SUPREME COURT OF THE UNITED STATES

No. 98–5881

BENJAMIN LEE LILLY, PETITIONER *v.* VIRGINIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

[June 10, 1999]

CHIEF JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR and JUSTICE KENNEDY join, concurring in the judgment.

The plurality today concludes that all accomplice confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule under *Ohio* v. *Roberts*, 448 U. S. 56 (1980). See *ante*, at 16. It also concludes that appellate courts should independently review the government's proffered guarantees of trustworthiness under the second half of the *Roberts* inquiry. See *ante*, at 17. I disagree with both of these conclusions, but concur in the judgment reversing the decision of the Supreme Court of Virginia.

I

The plurality correctly states the issue in this case in the opening sentence of its opinion: Whether petitioner's Confrontation Clause rights were violated by admission of an accomplice's confession "that contained some statements against the accomplice's penal interest and others that inculpated the accused." *Ante*, at 1. The confession of the accomplice, Mark Lilly, covers 50 pages in the Joint Appendix, and the interviews themselves lasted about an hour. The statements of Mark Lilly which are against his penal interest– and would probably show him as an aider and abettor– are quite separate in time and place from

other statements exculpating Mark and incriminating his brother, petitioner Benjamin Lilly, in the murder of Alexis DeFilippis.[1]

Thus one is at a loss to know why so much of the plurality's opinion is devoted to whether a declaration against penal interest is a "firmly rooted exception" to the hearsay rule under *Ohio* v. *Roberts*, *supra*. Certainly, we must accept the Virginia court's determination that Mark's statements as a whole were declarations against penal interest for purposes of the Commonwealth's hearsay rule. See *ante*, at 6. Simply labeling a confession a "declaration against penal interest," however, is insufficient for purposes of *Roberts*, as this exception "defines too large a class for meaningful Confrontation Clause analysis." *Lee* v. *Illinois*, 476 U. S. 530, 544, n. 5 (1986). The plurality tries its hand at systematizing this class, see *ante*, at 8, but most of its housecleaning is unwarranted and results in a complete ban on the government's use of accomplice confessions that inculpate a codefendant. Such a categorical holding has no place in this case because the relevant portions of Mark Lilly's confession were simply not "declarations against penal interest" as that term is understood

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[1]Mark identifies Ben as the one who murdered Alexis DeFilippis in the following colloquy:

"M. L. I don't know, you know, dude shoots him.

"G. P. When you say 'dude shoots him' which one are you calling a dude here?

"M. L. Well, Ben shoots him.

"G. P. Talking about your brother, what did he shoot him with?

"M. L. Pistol.

"G. P. How many times did he shoot him?

"M. L I heard a couple of shots go off, I don't know how many times he hit him." App. 258.

A similar colloquy occurred in the second interview. See *id.*, at 312–313.

in the law of evidence. There may be close cases where the declaration against penal interest portion is closely tied in with the portion incriminating the defendant, see 2 J. Strong, McCormick on Evidence §319 (4th ed. 1992), but this is not one of them. Mark Lilly's statements inculpating his brother in the murder of DeFilippis are not in the least against Mark's penal interest.

This case therefore does not raise the question whether the Confrontation Clause permits the admission of a genuinely self-inculpatory statement that also inculpates a codefendant, and our precedent does not compel the broad holding suggested by the plurality today. Cf. *Williamson* v. *United States*, 512 U. S. 594, 618–619 (1994) (KENNEDY, J. concurring) (explaining and providing examples of self-serving and more neutral declarations against penal interest). Indeed, several Courts of Appeals have admitted custodial confessions that equally inculpate both the declarant and the defendant,[2] and I see no reason for us to preclude consideration of these or similar statements as satisfying a firmly rooted hearsay exception under *Roberts*.

Not only were the incriminating portions of Mark Lilly's confession not a declaration against penal interest, but these statements were part of a custodial confession of the sort that this Court has viewed with "special suspicion" given a codefendant's "strong motivation to implicate the defendant and to exonerate himself." *Lee*, *supra*, at 541 (citations omitted). Each of the cases cited by the plurality

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[2] See, *e.g.*, *United States* v. *Keltner*, 147 F. 3d 662, 670 (CA8 1998) (statement "clearly subjected" declarant to criminal liability for "activity in which [he] participated and was planning to participate with . . . both defendants"); *Earnest* v. *Dorsey*, 87 F. 3d 1123, 1134 (CA10 1996) ("entire statement inculpated both [defendant] and [declarant] equally" and "neither [attempted] to shift blame to his co-conspirators nor to curry favor from the police or prosecutor").

to support its broad conclusion involved accusatory statements taken by law enforcement personnel with a view to prosecution. See *Douglas* v. *Alabama*, 380 U. S. 415, 416–417 (1965); *Lee*, *supra*, 532–536; cf. *Bruton* v. *United States*, 391 U. S. 123, 124–125 (1968); *Williamson*, *supra*, at 596–597. These cases did not turn solely on the fact that the challenged statement inculpated the defendant, but were instead grounded in the Court's suspicion of untested custodial confessions. See, *e.g.*, *Lee*, *supra*, at 544–545. The plurality describes *Dutton* v. *Evans*, 400 U. S. 74 (1970), as an "exception" to this line of cases, *ante*, at 14, n. 2, but that case involved an accomplice's statement to a fellow prisoner, see 400 U. S., at 77–78, not a custodial confession.

The Court in *Dutton* held that the admission of an accomplice's statement to a fellow inmate did not violate the Confrontation Clause under the facts of that case, see *id.*, at 86–89, and I see no reason to foreclose the possibility that such statements, even those that inculpate a codefendant, may fall under a firmly rooted hearsay exception. The Court in *Dutton* recognized that statements to fellow prisoners, like confessions to family members or friends, bear sufficient indicia of reliability to be placed before a jury without confrontation of the declarant. *Id.*, at 89. Several federal courts have similarly concluded that such statements fall under a firmly rooted hearsay exception.[3] *Dutton* is thus no "exception," but a case wholly outside

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[3] See, *e.g.*, *United States* v. *York*, 933 F. 2d 1343, 1362–1364 (CA7 1991) (finding federal declaration against penal interest exception firmly rooted in case involving accomplice's statements made to two associates); *United States* v. *Seeley*, 892 F. 2d 1, 2 (CA1 1989) (exception firmly rooted in case involving statements made to declarant's girlfriend and stepfather); *United States* v. *Katsougrakis*, 715 F. 2d 769, 776 (CA2 1983) (no violation in admitting accomplice's statements to friend).

the "unbroken line" of cases, see *ante*, at 14, n. 2, in which custodial confessions laying blame on a codefendant have been found to violate the Confrontation Clause. The custodial confession in this case falls under the coverage of this latter set of cases, and I would not extend the holding here any further.

The plurality's blanket ban on the government's use of accomplice statements that incriminate a defendant thus sweeps beyond the facts of this case and our precedent, ignoring both the exculpatory nature of Mark's confession and the circumstances in which it was given. Unlike the plurality, I would limit our holding here to the case at hand, and decide only that the Mark Lilly's custodial confession laying sole responsibility on petitioner cannot satisfy a firmly rooted hearsay exception.

II

Nor do I see any reason to do more than reverse the decision of the Supreme Court of Virginia and remand the case for the Commonwealth to demonstrate that Mark's confession bears "particularized guarantees of trustworthiness" under *Roberts*. The Supreme Court of Virginia held only that Mark Lilly's confession was admissible under a state law exception to its hearsay rules and then held that this exception was firmly rooted for Confrontation Clause purposes. See 255 Va. 558, 573–574, 499 S. E. 2d 522, 533–534 (1998). Neither that court nor the trial court analyzed the confession under the second prong of the *Roberts* inquiry, and the discussion of reliability cited by the Court, see *ante*, at 4, 16, pertained only to whether the confession should be admitted under state hearsay rules, not under the Confrontation Clause. Following our normal course, I see no reason for this Court to reach an issue upon which the lower courts did not pass. See *National College Athletic Assn.* v. *Smith*, 525 U. S. __, ___ (1999) (slip op., at 10) ("[W]e do not decide in the first

instance issues not decided below"). Thus, both this issue and the harmless-error question should be sent back to the Virginia courts. See *ante*, at 20.

The lack of any reviewable decision in this case makes especially troubling the plurality's conclusion that appellate courts must independently review a lower court's determination that a hearsay statement bears particularized guarantees of trustworthiness. Deciding whether a particular statement bears the proper indicia of reliability under our Confrontation Clause precedent "may be a mixed question of fact and law," but the mix weighs heavily on the "fact" side. We have said that "deferential review of mixed questions of law and fact is warranted when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine." *Salve Regina College* v. *Russell*, 499 U. S. 225, 233 (1991) (citation omitted).

These factors counsel in favor of deference to trial judges who undertake the second prong of the *Roberts* inquiry. They are better able to evaluate whether a particular statement given in a particular setting is sufficiently reliable that cross-examination would add little to its trustworthiness. Admittedly, this inquiry does not require credibility determinations, but we have already held that deference to district courts does not depend on the need for credibility determinations. See *Anderson* v. *Bessemer City*, 470 U. S. 564, 574 (1985).

Accordingly, I believe that in the setting here, as in *Anderson*, "[d]uplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources." See *id*., at 574–575. It is difficult to apply any standard in this case because none of the courts below conducted the second part of the *Roberts* inquiry. I would therefore remand this case to the Su-

preme Court of Virginia to carry out the inquiry, and, if any error is found, to determine whether that error is harmless.