adversarial confrontation enhances evidentiary credibility. In addition, the court found that the Confrontation Clause aimed at eliminating the potentially noxious effects of collateral prejudice.

The majority next analyzed the efficacy of limiting jury instructions and redacting confessions as anodynes to Confrontation Clause concerns. Although in *Bruton* the United States Supreme Court declared that a limiting instruction to the jury was insufficient to prevent collateral prejudice in a joint trial, the court recognized that the United States Supreme Court had subsequently restricted the reach of *Bruton*. Still, the court distinguished its

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40. *Id.*

41. *Robins*, 812 A.2d at 520. The Commonwealth conceded that non-self-inculpatory, custodial statements did not fit within a firmly rooted exception to the hearsay rule. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* “The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.” *Id.* (citing *Lilly*, 527 U.S. at 123-24 (quoting *Maryland v. Craig*, 497 U.S. 836, 845 (1990))).

46. *Robins*, 812 A.2d at 521. For the court, this is prejudice that might “occur at a joint trial from a limited admission of incriminatory statements through an extrajudicial confession of a non-testifying codefendant.” *Id.* (citing *Bruton*, 391 U.S. at 123).

47. *Id.* Both the trial court and the superior court’s reliance on such redactions prompted this line of inquiry by the court. *Id.* See supra note 30.

48. *Id.* at n.9 (citing *Bruton*, 391 U.S. at 135-36).

49. *Id.* (citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987)). In *Marsh*, the Court, per Justice Scalia, held that “the Confrontation Clause is not violated by the admission of a non-testifying codefendant’s confession with a proper limiting instruction when . . . the confession is redacted to eliminate not only the defendant’s name, but any reference to his or her existence.” *Marsh*, 481 U.S. at 211.
case from both *Bruton*\(^5\) and *Marsh*,\(^5\) determining that those cases were limited to minimizing spillover prejudice in a joint trial, while *Robins* involved the trial of a single defendant.\(^5\) Thus, the majority concluded that *Robins* was analytically distinct from *Bruton* and *Marsh*, and therefore redaction and limiting instructions were inapposite.\(^5\) As a result, the majority ruled that the Superior Court erred in finding that Auman's redacted statements overcame Robins' Sixth Amendment objections, since redaction was only apropos in the context of a joint trial.\(^5\)

Having abjured redaction as a panacea for Auman's statements, Justice Cappy focused his inquiry on another line of Confrontation Clause cases.\(^5\) This line of cases recognized two well-established exceptions to the Confrontation Clause: the rule of necessity and sufficient indicia of reliability.\(^5\) Since neither Robins nor the Commonwealth pursued the question of availability at trial, the court determined that the issue of unavailability was not within its scope of appellate review.\(^5\) With availability a non-issue, the court directed its attention to the question of whether Auman's statements manifested sufficient indicia of reliability to circumvent a Confrontation Clause challenge.\(^5\) According to the majority, for a statement to be supported by sufficient indicia of reliability, the statement must either qualify as a firmly rooted exception to the hearsay rule or evidence specific guarantees of trustworthiness.\(^5\) Given this, the court concluded that the remaining perti-

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53. *Id.* Regarding this point, the court stated: "This situation is not one where the spillover prejudice from a non-testifying codefendant's confession can be cured by a *Bruton* redaction." *Id.*
54. *Id.*
55. *Id.* at 522. For the court, *Ohio v. Roberts* and *Lilly v. Virginia* exemplified a more appropriate line of cases. *Id.* See *Ohio v. Roberts*, 448 U.S. 56 (1980) and *Lilly v. Virginia*, 527 U.S. 116 (1999).
56. *Id.* at 522. In general terms, the court defined the rule of necessity as "requiring . . . a demonstration of unavailability of a witness whose statement the government seeks to admit." *Id.* (citing *Ohio v. Roberts*, 448 U.S. at 65). The court went on to say that although unavailability is not mandated by the Confrontation Clause, "a demonstration is necessary where unavailability is an essential component of an underlying hearsay exception invoked by the government in an effort to surmount a Sixth Amendment challenge." *Id.* (citing United States v. Inadi, 475 U.S. 387, 406 (1986)).
57. *Robins*, 812 A.2d at 518 n.5.
58. *Id.* at 522. Based on federal precedent, the majority concluded "that certain hearsay statements marked with sufficient indicia of reliability may be admitted despite the absence of the witness from trial over Sixth Amendment challenge." *Id.* (citing *Roberts*, 448 U.S. at 66 and *Lilly*, 527 U.S. at 136).
59. *Id.* (citing *Marsh*, 448 U.S. at 66 and *Lilly*, 527 U.S. at 136).
nent constitutional question was whether Auman's statements against his penal interest qualified as a firmly rooted hearsay exception or whether his statements evidenced sufficient indicia of reliability.60

Because questions of firm rooting are a matter of federal law, the court's analysis followed federal jurisprudence.61 Accordingly, the majority concluded that "[a] firmly rooted hearsay exception . . . is one that does not require corroboration to support its reliability as a prerequisite to admission."62 Having determined what constitutes firm rooting under Sixth Amendment jurisprudence, the court examined whether statements against penal interest qualified as a firmly rooted exception to hearsay evidence.63 While acknowledging that Pennsylvania law had permitted a limited exception for exculpatory statements, the majority noted that it still required such statements to be buttressed by adequate assurance of reliability.64 Similarly, the Pennsylvania Rules of Evidence permit the introduction of declarations against penal interest, but only when such statements are further corroborated by evidence outside the statements themselves.65 Moreover, the majority determined that even when applicable at the federal level, statements against penal interest still require some form of external corroboration.66 Based on the confluence of state law, rules of evidence, and federal law, the court concluded that "the hearsay exception for declarations against penal interest [is] not firmly rooted under Pennsylvania law."67

Having rejected Auman's declarations against penal interest as firmly rooted, Justice Cappy took up the question of whether Auman's statements manifested sufficient indicia of reliability to qualify as an exception to the hearsay rule.68 To determine this,

60. Id.
61. Id. at 524.
63. Id. Unlike the question of firm rooting, however, the majority determined that state law governed whether Auman's statements qualified as declarations against penal interest. Id.
64. Id. at 525.
65. Id. at 525. According to the Pennsylvania Rules of Evidence, statements against interest "are not excluded by the hearsay rule if the declarant is unavailable as a witness." PA. R. EVID. 804(b)(3). Importantly, Pennsylvania Rules of Evidence require "corroborating circumstantial evidence of trustworthiness before an assertion against the declarant's penal interest can be introduced by either side in a criminal case." PA. R. EVID. 803(b)(3).
66. Id. at 525. See supra note 20.
67. Robins, 812 A.2d at 525.
68. Id.
Justice Cappy used a totality of the circumstances test, balancing the contextual reliability of Auman’s statements against the Confrontation Clause’s preference for adversarial testing. To begin, the majority found that the temporal lag between the burglary and Robins’ statements undermined their reliability, since Robins had ample time for reflection. Moreover, although the lack of relationship between Robins and Auman might tend to support the reliability of the statements, the fact that the initial conversation occurred in a cellblock militated against such reliability, since, as the court concluded, such jailhouse confessions are equally likely the result of bragging among criminals.

Regarding Robins’ statements in the hotel room, the majority determined that these statements fell below the requisite level of reliability to skirt the prophylactic proscriptions of the Confrontation Clause. Of particular importance, the court reasoned that because the arrangement purported to be a prelude to the sale of stolen stamps, Robins had to continue his prevarication in order to save face. What’s more, Justice Cappy claimed that despite his previous assertions to the contrary, Robins never in fact produced the stolen goods nor authenticated his possession of them in any meaningful way. The court also concluded that while self-inculpatory statements which do not shift blame to another might be sufficiently reliable in a custodial setting, similar statements made in a non-custodial setting in which the declarant is trying to

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69. Id. at 525-26. Lacking a bright-line test, the court enumerated the following list of factors to be considered:

[T]he circumstances under which the statements were uttered, including the custodial/non-custodial aspect of the setting and the identity of the listener; the content of the statement, including whether the statements minimize the responsibility of the declarant or spread or shift the blame; other possible motivations of the declarant, including improper motives such as to lie, curry favor, or distort the truth; the nature and degree of the ‘against interest’ aspect of the statements, including the extent to which the declarant apprehends that the making of the statement is likely to actually subject him to criminal liability; the circumstances or events that prompted the statements, including whether they were made with the encouragement or at the request of a listener; the timing of the statements in relation to events described; the declarant’s relationship to the defendant; and any other factors bearing upon the reliability of the statement as issue.

Id.

70. Id. at 526.
71. Id. at 526-27.
72. Robins, 812 A.2d at 527.
73. Id.
74. Id.
enhance his image would generally lead to the opposite conclusion.\textsuperscript{75}

Justice Saylor concurred in the judgment, agreeing in total with the majority's determination that declarations against penal interest do not qualify as a firmly rooted exception to the hearsay rule under Pennsylvania law.\textsuperscript{76} Although Justice Saylor also agreed that Auman's statements failed to evince the requisite degree of reliability needed to obviate Confrontation Clause concerns, he disagreed with the majority's analysis.\textsuperscript{77} Unlike the majority, Justice Saylor concluded that Auman’s guilty plea alone sufficiently guaranteed the veracity of Auman's hearsay statements.\textsuperscript{78} Moreover, Justice Saylor found the trial court's judicious redaction of Auman's statements, expunging as they did all incriminating references to Robins, sufficiently ameliorative to withstand Confrontation Clause objections.\textsuperscript{79} Still, because the Commonwealth sought to use Auman's statements as the functional equivalent of a witness against Robins, Justice Saylor found that the Sixth Amendment’s preference for face-to-face cross-examination impeded their admission.\textsuperscript{80}

Justice Saylor next discussed the circumstances surrounding Robins' statements.\textsuperscript{81} In general, Justice Saylor agreed with the majority's use of the totality of the circumstances test,\textsuperscript{82} but he concluded that Downey’s identity as a confidant and the detective’s role as a prospective purchaser tended to authenticate Auman’s statements.\textsuperscript{83} Moreover, in contrast to the majority, Justice Saylor found Lilly inapplicable to non-custodial confessions or confessions that do not shift blame to other confederates.\textsuperscript{84}

\textsuperscript{75} Id.
\textsuperscript{76} Id. (Saylor, J., concurring).
\textsuperscript{77} Robins, 812 A.2d at 528 (Saylor, J., concurring).
\textsuperscript{78} Id. (Saylor, J., concurring).
\textsuperscript{79} Id. (Saylor, J., concurring).
\textsuperscript{80} Id. at 530 (Saylor, J., concurring).
\textsuperscript{81} Id. at 528-29 (Saylor, J., concurring).
\textsuperscript{82} Robins, 812 A.2d at 528-29 (Saylor, J., concurring).
\textsuperscript{83} Id. at 529 (Saylor, J., concurring). In reaching this conclusion, Justice Saylor relied on several cases from other jurisdictions. Id. (citing Denny v. Godmansion, 252 F.3d 896, 902-04 (7th Cir.), \textit{cert. denied}, 534 U.S. 938 (2001); United States v. Tocco, 200 F.3d 401, 416 (6th Cir. 2000); United States v. Boone, 229 F.3d 1231, 1234 (9th Cir. 2002), \textit{cert. denied}, 532 U.S. 1012 (2001); United States v. Westmoreland, 240 F.3d 618, 627-28 (7th Cir. 2001); United States v. Shea, 211 F.3d 658, 660 (1st Cir. 2000); United States v. Robbins, 197 F.3d 829, 840 (7th Cir. 1999); United States v. Barone, 114 F.3d 1284, 1302 (1st Cir. 1997); United States v. Matthews, 20 F.3d 538, 546 (2d Cir. 1994)).
\textsuperscript{84} Id. (Saylor, J., concurring) (citing United States v. Shea, 211 F.3d 658, 669 (1st Cir. 2001); and United States v. Robbins, 197 F.3d 829, 839-40 (7th Cir. 1999)).
In the next portion of his concurrence, Justice Saylor discussed the combined effect of heavy government involvement in procuring Robins' recorded hotel room statements and the records omission of facts delineating Auman's unavailability as a witness. Absent substantive evidence in the record regarding Auman's unavailability, Justice Saylor said he was incapable of determining "whether the Commonwealth acted on a good faith belief that Auman was unavailable or according to a preference for the introduction of his hearsay statements over his personal appearance before the jury at [Robins'] trial." Absent factual corroboration of Auman's unavailability, Justice Saylor would have held that the Confrontation Clause prohibited Auman's non-custodial, extrajudicial statements.

In conclusion, Justice Saylor indicated he would have preferred to remand the case to the Superior Court to determine whether the hotel room statements would have fit under the conspirator exception, an exception to which the prerequisite of unavailability is not attached. In addition, Justice Saylor would also have permitted the Superior Court to determine whether Rob-
ins' concession to Auman's unavailability was an implied waiver of Robins' Confrontation Clause challenge. 89

Justice Castille, joined by Justice Newman, dissented, raising several challenges to the majority's decision. 90 Initially, Justice Castille found no significant analytical distinction between exculpatory and inculpatory statements as they pertain to the issue of trustworthiness. 91

For the sake of argument, Justice Castille conceded that statements against penal interest did not qualify as a firmly rooted hearsay exception under Pennsylvania law. 92 Still, Justice Castille qualified the nature of his concession, expressing confidence that at some future point the United States Supreme Court might find that some self-incriminating statements made by an unavailable witness in a non-custodial setting do qualify as a firmly rooted exception to hearsay evidence. 93 Given this possibility, Justice Castille found the majority's foreclosure of the firmly rooted issue imprudent. 94

In the remaining sections of his dissent, Justice Castille quarreled with the majority's determination that the contextual circumstances surrounding Auman's declarations failed to demonstrate the requisite indicia of reliability. 95 To begin his challenge,

89. Id. (Saylor, J., concurring).
90. Id. (Castille, J., dissenting).
91. Id. at 532-33 (Castille, J., dissenting). Regarding this point, Justice Castille stated: "If the roles were reversed and [Robins] alleged to have played Auman's role in this conspiracy, and [Robins] sought to introduce Auman's confessions as proof that the Commonwealth had the wrong man, would the Court hold that Auman's confessions were unreliable . . . I think not." Id. (Castille, J., dissenting). While acknowledging that this role reversal posed no Sixth Amendment issues, Justice Castille nevertheless reasoned that "the reliability of a declaration against penal interest should not vary depending upon which party in a criminal case offers it up." Id. at 533 (Castille, J., dissenting).
92. Robins, 812 A.2d at 533 (Castille, J., dissenting). Justice Castille made clear, however, that his concession was limited to the purposes of this dissent only. Id. (Castille, J., dissenting).
93. Id. at 533-34 (Castille, J., dissenting). Justice Castille based his assumption on two United States Supreme Court cases, Lilly v. Virginia and Dutton v. Evans, each of which, he argued, left open the possibility of some exception to the general prohibition against admitting declarations against penal interest of an unavailable accomplice. Id. (Castille, J., dissenting) (citing Lilly, 527 U.S. 116, 119 (1999); Evans, 400 U.S. 74, 86-89 (1970)).
94. Id. at 534 (Castille, J., dissenting). Justice Castille expressed concern that such an inflexible holding failed to recognize the subtle relationship between what is newly planted and what is firmly rooted. Id. (Castille, J., dissenting).
95. Id. at 534-35 (Castille, J., dissenting). Justice Castille characterized this portion of the majority's opinion as a "colorful and imaginative analysis." Id. at 533 (Castille, J., dissenting). Although he did not quibble with the factors used by the majority in making its determination (see supra note 66), he did object to the majority's application of those factors. Id. (Castille, J., dissenting).
Justice Castille distinguished this case from *Lilly v. Virginia*, since *Lilly* was concerned only with collateral prejudice effectuated by statements that both exculpate the declarant and inculpate his accomplice. Justice Castille focused on the external residue of credibility supporting Auman's declarations. First, in contradistinction to the majority, Justice Castille claimed that since Auman was still attempting to peddle stolen wares, the inference was that the conspiracy was still ongoing. Second, Justice Castille asserted that the non-custodial setting itself sufficiently guaranteed the authenticity of Auman's statements. Third, rather than attempting to shift blame to a confederate, Auman made his statements pursuant to an exchange intended for his own benefit. Last, Justice Castille asserted that the temporal gap afforded Auman's statement a modicum of credibility. Specifically, Auman's follow-up conduct in the hotel room demonstrated affirmative actions internally consistent with the statement's import. That Auman showed a peculiar awareness of the inculpatory nature of his statements further demonstrated a conscious awareness entirely consistent with veracity.

Justice Castille also criticized the majority for rejecting objective facts established in the record in favor of vague, hypothesized possibilities that not only were not supported by the record, but also contradicted fundamental behavioral assumptions. Rather
than hold that the mere existence of other possibilities inexorably rendered Auman's statements inadmissible as a matter of law, Justice Castille contended that such hypothetical musings are better left for the jury to determine. Furthermore, Justice Castille argued that it defies logic to assume, as he argued the majority did, that a person is just as likely to take credit for a crime he did not commit as it is for him to take credit for a crime he did commit.

The final section of Justice Castille's dissent disputed Justice Saylor's concurrence, specifically his concerns for Auman's unavailability. Although recognizing that Robins' failure to press the unavailability of Auman had certain tactical advantages for Robins, Justice Castille dismissed the import of the issue because neither party ever disputed Auman's unavailability. As a result, Justice Castille agreed with the majority that the issue of unavailability was beyond the scope of appellate review.

Justice Eakin, in an opinion also joined by Justice Newman, dissented, finding that Auman's statement was sufficiently corroborated by the circumstance in which it was proffered. Like Justice Castille, Justice Eakin concluded that only someone intimately involved with a crime would brag about it, especially since the crime was stale and forgotten in the minds of the uninvolved. Regarding the involvement of the police in procuring Auman's declarations in the hotel room, Justice Eakin concluded
that this fact had relevance only if Auman was aware of their involvement or if the police somehow coerced the statements from him.\textsuperscript{113} Justice Eakin ended his dissent by agreeing with the majority that Auman's purported narcotics use had no relevance.\textsuperscript{114} Because Justice Eakin determined that there was no reason to find Auman's statements unreliable, he would have admitted them into evidence over Robins' Sixth Amendment challenge.\textsuperscript{115}

The United States Supreme Court's first major case involving the interplay between hearsay evidence and Confrontation Clause mandates was in \textit{Mattox v. United States}.\textsuperscript{116} In \textit{Mattox}, because both witnesses at issue were deceased at the time of trial, the trial court allowed the reporter's notes of their former testimony to be introduced into evidence.\textsuperscript{117} While recognizing the Confrontation Clause's emphasis on the right to cross-examine a witness at trial,\textsuperscript{118} the Court determined that "[t]he law . . . declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused."\textsuperscript{119} Since the testimony in question had previously been subjected to cross-examination at an earlier trial, the Court concluded that "the substance of the constitutional protection had been preserved," and therefore no Confrontation Clause violation occurred, despite the defendant's current inability to cross-examine the witnesses.\textsuperscript{120}

The Court revisited the Confrontation Clause-hearsay dilemma again, more than a half-century later, in \textit{Pointer v. State of Texas}.\textsuperscript{121} In \textit{Pointer}, a witness, Phillips, testified at a preliminary

\begin{flushleft}
\textsuperscript{113} \textit{id.} (Eakin, J., dissenting).
\textsuperscript{114} \textit{id.} (Eakin, J., dissenting).
\textsuperscript{115} \textit{id.} (Eakin, J., dissenting).
\textsuperscript{116} 156 U.S. 237, 242 (1895).
\textsuperscript{117} \textit{id.} at 238. In 1891, the defendant was convicted of murder, a charge subsequently reversed and remanded by the United States Supreme Court. \textit{id} at 239. At the subsequent trial, the defendant was again convicted of murder, and again the Supreme Court reviewed the case. \textit{id}.
\textsuperscript{118} \textit{id.} at 239. In summarizing the purpose of the Confrontation Clause, the Court stated:

The primary object of the constitutional provision in question was to prevent depositions or ex part affidavits . . . being used against the prisoner in lieu of a person examination and cross-examination of the witness, in which the 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 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.

\textit{id.} at 242-43.
\textsuperscript{119} \textit{id.} at 243.
\textsuperscript{120} \textit{id.} at 244.
\textsuperscript{121} 380 U.S. 400 (1965).
\end{flushleft}
hearing against the defendant, Pointer, who at the time was not represented by counsel.\textsuperscript{122} Prior to trial, Phillips moved to California and was therefore unable to testify at trial.\textsuperscript{123} In lieu of the witness' live testimony, the prosecution, over the defendant's objections, read the preliminary hearing testimony into evidence.\textsuperscript{124} The Texas Court of Criminal Appeals affirmed the trial court's conviction, finding no substantive constitutional violation.\textsuperscript{125} The Supreme Court granted certiorari\textsuperscript{126} and disagreed with the Texas courts.\textsuperscript{127}

In reaching its conclusion, the Court clarified the interrelation of hearsay and the Confrontation Clause in two important respects: first, finding the right to confront witnesses at trial a fundamental right, the Court made the Confrontation Clause binding on the states through the Fourteenth Amendment to the United States Constitution;\textsuperscript{128} second, the Court held that because the "statement had not been taken at a time and under circumstances affording [the defendant] through counsel an adequate opportunity to cross-examine Phillips," its admission into trial offended the Confrontation Clause.\textsuperscript{129}

Regarding the Confrontation Clause, the Court reaffirmed its belief that "a major reason underlying the constitutional confrontation rule is to give a defendant charged with a crime an opportunity to cross-examine the witnesses against him."\textsuperscript{130}

The Supreme Court again examined the interplay between the Confrontation Clause and hearsay evidence in \textit{Bruton v. United States}.\textsuperscript{131} In \textit{Bruton}, two defendants (Bruton and Evans) were

\begin{itemize}
  \item \textsuperscript{122} \textit{Id.} at 401.
  \item \textsuperscript{123} \textit{Id.}
  \item \textsuperscript{124} \textit{Id.} at 401-02. Defendant's counsel raised Confrontation Clause challenges to the admission of the preliminary hearing testimony, stating, "Your Honor, we will object to that, as it is a denial of the confrontment of the witnesses against the Defendant." \textit{Id.} at 401.
  \item \textsuperscript{125} \textit{Id.} at 402. The Texas Court of Criminal Appeals was "the highest state court to which the case could be taken." \textit{Id.}
  \item \textsuperscript{126} Certiorari is "[a] writ issued by an appellate court, at its discretion, directing a lower court to deliver the record in the case for review. The U.S. Supreme Court uses certiorari to review most of the cases that it decides to hear." \textsc{Black's Law Dictionary} 179 (7th ed. 2000).
  \item \textsuperscript{127} \textit{Pointer}, 380 U.S. at 402, 408.
  \item \textsuperscript{128} \textit{Id.} at 403. In relevant part, the Fourteenth Amendment to the United States Constitution states: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." \textsc{U.S. Const. amend. XIV, §1}.
  \item \textsuperscript{129} \textit{Id.} at 407-08.
  \item \textsuperscript{130} \textit{Id.} at 406-07.
  \item \textsuperscript{131} 391 U.S. 123 (1968).
\end{itemize}
tried jointly on charges of armed postal robbery.\textsuperscript{132} At trial, a postal inspector testified regarding two confessions made by Evans in which he admitted not only to committing the robbery, but also to having an unnamed accomplice.\textsuperscript{133} Despite the prosecution's attempt to use the confessions as substantive evidence against Bruton, the judge admonished the jury that although it could consider the confessions as evidence against Evans, they were precluded from using the confession as evidence against Bruton.\textsuperscript{134} Both defendants appealed their convictions to the Court of Appeals for the Eighth Circuit.\textsuperscript{135} Although overturning Evans' conviction,\textsuperscript{136} the court of appeals affirmed Bruton's conviction,\textsuperscript{137} finding the judge's limiting instruction to the jury sufficiently curative of any Confrontation Clause problems.\textsuperscript{138}

The Supreme Court of the United States granted certiorari to reconsider its holding in \textit{Delli Paoli v. United States},\textsuperscript{139} the case upon which the court of appeals grounded its decision.\textsuperscript{140} In \textit{Delli Paoli}, the Court held that a jury could reasonably follow a limiting instruction telling them to disregard a codefendant's extrajudicial confession which implicated the defendant.\textsuperscript{141} But the Court noted, however, that, since \textit{Delli Paoli}, it had consistently moved away from that holding.\textsuperscript{142} Following this trend, the Court concluded

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  \item \textsuperscript{132} \textit{Id.} at 124.
  \item \textsuperscript{133} \textit{Id.} In his second confession, Evans admitted to having an accomplice but stopped short of naming him. \textit{Id.}
  \item \textsuperscript{134} \textit{Id.}
  \item \textsuperscript{135} \textit{Id.}
  \item \textsuperscript{136} \textit{Bruton}, 391 U.S. at 124-25. Because the trial took place a week after the Supreme Court's ruling in \textit{Miranda v. Arizona}, the court of appeals found \textit{Miranda} applicable to the case. \textit{Id.} at 124 n.1. Since no warnings of any kind were administered prior to Evans' confessions, the court of appeals deemed the confessions inadmissible, as they pertained to Evans. \textit{Id.}
  \item \textsuperscript{137} \textit{Id.}
  \item \textsuperscript{138} \textit{Id.} at 125.
  \item \textsuperscript{139} 352 U.S. 232 (1957).
  \item \textsuperscript{140} \textit{Bruton}, 391 U.S. at 125.
  \item \textsuperscript{141} \textit{Id.} at 126 (citing \textit{Delli Paoli}, 352 U.S. at 239).
  \item \textsuperscript{142} \textit{Id.} at 126-27. In \textit{Douglas v. State of Alabama}, for example, the Court held that a defendant's inability to cross-examine a non-testifying coconspirator denied the defendant's rights accorded by the Confrontation Clause. \textit{Id.} at 127 (citing \textit{Douglas v. State of Alabama}, 380 U.S. 415, 419 (1965)). The Court concluded that while the coconspirator's refusal to answer was not testimony, it nevertheless enabled a situation in which the jury could wrongly conclude both the fact that the statement was made and that it was true. \textit{Id.} (citing \textit{Douglas}, 380 U.S. at 419). And in \textit{Jackson v. Denno}, the Court repudiated the basic premise of \textit{Delli Paoli}, regarding the voluntariness of a confession. \textit{Id.} at 128 (citing \textit{Jackson v. Denno}, 378 U.S. 368, 388 (1964)). There, the Court specifically rejected the proposition that a jury, when determining the confessor's guilt, could be relied on to ignore the confession of guilt should it find the confession involuntary. \textit{Id.} (citing \textit{Jackson}, 378 U.S. at 388-89).
\end{itemize}
that regardless of a clear limiting instruction to the jury, the potential collateral damage emanating from a non-testifying codefendant’s extrajudicial statements was too severe to go unmolested by confrontational testing.\textsuperscript{143} As the Court concluded: “The unreliability of such evidence is intolerably compounded when the alleged accomplice \ldots does not testify and cannot be tested by cross-examination.”\textsuperscript{144}

The testimony at issue in \textit{Evans v. Dutton}\textsuperscript{145} involved a purported statement made by a coconspirator to a cellmate which directly inculpated the defendant.\textsuperscript{146} Although the defendant objected, claiming the admission of the statement violated his right to confront the witness, the trial court overruled the objection, and defense counsel subsequently cross-examined the witness.\textsuperscript{147} After his conviction, the defendant appealed to the Georgia Supreme Court.\textsuperscript{148} The Georgia Supreme Court affirmed the conviction, rejecting the defendant’s Confrontation Clause challenge.\textsuperscript{149} Like the trial court, the Georgia Supreme Court upheld the introduction of the statement based on Georgia’s statutory exception to hearsay evidence for coconspirators.\textsuperscript{150} The Court of Appeals for the Fifth Circuit reversed the judgment, holding that the statement’s admission violated the defendant’s right to confront the witness.\textsuperscript{151}

The Supreme Court granted certiorari and rejected the court of appeals ruling as contrary to its Confrontation Clause jurispru-

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\item \textsuperscript{143} \textit{Bruton}, 391 U.S. at 137. As the Court indicated, “when the admissible confession of one defendant inculpates another defendant, the confession is never deleted from the case . . . [The jury] cannot determine that a confession is true insofar as it admits that A committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts.” \textit{Id.} at 131.
\item \textsuperscript{144} \textit{Id.} at 136. Despite its conclusion, the Court did not hold that “every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions . . . .” \textit{Id.} at 135.
\item \textsuperscript{145} 400 U.S. 74 (1970).
\item \textsuperscript{146} \textit{Id.} at 77-78. The statement at issue occurred after the declarant had returned from his arraignment hearing. \textit{Id.} at 77. Upon his return, his cellmate [Shaw] asked him, “How did you make out in court?” \textit{Id.} The defendant [Williams] responded: “If it hadn't been for that dirty son-of-a-bitch, Alex Evans [defendant], we wouldn't be in this now.” \textit{Id.}
\item \textsuperscript{147} \textit{Id.} at 77-78.
\item \textsuperscript{148} \textit{Id.} at 78.
\item \textsuperscript{149} \textit{Id.}
\item \textsuperscript{150} \textit{Dutton}, 400 U.S. at 78. In relevant part, the Georgia statute provides that “[a]fter the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all.” \textit{Id.} (citing GA. CODE ANN. § 38-306 (1954)).
\item \textsuperscript{151} \textit{Id.} at 76. In reaching its conclusion, the court of appeals determined that no grounds existed for Georgia’s statutory hearsay exception. \textit{Id.} at 79. In particular, the court noted that Georgia’s exception “was broader than that applicable to conspiracy trials in the federal courts.” \textit{Id.}
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Although the Court declined to equate Confrontation Clause requirements with hearsay evidentiary rules, the Court did not find the disparity between Georgia's statutory hearsay exception and the federal rule sufficient to render Georgia's statute unconstitutional. Moreover, unlike prior cases finding Confrontation Clause violations, the testimony in this case was not essential to the defendant's conviction since, among other things, a total of nineteen other witnesses, including one eyewitness, testified against the defendant. Perhaps more importantly, the Court emphasized that defendant's counsel had the opportunity to cross-examine the witness intensely about the veracity of his testimony. And last, the Court concluded that since the statements made were spontaneous and against the defendant's penal interest, they were sufficiently reliable to overcome a Confrontation Clause challenge.

In Ohio v. Roberts, the Supreme Court purported to apply a "general approach" to questions involving the interaction of the Confrontation Clause and hearsay evidence. Roberts involved the admissibility of testimony procured from a witness at a preliminary hearing but who was subsequently unavailable to testify at trial. Against a Confrontation Clause challenge by the defendant, the trial court permitted a transcript of the witness' preliminary hearing testimony to be admitted as evidence at trial. The

152. Id. at 79.
153. Id. at 86.
154. Id. at 81. Unlike the federal rule, the Georgia statute included statements made in the concealment phase of the conspiracy. Id. But as the Court stated regarding this point: "We cannot say that the evidentiary rule applied by Georgia violates the Constitution merely because it does not exactly coincide with the hearsay exception applicable in the decidedly different context of federal prosecution for the substantive offense of conspiracy." Id. at 83.
155. Dutton, 400 U.S. at 87. The Court characterized the testimony at issue as "of peripheral significance at most." Id.
156. Id.
157. Id. As the Court stated:
The hearsay rule does not prevent a witness from testifying as to what he has heard; it is rather a restriction on the proof of fact through extrajudicial statements. From the viewpoint of the Confrontation Clause, a witness under oath, subject to cross-examination, and whose demeanor can be observed by the trier of fact, is a reliable informant not only as to what he has seen but also as to what he has heard.
158. Id. at 88.
159. Id. at 89.
161. Id. at 65.
162. Id. at 59. In reaching its decision, the court relied on OHIO REV. CODE ANN. § 2945.49 (1975), which allows the use of preliminary hearing testimony of a witness unable
Court of Appeals of Ohio overturned the conviction.\textsuperscript{163} Relying on the Supreme Court’s decision in \textit{Barber v. Page},\textsuperscript{164} the court of appeals concluded that the record failed to indicate a good faith effort on the part of the state to secure the witness’s availability at trial.\textsuperscript{165} The Supreme Court of Ohio affirmed the court of appeals’ decision, holding that a cross-examination at a preliminary hearing does not afford sufficient constitutional protection to overcome Confrontation Clause concerns.\textsuperscript{166}

The United States Supreme Court granted certiorari to consider the relationship between the hearsay rule and the Confrontation Clause.\textsuperscript{167} In an opinion by Justice Blackmun, the Court presented what it characterized as a general approach to analyzing the admissibility of hearsay statements against Confrontation Clause challenge.\textsuperscript{168} In general, the Court concluded that the Confrontation Clause limits hearsay testimony in two important ways.\textsuperscript{169} First, because the Confrontation Clause exhibits a preference for direct confrontation, the Sixth Amendment establishes a rule of necessity.\textsuperscript{170} Accordingly, to satisfy this rule, the State must, at a minimum, demonstrate the unavailability of the witness whose statement it wishes to introduce.\textsuperscript{171} Second, if unavailability is properly shown, those hearsay statements marked with sufficient indicia of trustworthiness will be admitted.\textsuperscript{172} Justice Blackmun

\textsuperscript{163} \textit{Id. at 59-60.}
\textsuperscript{164} 390 U.S. 719, 722-25. In \textit{Barber}, the Court held that the reading of a witness’ preliminary hearing testimony into evidence at trial violated the defendant’s Sixth Amendment right to confront the witness, since the State failed to show that the witness was unavailable to testify at trial.” \textit{Barber}, 390 U.S. at 725-26.
\textsuperscript{165} \textit{Id. at 60.}
\textsuperscript{166} \textit{Id. at 60-61.} The Court found that the court of appeals erred regarding the witness’ availability. \textit{Id.} Unlike the witness at issue in \textit{Barber v. Page}, whose location was known to the State, the court concluded that the \textit{voir dire} sufficiently established the unavailability of the witness. \textit{Id. at 61.}
\textsuperscript{167} \textit{Id. at 62.}
\textsuperscript{168} \textit{Id. at 65-66.}
\textsuperscript{169} \textit{Id. at 65.}
\textsuperscript{170} \textit{Roberts}, 448 U.S. at 65.
\textsuperscript{171} \textit{Id.} The Court did indicate that in circumstances where the utility of direct confrontation is minimal, the State need not demonstrate unavailability. \textit{Id.} at n.7 (citing \textit{Dutton}, 400 U.S. at 91).
\textsuperscript{172} \textit{Id.} (citing Snyder v. Massachusetts, 291 U.S. 97, 107 (1934)). As the Court indicated, the thrust of the indicia of reliability requirement rests on the conclusion that “certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with” the Sixth Amendment. \textit{Id.} at 66 (citing \textit{Mattox}, 156 U.S. at 244).
indicated that such reliability "can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." Absent qualifying as a firmly rooted hearsay exception, only those statements which demonstrate a "particularized guarantee of trustworthiness" may be admitted at trial.

Applying the new test to the facts in Roberts, the Court concluded that not only had the unavailability of the witness been properly established, but also that since the witness had been cross-examined at the preliminary hearing, the witness' statements bore the requisite marks of trustworthiness to circumvent Confrontation Clause objections. This conclusion, the Court found, properly balanced the practical concerns of criminal procedure with the confrontation requirements of the Sixth Amendment.

The Supreme Court subsequently reexamined the efficacy of retraction and limiting instructions in Richardson v. Marsh, this time restricting the reach of the Court's previous holding in Bruton. The issue in Richardson was whether Bruton commands the same conclusion when a codefendant's confession is redacted to omit references to the defendant, but to which the defendant is linked by other evidence presented at trial. At trial, the confession of a codefendant was admitted into evidence after all references to the defendant, both direct and indirect, were removed. The trial judge also admonished the jury that the confession could not be used as evidence against the defendant. After her conviction, the defendant filed a writ of habeas corpus petition, alleging, in part, that admitting the codefendant's confes-

173. Roberts, 448 U.S. at 66. As the Court determined, the indicia of reliability approach is predicated on the understanding "that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with 'the substance of the constitutional protections.'" Id. (citing Mattox, 156 U.S. at 244).

174. Id.

175. Id. at 67-75.

176. Id. at 63-64.


178. Id. at 202.

179. Id.

180. Id. at 203.

181. Id. at 204-05. The first admonition was prior to the introduction of the confession at trial, and the second admonition was before jury deliberations commenced. Id. The prosecutor himself proffered a similar caveat to the jury during closing arguments. Id. at 205.

182. A writ of habeas corpus is "employed to bring a person before a court, most frequently to ensure that the party's imprisonment or detention is not illegal." BLACK'S LAW DICTIONARY 715 (7th ed. 2000).
sion at trial violated her right to confront a witness against her.\textsuperscript{183} The district court denied the request,\textsuperscript{184} but the Court of Appeals for the Sixth Circuit reversed the decision.\textsuperscript{185} According to the court of appeals, a Bruton-type assessment of confessions made by a non-testifying codefendant required a determination of the inculpatory value of the confession, both on its face and in light of other evidence presented at trial.\textsuperscript{186} Because, as the court concluded, the codefendant's confession was the only direct evidence against the defendant, it "was powerfully incriminating to [the defendant] with respect to the critical element of intent,"\textsuperscript{187} and its use at trial therefore eviscerated the defendant's Confrontation Clause rights.\textsuperscript{188} The United States Supreme Court granted certiorari to resolve conflicts among the federal circuits on this issue.\textsuperscript{189}

Writing for the majority, Justice Scalia distinguished Marsh from Bruton, because, unlike the confession in Bruton, the confession in Marsh did not directly implicate the defendant in the crime.\textsuperscript{190} As such, Justice Scalia concluded that the Bruton Court's concern with collateral prejudice was not implicated when a defendant is only indirectly inculpated.\textsuperscript{191} Accordingly, Justice Scalia found that the twin pillars of a limiting jury instruction and of redaction provided sufficient Sixth Amendment protection, since a jury is more likely to obey such an instruction when there is only an inferential inculpatory connection between the confessor and the defendant.\textsuperscript{192} As a result, Justice Scalia ruled that there was no need to extend the Bruton rule to a case where a codefendant's

\begin{footnotes}
\item 183. Richardson, 481 U.S. at 205.
\item 184. Id.
\item 185. Id.
\item 186. Id. at 205-06.
\item 187. Id. at 206 (quoting Richardson v. Marsh, 781 F.2d 1201, 1213 (6th Cir. 1986)).
\item 188. Richardson, 481 U.S. at 206.
\item 189. Id.
\item 190. Id. at 208. As Justice Scalia pointed out: "[I]n this case the confession was not incriminating on its face, and became so only when linked with evidence introduced later at trial." Id.
\item 191. Id. In its decision, the court of appeals specifically noted that other appellate courts had "declined to adopt the 'evidentiary linkage' or 'contextual implication' approach to Bruton questions." Id. at 206.
\item 192. Id. at 208-09. Justice Scalia predicated his conclusion on the grounds that the law assumes "that jurors follow their instructions." Id. at 206. Regarding jury instructions, Justice Scalia also said, "the rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process." Id. at 211.
\end{footnotes}
confession is redacted to remove all references to the defendant, and it is also accompanied by a carefully crafted limiting instruction to the jury.\textsuperscript{193}

The Court again applied Roberts' general approach in Idaho v. Wright.\textsuperscript{194} Wright involved the admissibility of an extrajudicial statement made by a three year old in response to questions posed by her doctor about alleged child abuse.\textsuperscript{195} Despite the defendants' objections to the contrary, the trial court, pursuant to Idaho's residual hearsay exception, allowed the doctor to testify regarding the child's statements.\textsuperscript{196} On appeal to the Idaho Supreme Court, one defendant contended that the admission of the doctor's testimony regarding the child's statements violated her Confrontation Clause rights.\textsuperscript{197} The Idaho Supreme Court accepted this contention and reversed the conviction.\textsuperscript{198} In so doing, the court concluded that the trial court erred in admitting the incriminating hearsay testimony of the child, since such testimony was not a recognized exception to hearsay evidence, based, as they were, on an interview devoid of significant procedural safeguards.\textsuperscript{199} The court further concluded that because the interview was conducted by someone with preconceived notions about what information should be disclosed, the statements also lacked the specific guarantees of credibility necessary to satisfy the Confrontation Clause.\textsuperscript{200}

The United States Supreme Court granted certiorari, and although ultimately rejecting the Idaho Supreme Court's ration-
the Court, in an opinion authored by Justice O'Connor, affirmed the decision. In reaching its conclusion, the Court employed Roberts' general approach. Justice O'Connor agreed that, for the purposes of this case, the witness was unavailable. Moreover, Justice O'Connor concluded that Idaho's residual hearsay rule was not a firmly rooted exception to hearsay evidence, because, as she stated, such statements "do not share the same tradition of reliability that supports the admissibility of statements under a firmly rooted hearsay exception." Turning to the question of whether the hearsay statements were marked by sufficient indicia of reliability, Justice O'Connor concluded that such a determination must be made by looking at the totality of the circumstances surrounding the statements in an effort to assess whether the declarant was likely to be telling the truth. Given the context in which the child's statements were made, including the doctor's leading questioning and his preconceived notions about what he wanted to hear, Justice O'Connor found that the statements were insufficiently credible to overcome Confrontation Clause mandates.

201. Id. at 813, 818. As the Court stated: "[W]e reject the apparently dispositive weight placed by that court on the lack of procedural safeguards at the interview . . . . [W]e do not believe the Constitution imposes a fixed set of procedural prerequisites to the admission of such statements at trial." Id. Thus, the Court concluded: "[W]e decline to read into the Confrontation Clause a preconceived and artificial litmus test for the procedural propriety of professional interviews in which children make hearsay statements against a defendant." Id. at 819.

202. Id.

203. Id. at 815.

204. Wright, 497 U.S. at 816. As Justice O'Connor indicated, both the trial court and defense counsel agreed that the witness "was incapable of communicating with the jury." Id.

205. Id. at 817. According to the Court, "[a]dmission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements." Id.

206. Id. at 820.

207. Id. at 826. The Court also rejected the State's argument that corroborating evidence external to the statements rendered the statements inherently reliable. Id. at 822. As Justice O'Connor concluded:

[The use of corroborating evidence to support a hearsay statement's 'particularized guarantee of trustworthiness' would permit the admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility.]

Id. at 823.
The U.S. Supreme Court also revisited the Roberts availability requirement in *United States v. Inadi*.\(^{208}\) The issue before the Court was whether the Confrontation Clause required a showing of unavailability before statements made by a coconspirator could be admitted at trial.\(^{209}\) Over the objections of the defendant,\(^{210}\) the trial court admitted tape recorded statements of various calls made among a number of conspirators, many of whom did not testify at trial.\(^{211}\) The trial court reasoned that since the statements were made in furtherance of a conspiracy, they were admissible under Federal Rule of Evidence 801(d)(2)(E).\(^{212}\)

On appeal, the Court of Appeals for the Third Circuit reversed the conviction.\(^{213}\) Although agreeing that Rule 801(d)(2)(E) had been satisfied, the court ruled that the Confrontation Clause mandated a showing of unavailability prior to the admission of extrajudicial statements.\(^{214}\)

The U.S. Supreme Court granted certiorari to determine whether a showing of unavailability was a constitutionally mandated condition precedent to statements made by a coconspirator.\(^{215}\) Writing for the majority, Justice Powell concluded that a showing of a witness' unavailability was not constitutionally required.\(^{216}\) In reaching this conclusion, the Court narrowed the rule of necessity first articulated in *Roberts*, limiting the rule of necessity to cases involving prior testimony.\(^{217}\) Although not without merit, Justice Powell concluded that the burdens imposed by the

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209. Id. at 388.
210. Id. at 390. The defendant proffered two objections. *Id.* First, the defendant argued that the statements at issue were not made in furtherance of the conspiracy and thus failed Federal Rule of Evidence 801(d)(2)(E), which excludes from hearsay "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." *Id.* at n.1. (citing FED. R. EVID. 801(d)(2)(E)). Concomitantly, defendant also argued that without a showing that the declarant was unavailable, the statements were inadmissible against the Confrontation Clause. *Id.*

211. Id.
212. Id. at 390 (citing FED. R. EVID. 801(d)(2)(E)). *See supra* note 18.
213. *Inadi*, 475 U.S. at 391.
214. *Id.* The Court of Appeals relied on the Supreme Court's decision in *Ohio v. Roberts*, which it claimed made a showing of unavailability a constitutional requirement. *Id.* (citing United States v. Inadi, 748 F.2d 812, 818 (3d Cir. 1984)).

215. *Id.*
216. *Id.* at 400.
217. *Id.* at 392-93. Justice Powell concluded that even the Roberts' Court never intended its decision to be a blueprint for determining hearsay evidence questions. *Id.* at 392 (citing *Roberts*, 448 U.S. at 64-65). Moreover, Justice Powell said that a rigid rule of necessity would necessarily preclude all extrajudicial statements, a conclusion he argued the Confrontation Clause did not anticipate. *Id.* at 392.
rule of necessity were outweighed by the potential benefits of statements given by coconspirators. Following this logic, the Court affirmed the use of coconspirator statements and rejected imposing a blanket requirement of unavailability prior to their admission.

Lee v. Illinois was a joint trial of codefendants charged with double murder. Importantly, confessions by both defendants were central to both the prosecution and the defendants' cases. In convicting the defendants, however, the trial judge relied on one of the confessions to the exclusion of the other.

On appeal, Lee contended that the trial judge's use of her codefendant's confession as evidence against her violated her Confrontation Clause rights, and that her conviction should therefore be overturned. While agreeing that the trial judge had used the codefendant's confession as evidence against her, the court of appeals denied that defendant's rights under the Confrontation Clause were violated, since, as it concluded, the confessions were interlocking. The Illinois Supreme Court denied the defendant's appeal. The United States Supreme Court granted certiorari to decide whether the trial judge's use of a codefendant's confession as evidence against the defendant did indeed offend the Confrontation Clause.

In holding that defendant's rights under the Confrontation Clause were violated, the Court analogized this case to Douglas v. Alabama, in which the Court held that the inability to confront an accomplice's alleged confession violated the defendant's rights under the Confrontation Clause. For the Court, the violations in

218. Inadi, 475 U.S. at 397-99. As the Court stated: "A rule that required each invocation of Rule 801(d)(2)(E) to be accompanied by a decision on the declarant's availability would impose a substantial burden on the entire criminal justice system." Id. at 399.
219. Id. at 400.
221. Id. at 531. Neither defendant testified at trial. Id.
222. Id. at 536.
223. Id. at 538.
224. Id.
225. Lee, 476 U.S. at 538. Although finding that the confessions were interlocking, the court of appeals provided no working definition of what interlocking confessions meant. Id. at 538-39. Instead, the court simply held that interlocking confessions did not fall within the Bruton rule, which it said proscribed the use at trial of a codefendant's confession when it implicated the defendant in criminal activity. Id.
226. Id. at 539.
227. Id.
this case were even more egregious, since they stood in contradis-
tinction to the very purpose of the Confrontation Clause. The Court also determined that the confession at issue lacked the requisite indicia of truthfulness to overcome the strong presumption against the reliability accorded coconspirator confessions when used against a defendant. Because the confession was elicited by the police, who knew exactly what they wanted to hear, and because the declarant had ample reason to distort the facts to the defendant’s detriment, the confession was not sufficiently reliable to overcome a Confrontation Clause challenge. That the two confessions significantly overlapped regarding important details was inconsequential, for the points on which they diverged were central to a determination of the defendant’s guilt or innocence. And since the inculpatory confession was unreliable, its use without the defendant’s ability to cross-examine the declarant ran afoul of the Confrontation Clause preference for face-to-face con-
frontation.

In Bourjaily v. United States, the United States Supreme Court further restricted Roberts, holding that an inquiry into indi-
cia reliability was not constitutionally mandated. At trial, the judge admitted tape recorded statements of a non-testifying cocon-
spirator into evidence, despite the defendant’s Confrontation Clause challenge. The trial judge grounded his decision on Fed-
eral Rule of Evidence 801(d)(2)(E), concluding that since the re-
corded statements were made in furtherance of an ongoing con-
spiracy, they were not hearsay, and therefore they were admissi-
ble. The United States Court of Appeals for the Sixth Circuit agreed with the trial court’s admissibility determination and re-
jected defendant’s Confrontation Clause challenge. In affirming

230. Id. at 543. As the Court put it: “The danger against which the Confrontation Clause was erected—the conviction of a defendant based, at least in part, on presumptively unreliable evidence—actually occurred. Id.
231. Id.
232. Id. at 544-45.
233. Id. at 546. According to the Court, the confessions diverged on defendant’s in-
volveinent in the planning of the one murder and her facilitation of the other murder, fac-
tors the Court refused to deem inconsequential. Id.
234. Lee, 476 U.S. at 546. Although reversing the judgment, the Court did not foreclose the possibility that the harm done by the admission was harmless; thus, the Court re-
manded the matter for further consideration on this point. Id. at 547.
236. Id. at 182.
237. Id. at 174.
238. Id. See supra note 18.
239. Id.
the trial court's decision, the court of appeals held that the requirements for admissibility under Rule 801(d)(2)(E) automatically satisfied Confrontation Clause mandates.\(^{240}\)

The Supreme Court granted certiorari to examine whether an independent inquiry into the reliability of extrajudicial statements is constitutionally required.\(^{241}\) Relying on the Court's own analysis in Roberts, Chief Justice Rehnquist concluded that no independent inquiry need be undertaken if out-of-court statements made by the non-testifying coconspirator qualify as a firmly rooted exception to the hearsay evidence rule.\(^{242}\) Finding that the coconspirator exception to hearsay evidence was firmly rooted in its jurisprudence, the Chief Justice concluded that no separate inquiry into reliability was necessary, since the statements made by the coconspirator were made in furtherance of an ongoing conspiracy.\(^{243}\)

The Court's most recent Confrontation Clause analysis came in Lilly v. Virginia.\(^{244}\) In Lilly, the Court once again addressed the relationship between the Confrontation Clause and hearsay evidence, only this time in the context of extrajudicial statements against penal interest made by a non-testifying witness that implicated the defendant.\(^{245}\) In this case, Mark Lilly, the declarant, gave two recorded statements to the police.\(^{246}\) Although Mark's statements implicated all three men in the alleged crime-spree, by shifting the blame from Mark to his brother, Benjamin, Mark's statements also tended to militate against his specific involvement in the murder of DeFilippis.\(^{247}\) At trial, Mark invoked his Fifth Amendment right against self-incrimination.\(^{248}\) The state then sought to introduce Mark's tape recorded statements, contending

\(^{240}\) Bourjaily, 483 U.S. at 182.

\(^{241}\) Id. at 173.

\(^{242}\) Id. at 183.

\(^{243}\) Id. at 183-84.

\(^{244}\) 527 U.S. 116 (1990).

\(^{245}\) Id. at 120. According to the police, three men, Mark Lilly, his brother Benjamin Lee Lilly, and his roommate Gary Wayne Barker, committed a series of crimes in a two-day long crime spree. Id. On December 4, 1995, the three men "broke into a home and stole nine bottles of liquor, three loaded guns, and a safe." Id. On the following day, "the men drank the stolen liquor, robbed a small country store, and shot at geese with their stolen weapons. After their car broke down, they abducted Alex DeFilippis and used his vehicle to drive to a deserted location. One of them shot and killed DeFilippis." Id. Moreover, before their arrest on the evening of December 5, 1995, the three men committed two additional robberies. Id.

\(^{246}\) Id. at 121.

\(^{247}\) Id. Although admitting some involvement in the burglary, Mark distanced himself from the murder, saying he "didn't have nothing to do with the shooting." Id. Barker also told police that Benjamin Lee Lilly "masterminded the robberies and was the one who had killed DeFilippis." Id. at 120-21.

\(^{248}\) Id. at 121.
that because they were the statements against the penal interest of an unavailable witness, they were admissible against both hearsay and Confrontation Clause objections.\textsuperscript{249} Benjamin Lilly objected, arguing not only that statements which tend to shift blame are not statements against penal interest, but also that their admission violated his Confrontation Clause right to cross-examination.\textsuperscript{260} Over the objection, the trial judge admitted both the tape recorded statements and written transcripts of the recordings in full; the jury subsequently convicted Benjamin, recommending the death sentence for capital murder.\textsuperscript{251}

The Virginia Supreme Court concurred with the trial court’s decision and affirmed the defendant’s conviction.\textsuperscript{252} The court concluded that, as statements against penal interest, they qualified as an exception to hearsay evidence under Virginia law.\textsuperscript{253} Moreover, the court rejected the defendant’s Confrontation Clause challenge, since it concluded that the statements qualified as a firmly rooted exception to hearsay evidence.\textsuperscript{254} And even though the statements shifted some blame to the defendant, the court ruled that such mitigating circumstances were relevant only to the import a jury could afford them and not to their admissibility.\textsuperscript{255}

The United States Supreme Court granted certiorari to determine whether the Virginia Supreme Court’s decision was in accord with its Confrontation Clause jurisprudence.\textsuperscript{256} A plurality of the Court disagreed with the Supreme Court of Virginia’s conclusion and reversed the decision.\textsuperscript{257} The plurality’s analysis, penned by

\begin{itemize}
\item \textsuperscript{249} Lilly, 527 U.S. at 121.
\item \textsuperscript{250} Id. at 121-22.
\item \textsuperscript{251} Id. at 122. Heeding the jury’s recommendation, the court imposed the death sentence on Benjamin. Id. The jury also found Benjamin Lilly guilty of “robbery, abduction, carjacking, possession of a firearm by a felon, and four charges of illegal use of a firearm, for which offenses he received consecutive prison sentences of two life terms plus 27 years.” Id.
\item \textsuperscript{252} Id.
\item \textsuperscript{253} Id. Important to the court’s reasoning on this point was the fact that other evidence admitted at trial buttressed the reliability of Mark’s out-of-court statements. Id.
\item \textsuperscript{254} Lilly, 527 U.S. at 122. Relying on the United States Supreme Court’s decision in White v. Illinois, the Virginia Supreme Court concluded that hearsay statements supported by sufficient indicia of reliability were a firmly rooted exception to the hearsay rule forcibly satisfying Confrontation Clause mandates. Id. Thus, the court concluded: “[A]dmissibility into evidence of the statement against penal interest of an unavailable witness is a ‘firmly rooted’ exception to the hearsay rule in Virginia.” Id.
\item \textsuperscript{255} Id. at 122-23.
\item \textsuperscript{256} Id. at 123.
\item \textsuperscript{257} Id. at 140. The decision produced a fractured opinion in which “Justice Stevens announced the judgment of the Court and delivered the opinion of the Court with respect to Parts, I, II, and VI, and an opinion with respect to Parts III, IV, and V in which Justice Souter, Justice Ginsberg, and Justice Breyer join[ed].” Id. at 120. Justice Scalia joined
\end{itemize}
Justice Stevens, began by recognizing that the question of whether statements are against penal interest is a matter of state law. But despite this concession, Justice Stevens made clear that the question of whether a statement falls within a firmly rooted exception hearsay exception is a matter of federal law. Accordingly, Justice Stevens next turned to a determination of whether statements against penal interest qualify as a firmly rooted exception to hearsay evidence. Based on past precedent, Justice Stevens opined that declarations against penal interest was too broad a category for meaningful Confrontation Clause analysis. Given that, Justice Stevens focused on narrower category of evidence against penal interest which attempts to establish the guilt of an accomplice. Unlike other exceptions to hearsay evidence, Justice Stevens noted that incriminating confessions made by a coconspirator were “of quite recent vintage.” Moreover, Justice Stevens added that the Court had previously determined that against penal interest statements were presumptively unreliable, at least with respect to the non-self-inculpatory portions. As a result, Justice Stevens concluded that inculpatory confessions made by an accomplice against a defendant failed to qualify as a firmly rooted exception to the hearsay rule.

Having declared such statements beyond the purview of a hearsay exception, Justice Stevens turned to whether the statements
were inherently reliable. Rejecting the state's argument that appellate court should defer to the lower court's assessment of reliability, Justice Stevens said that an appellate court should undertake a separate review of the circumstances in which the statements were made. In undertaking this analysis, Justice Stevens rejected each argument proffered by the state in support of reliability. As Justice Stevens concluded: "neither the words that [Mark] spoke nor the setting in which he was questioned provides any basis for concluding that his comment regarding [Benjamin's] guilt were so reliable that there was no need to subject them to adversarial testing in a trial setting."

Although concurring in the judgment, Justice Rehnquist rejected the plurality's steadfast ruling that statements against penal interest necessarily fall outside a firmly rooted exception to the hearsay rule. Chief Justice Rehnquist also criticized the breadth of the plurality's holding prohibiting the state's use of an accomplice's incriminating statements against a defendant. Accordingly, the Chief Justice would have held that a custodial confession shifting sole blame on a defendant is not a firmly rooted exception to the hearsay rule. But he left open the question of whether statements that both inculpate the coconspirator and shift some of the blame satisfied the firm rooting test.

The Pennsylvania Supreme Court's ruling in Commonwealth v. Robbins is another important step in the ongoing delineation of

266. Id. at 135.
267. Id. at 136-37.
268. Id. at 137-39. Justice Stevens rejected that argument that hearsay statements are made reliable when corroborated by other evidence introduced at trial. Id. at 137-38. As Justice Stevens stated: "To be admissible under the Confrontation Clause . . . hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not be reference to other evidence at trial." Id. at 138 (quoting Wright, 497 U.S. at 822). Moreover, Justice Stevens rejected the argument that the administration of Miranda rights provided contextual support for reliability. Id. at 139. Justice Stevens also determined that the declarant's conscious knowledge of his self-incrimination only restated the fact that the statements were contrary to his penal interest.

269. Lilly, 527 U.S. at 139. Given that Mark was in police custody for the crimes charged, that he was aware of the seriousness of the charged crimes, and that he was responding to leading questions totally devoid of adversarial testing, Justice Stevens concluded that "Mark had a natural motive to attempt to exculpate himself as much as possible." Id.
270. Id. at 145 (Rehnquist, C.J., concurring).
271. Id. at 147-48. As the Chief Justice said, the plurality's blanket ban "sweeps beyond the facts of this case and our precedent . . . ." Id. at 148 (Rehnquist, C.J., concurring).
272. Id. at 148 (Rehnquist, C.J., concurring).
273. Id. (Rehnquist, C.J., concurring).
Confrontation Clause jurisprudence. Although far from bringing analytical closure to this somewhat enigmatic terrain, at bottom the ruling confirms that the Confrontation Clause and hearsay evidence are not coextensive, and that the Confrontation Clause remains a real and robust Sixth Amendment requirement, one standing over and against evidentiary rules. And while Robins does not finally suture the exegetical nexus between the Confrontation Clause and hearsay evidence, it does further delimit the outer reaches of the two concepts, the penumbral point at which their seemingly intractable synergy wanes and they become separate and distinct entities, concepts with sometimes similar pursuits but often dissimilar applications. A contrary ruling would have further conflated the two concepts, ostensibly leaving the reliability of testimony their shared and singular goal. But Robins ensures that, at least in Pennsylvania, the Confrontation Clause retains both procedural and substantive aspects.274 In other words, the right to confront an adverse witness, to cross-examine him or her robustly, remains inextricably intertwined with jurisprudential notions of fair process, a procedural right to be contravened only under extreme circumstances, such as witness unavailability or statements marked with sufficient indicia of reliability, where the perceived procedural harm is infinitesimally small when compared to the greater demands of justice. What's more, Robins also ensures that the Confrontation Clause continues to serve as a substantive right, a conduit for testimonial credibility, a threshold of reliability through which testimony must pass in order to become viable. And even though considerable overlap between the Confrontation Clause and hearsay evidence still exists, Robins suggests that the substance of the testimony, its possible veracity, though important, is not dispositive, for it remains the province of adversarial procedure to determine the validity of inculpatory statements proffered by a non-testifying coconspirator.275

274. See Blumenthal, Jeremy, Reading the Text of the Confrontation Clause: "To Be" or not "To Be"?, 3 U. PA. J. CONST. L, 722, 729-34 (2001). Although Blumenthal does not necessarily agree that such a bifurcated explication of the Confrontation Clause is historically valid, he does recognize that such an understanding has predominated in American jurisprudence. Id.

275. The effects of recognizing this Robins dichotomy are far-reaching, given the different standards of appellate review for evidentiary questions and constitutional questions. By keeping the two hemispheres separate and distinct, a defendant can better preserve his appellate rights, since Confrontation Clause issues, as issues of law, permit a broader, plenary review upon appeal.
Beyond recognizing an important dichotomy between the Confrontation Clause and hearsay evidentiary rules, Robins also reaffirms a fundamental aspect of federalism, namely, that state courts retain control over determining what is and what is not a firmly rooted exception to the hearsay evidence rule. In particular, Justice Cappy made clear that statements against penal interest are not sufficiently ensconced within the ambit of a recognized exception to the hearsay evidence rule to circumvent the prophylactic dictates of the Confrontation Clause. As such, disqualified from hearsay protection, statements against penal interest made by a non-testifying witness must therefore conform to the procedural and substantive demands of Confrontation Clause jurisprudence. Failure to do so renders them invalid, frustrating their admission at trial. Whether this forever remains purely within the purview of state jurisprudence is, of course, unknowable, but for now at least there remains an important distinction between the scope of firmly rooted hearsay evidence, a federal question, and precisely what constitutes firm rooting, a state question.

Robins also appears to foreclose a continued expansion of Bruton-type redactions, squarely limiting such redactions to the confines of a joint trial. In short, while eliding all potentially inculpatory references to a codefendant, whether direct or indirect, may suffice in the context of a joint trial, such erasures do not effectuate adequate protection in a trial against a single defendant. In a case against a single defendant, a non-testifying co-conspirator's redacted statements present two important and interrelated problems. First, the admission of such statements contravenes the Confrontation Clause's purported protection against collateral prejudice. Where there is only one defendant on trial, the very fact that the statement is admitted unduly prejudices the defendant, since the defendant necessarily serves as the only logical foil against which the evidence can rebound. Second, the trial


277. Regarding this point, Justice Cappy stated: "(Robins) is not concerned with the effectiveness of limiting instructions and the prevention of spillover prejudice to a defendant when his codefendant's confession is admitted against the codefendant at a joint trial." Robins, 812 A.2d at 521 (emphasis added).
of a single defendant perforce throws the against penal interest nature of a non-testifying co-conspirator's statements into question, because in such a setting the against penal aspect of the statements vanishes, since the statement is no longer against the declarant's penal interest; rather, the inculpatory statements become substantive evidence of the defendant's guilt. And as substantive trial evidence, such statements must circumnavigate the Confrontation Clause's preference for adversarial testing to be valid. An alternative ruling would potentially open up a proverbial Pandora's Box of accomplice testimony, allowing for myriad abuses. Without some reasonable limitations on the admission of a non-testifying coconspirator's statements, a defendant lies prostrate before the court, a potential target for any begrudged accuser. Accordingly, the only protection against abuse is the prosecution's ethical duty to ferret out specious, vindictive, and uncorroborated claims inculpating the accused. And although in many, if not most, instances this might suffice, the majority's ruling in Robins demonstrates a clear preference for the alternative safeguards afforded by the Confrontation Clause. For, as the holding in Robins suggests, it is ultimately the Constitution, and not the State, which instantiates certain fundamental rights meant to curb such potential abuse.

To this extent, then, Robins appears to place real obstacles in the path of the prosecution's use of co-conspirator testimony. After Robins, the mere fact that an accomplice's own statements, or confession, either directly or indirectly implicate a co-conspirator is certainly not enough. As the Robins' court found, the manner in which such a confession or declaration is obtained, as well as the characteristics and context of the statement itself, are crucial to its potential use at trial. And in determining that the admission of extrajudicial, non-custodial statements of a non-testifying coconspirator contravenes the Confrontation Clause, the majority emphasized the need for prosecutors to take some prophylactic steps in advance to ensure that potential testimonial evidence satisfies the enlivened strictures of the Sixth Amendment. Just how prosecutors might refashion their approach to accomplice-declarants is yet to be determined. But at a minimum, Robins suggests that prosecutors should pay close attention to whether the accomplice-declarant is available for trial. And if he or she is not, prosecutors should take steps either to alleviate such unavailability, perhaps through immunity agreement or the like, or adumbrate before the court as to why an accomplice-declarant,
whose testimony is integral to the state’s case, is unavailable to testify at trial. Short of this, the Sixth Amendment, at least in Pennsylvania, will stand as an insurmountable obstacle to the admission of such untested testimony.

David H. Cook