No. 98-5881

In the
Supreme Court of the United States

October Term, 1998

Benjamin Lee Lilly, ***Petitioner,***

v.

Commonwealth of Virginia, ***Respondent.***

On Writ of *Certiorari to*
Supreme Court of Virginia

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF VIRGINIA FOR LEAVE TO FILE BRIEF *AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF VIRGINIA, IN SUPPORT OF PETITIONER*

Pursuant to Rule 37.2(b), the American Civil Liberties Union (ACLU) and the ACLU of Virginia respectfully move this Court for leave to file the attached brief *amicus curiae in support of petitioner. Petitioner has granted consent, but respondent has refused to consent.*

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Virginia is its statewide affiliate. In support of those principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae.*

This case raises important questions about the meaning of the Confrontation Clause, which has been a vital ingredient of the fair trial right for hundreds of years. In particular, this case presents the Court with an opportunity to reconsider the relationship between the Confrontation Clause and the law of hearsay. Because we believe the Confrontation Clause has too often been treated as little more than a constitutional analog of the hearsay rules, thus undervaluing its significance in our constitutional scheme, we respectfully seek leave to file the attached brief *amicus curiae.*

Respectfully submitted,

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Dated: December 21, 1998

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INTEREST OF *AMICI*[1]

The interest of *amici is set forth in the accompanying motion for leave to file this brief amicus curiae.*

STATEMENT OF THE CASE

The petitioner, Benjamin Lilly, was convicted in the Virginia Circuit Court of the capital murder of a student during a car-jacking. The trial court entered judgment on the jury's verdict on March 7, 1997,

and imposed the death sentence recommended by the jury. The Virginia Supreme Court affirmed the conviction and the sentence on April 17, 1998, in *Lilly v. Commonwealth, 499 S.E.2d 522 (Va. 1998).*

With petitioner at the time of the shooting were Gary Wayne Barker and petitioner's brother, Mark Lilly. At petitioner's trial, Barker, who had been allowed to plead guilty and to avoid the death penalty, testified against him; Mark Lilly, who had not been tried or allowed to plead, invoked his privilege against self-incrimination. The court then admitted the in-custody confession given by Mark Lilly to the police in which he named his brother as the triggerman. Mark Lilly was subsequently permitted to plead guilty to noncapital murder, and recanted portions of his confession at petitioner's sentencing.

On appeal, the Virginia Supreme Court held that Mark Lilly's in-custody confession had been properly admitted as a statement against interest under a "firmly rooted" Virginia hearsay exception, and that the confession therefore satisfied the Confrontation Clause. *Id. at 534.*

SUMMARY OF ARGUMENT

This case presents the Court with an opportunity to restore the Confrontation Clause to its proper place as one of the fundamental guarantees protected by the Constitution, one with deep roots in the Anglo-American tradition and, indeed, throughout Western jurisprudence. Decisions of this Court have tended to merge the confrontation right with the ordinary law of hearsay, perceiving both as principally guarantors of the reliability of evidence. This approach, we submit, has not worked. It denigrates the confrontation right and the fundamental sense of procedural fairness that the right protects. It ignores the language of the Clause, the history of the right, and the role of the right in the Sixth Amendment. It provides insufficient guidance and affords too much discretion to lower courts in interpreting the Confrontation Clause. It simultaneously leads to overly rigid hearsay law. The price to our system of justice is exemplified by intolerable results such as the one reached by the court below in this case.

We believe that it is necessary to break the link between confrontation and hearsay, both so that a robust understanding of the confrontation right can be developed and so that ordinary hearsay law will not be confused by an imposed correspondence with a right that has been inadequately articulated. A majority of this Court, in *White v. Illinois, 502 U.S. 346 (1992)White v. Illinois, 502 U.S. 346, 353 (1992), rejected a proposal by the Government to uncouple the Confrontation Clause from the hearsay rule as an "argument . . . [that] comes too late in the day," but that conclusion was apparently based primarily on the Court's concern that the Government's reading of the Clause "would virtually eliminate its role in restricting the admission of hearsay testimony." Id. at 352. By contrast, the approach we present here would reinvigorate the Clause, giving it force independent of hearsay law. At the same time, though our approach is markedly different analytically from the current doctrine, the results of our approach would, at least for the most part, square with those reached in the Court's decisions.*

The most crucial step in achieving a better sense of the Confrontation Clause is recognizing its unique purpose. The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The concerns that led to the Confrontation Clause predate modern hearsay law. Two consequences flow from this acknowledgement. First, if a declarant is acting as a witness -- whether in or out of court -- the Clause undeniably applies and violations of its core principles cannot be excused on the basis of hearsay exceptions. Second, not every hearsay declaration raises a Confrontation Clause issue. *See White v. Illinois, 502 U.S. at 358 (Thomas and Scalia, JJ., partially concurring). Within its proper realm, we believe the Confrontation Clause states a simple and categorical rule, which is central to the Anglo-American conception of justice: the accused has a right to confront all adverse witnesses. This means, at the very least, the right to cross-examine the witness under oath.*

We will present in this brief some varying understandings of what the term "witnesses" should be understood to mean in the Clause. Formulating a precise definition is not a simple matter, but under any plausible definition Mark Lilly was acting as a witness within the meaning of the Clause when he made the crucial accusation in this case. The admission of such statements sets up, in effect, an inquisitorial system in which prosecutors are free to take unsworn statements from witnesses behind closed doors, out of the presence of the accused or of counsel, who are given no opportunity for cross-examination, and then use those statements to convict a defendant -- all because of the courts' perception that such testimony is trustworthy. This practice was recognized to be unacceptable long before the Confrontation Clause was adopted, and it is at the very core of what the Clause was meant to prevent. Just as the rights

to trial by jury and to counsel are not qualified by the court's evaluation of the merits of the case, the right to confront the witness is not qualified by the court's evaluation of the accuracy of the witness's statement.

ARGUMENT

I.ANGLO-AMERICAN TRADITIONS, CIVILIZED PRACTICE, AND THE STRUCTURE OF THE SIXTH AMENDMENT CALL FOR A CATEGORICAL RIGHT TO CONFRONTATION INDEPENDENT OF THE HEARSAY DOCTRINE

The right of an accused to confront the witnesses against him predates, and is independent of, the law of hearsay. It has received its fullest development within the Anglo-American tradition, but it has also been a critical feature of other judicial systems, which have nothing resembling our law of hearsay. The history and broad recognition of the confrontation right demonstrate that it is not an adjunct of, or an attempt to constitutionalize, the law of hearsay. Rather, it is a fundamental and categorical rule as to how the testimony of witnesses should be taken.

A.The Right To Confrontation Has A Long History That Antedates The Hearsay Rule

1.Early Roots

The ancient Hebrews required accusing witnesses to give their testimony in front of the accused. Deut. 19:15-18. And so did the Romans. [2] When medieval Continental systems began to rely on the testimony of witnesses, they allowed the parties to examine the witnesses -- but on written questions.[3] These systems took the testimony behind closed doors, for fear that witnesses would be coached or intimidated.

By contrast, the open and confrontational way in which testimony was taken was the most critical characteristic of the common law trial. In the middle of the 16th century, Sir Thomas Smith wrote a well-known account of a typical English criminal trial, which he described as an "altercation" between the accusing witness and the accused. De Republica Anglorum (Mary Dewar ed. 1982)De Republica Anglorum 74 (Mary Dewar ed. 1982). Beginning nearly a century before Smith wrote, and continuing for centuries afterwards, numerous English judges and commentators praised the open and confrontational nature of the English trial in contrast to its Continental counterpart.[4]

For example, Sir Matthew Hale lauded the "open Course of Evidence to the Jury in the Presence of the Judges, Jury, Parties and Council" in English procedure. Among other advantages, this procedure allowed "Opportunity for all Persons concern'd" to question the witness and "Opportunity of confronting the adverse Witnesses."[5] In a passage closely following Hale, Blackstone articulated many of the same advantages -- including "the confronting of adverse witnesses" -- of "the English[] way of giving testimony, ore tenus."[6]

Thus, by 1696, in the celebrated case of *R. v. Paine, it was clearly established that, even if a witness had died, his statement made to a justice of the peace could not be admitted against a misdemeanor defendant because the defendant was not present when the examination was taken and so "could not cross-examine" the deponent.*[7]

To be sure, the norm of confrontation was not always respected. First *Paine itself distinguished felony cases. Since the mid-sixteenth century, justices of the peace had been required to examine felony witnesses, and these examinations were admissible at trial if the witness was then unavailable and the examination was taken under oath. Langbein, John H., Prosecuting Crime in the Renaissance (1974)John H. Langbein, Prosecuting Crime in the Renaissance 27-29 (1974). This anomalously lenient treatment -- which was probably one of the abuses at which the Confrontation Clause was aimed -- was controversial by the early seventeenth century, see R. v. Westbeer,1 Leach 12, 168 E.R. 108 (1739) R. v. Westbeer, 1 Leach 12, 13, 168 E.R. 108, 109 (1739), and it was eliminated by statute in the nineteenth century. Stats. 11 & 12 Vict. ch.42 §17 (1848) Stats. 11 & 12 Vict. ch.42 §17 (1848).*

Second, a set of courts in England, including the equity courts, followed the Continental system rather than the common law, relying largely on testimony taken out of court and out of the presence of the

parties.[8] These courts appeared to be arms of unlimited royal power, and so many of them, notably the court of Star Chamber, did not survive the upheavals of the seventeenth century. The Stuart Constitution (J.P. Kenyon ed., 2d ed. 1986)The Stuart Constitution 106 (J.P. Kenyon ed., 2d ed. 1986).

Third, the Crown, eager to use the criminal law as a means of controlling its adversaries, sometimes used testimony taken out of the presence of the accused. Thus, it is in the treason cases of Tudor and Stuart England that we find the battle for the confrontation right most clearly fought.

As early as 1521, treason defendants, often using the term "face to face," demanded that the witnesses be brought before them.[9] Sometimes these demands were heeded,[10] sometimes not -- but what is most notable is that they found recurrent support in acts of Parliament, which repeatedly required that accusing witnesses be brought "face to face" with the defendant.[11] By the middle of the seventeenth century, the battle was won, and courts clearly understood that treason witnesses must testify before the accused, subject to questioning by the accused.[12]

Well into that century, prosecutorial authorities often tried to use confessions of alleged accomplices of the accused that were not made according to the usual norms of testimony, under oath and before the accused. The case of Sir Walter Raleigh is the most notorious, but far from the only one. The theory -- remarkably similar to the one adopted by the lower court in this case -- was that self-accusation was "as strong as if upon oath."[13] But the judges soon realized the iniquity of allowing an exception to the usual norms of testimony simply because the accomplice accused himself as well as another.[14]

In 1662, shortly after the Restoration, the judges of the King's Bench ruled unanimously and definitively that, though a pretrial confession was "evidence against the Party himself who made the Confession" and, if adequately proved could indeed support conviction of that person without witnesses to the treason itself, the confession "cannot be used as evidence against any others whom on his Examination he confessed to be in the Treason."[15] This fundamental principle[16] seems never since to have been seriously challenged until recently -- in cases like the current one.[17]

2.The History Of Confrontation In America

The confrontation right naturally found its way to America.[18] Thus, a Massachusetts statute of 1647 provided that "in all capital cases all witnesses shall be present wheresoever they dwell."[19] But the Americans did not simply draw on English law. American criminal procedure developed in a distinctive way. The right to counsel in felony trials developed far more quickly in America than in England, and with it rose an adversarial spirit that made the opportunity for confrontation of adverse witnesses especially crucial.[20] In addition, the right became especially relevant to American concerns when Parliament began in the 1760's to regulate the colonists through inquisitorial means like the Stamp Act, which provided for the examination of witnesses upon interrogatories. [21] It is clear that the Framers were aware of the abuses in the sixteenth and seventeenth century treason trials and of the defendants' demands for meeting their accusers "face to face."[22] They knew as well about the procedural reforms achieved by the Glorious Revolution, which included requiring treason to be proved through the testimony of two trial witnesses.

In the Revolutionary period the right to confrontation was frequently expressed, especially in the early state constitutions: Some used the time-honored "face to face" phrase;[23] others, following Hale and Blackstone, adopted language strikingly similar to that later used in the Confrontation Clause of the Sixth Amendment.[24]

3.The History Of Confrontation Was Unrelated To The Evolution Of The Hearsay Doctrine

Note that in this account of the background of the Confrontation Clause, we have not mentioned reliability. To be sure, one of the advantages perceived by those who lauded the common law system of open confrontation of witnesses was its contribution to truth-determination.[25] But neither in the statutes, nor in the case law, nor in the commentary was there a suggestion that, if the courts determined that a

particular item or type of testimony was reliable, then the accused lost his right of confrontation. On the contrary, the confrontation principle was a categorical rule, a basic matter of the procedures by which testimony was taken.

Similarly, the law against hearsay has not played a role in this account. It could not have: Hearsay doctrine, like evidentiary law more generally, was not well developed even at the time the Clause was adopted, much less during the previous centuries. As late as 1794, Edmund Burke remarked in the House of Commons that the rules of "the law of evidence . . . [were] very general, very abstract, and comprised in so small a compass that a parrot he had known might get them by rote in one half hour, and repeat them in five minutes." [26] The tendency to meld the confrontation right and hearsay is a latter-day development. It likely reflects the influence of Wigmore, who subordinated the confrontation right to hearsay.[27] More recent commentators regard Wigmore's view as anachronistic because their research teaches that the hearsay rule evolved in both England and America considerably later than Wigmore claimed.[28]

It is noteworthy that the word hearsay appears neither in *Mattox v. United States, 156 U.S. 237 (1895)Mattox v. United States, 156 U.S. 237 (1895), the first of several cases to note that the "primary object" of the Clause was to prevent the use of testimony taken ex parte, id. at 242, nor in Pointer v. Texas, 380 U.S. 400 (1965) Pointer v. Texas, 380 U.S. 400 (1965), which held that the Clause expresses a fundamental right applicable against the states. As its language plainly indicates, the Clause was not an attempt to constitutionalize the nascent law of hearsay. [29] Rather, it plainly expressed the fundamental principle that if a person acts as a witness against an accused, the accused must have an opportunity to confront that person.*

4.The Court's View That Confrontation Only Seeks To Promote Accuracy In Factfinding Is Contrary To The Structure Of The Sixth Amendment

Our historical discussion has shown that evidentiary concerns were not a significant factor in adoption of the Confrontation Clause. Rather, the Clause was meant to protect a categorical procedural right that, like the right to counsel, was in place by the time the Bill of Rights was adopted. This conclusion is fortified by the placement of the Clause in the Sixth Amendment.

If one looks at the grand design of the Sixth Amendment, in accordance with ordinary canons of statutory analysis that construe a provision as a harmonious whole,[30] one sees a bundle of procedural protections for a criminal defendant that have more than accuracy in factfinding at their core. The right to counsel is recognized as fundamental even if it interferes with factfinding in a particular case. *See Massiah v. United States, 377 U.S. 201 (1964)Massiah v. United States, 377 U.S. 201 (1964)(excluding defendant's incriminating statements that had been obtained in violation of the right to counsel; the dissent objected to the Court's erection of "additional barriers to the pursuit of truth," id. at 208). And the right to a jury trial is not suspended because a judge may be more capable than jurors of correctly evaluating complicated expert testimony, such as competing statistical analyses of the significance of DNA evidence. Nor has the interpretation of the Compulsory Process Clause turned solely on "accuracy in factfinding." See Rock v. Arkansas, 483 U.S. 44 (1987)Rock v. Arkansas, 483 U.S. 44 (1987)(relying in part on the Compulsory Process Clause to hold unconstitutional a state rule purportedly "designed to ensure trustworthy testimony").*

Only the Confrontation Clause has of late been stripped of any role other than furthering evidentiary objectives. We urge the Court to recognize that this interpretation ignores significant values at the core of the right to confrontation, and leads to intolerable results that cannot be adequately policed by the Court.

B.A Confrontation Right Is Recognized In Modern Europe

This perspective is borne out by recent developments under the European Convention on Human Rights. That Convention contains nothing resembling a hearsay rule, of course, because most of the judicial systems falling under it do not have hearsay law. But Articles 6(1) and 6(3)(d) of the Convention contain, respectively, a general protection of a criminal defendant's right to a fair trial and a specific protection of his right "to examine or have examined witnesses against him." Under these provisions, the European

Court of Human Rights has issued a series of decisions establishing a right of confrontation, which it has referred to as such.[31]

Thus, the court has repeatedly held that defendants' confrontation rights were violated by the use at trial of statements made before trial to investigative or prosecutorial authorities, where the defendant had no opportunity to examine the witness. And the English Court of Appeal has recently relied on the same provisions of the Convention in reaching a similar conclusion.[32]

We thus face the great irony that the confrontation right, one of the great glories of the Anglo-American system of criminal procedure, is now receiving its clearest articulation in decisions by and following a Continental court. The reasons are clear enough: The Europeans are unencumbered by the peculiar hearsay doctrine of the common law tradition. They recognize that confrontation is a categorical rule that expresses a fundamental human right.

II.A CATEGORICAL RIGHT OF CONFRONTA-TION WOULD YIELD MORE CONSTANT RESULTS, ELIMINATE THE COURTS' NEED TO EVALUATE TRUSTWORTHINESS IN APPLYING THE SIXTH AMENDMENT, AND PERMIT THE CONTINUING DEVELOPMENT OF THE HEARSAY RULE WITHOUT REQUIRING THE OVERRULING OF PRIOR PRECEDENTS OF THE COURT

A.The Court's Current Approach To Confrontation Produces Intolerable Results, As Illustrated By The Case Below

The Court has declared an exact fit between the hearsay rule and the Confrontation Clause when the out-of-court statement satisfies a "firmly rooted" hearsay exception. ***United States v. Inadi, 475 U.S. 387 (1986)United States v. Inadi, 475 U.S. 387 (1986); White, 502 U.S. at 357 ("a `firmly rooted' hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability"). This formula, which masquerades as a categorical rule that results in consistent interpretations of a basic constitutional right, instead gives lower courts enormous leeway to admit hearsay against a criminal defendant, subject to correction only in the rare instance in which this Court grants certiorari.***

The test to be used in determining when an exception is "firmly rooted" is far from clear. In ***White, the Court affirmed the Illinois court's admission of statements made in the course of receiving medical care that identified the defendant as having sexually abused a four-year-old child. The Court justified its conclusion that such statements are "firmly rooted" by noting that a hearsay exception for such statements is recognized in the Federal Rules of Evidence, and "widely accepted among the states." 502 U.S. at 356 n.8. But before the Federal Rules' enactment in 1975, the exception generally did not include statements such as the one involved in White, describing an injury's cause, even if relevant to diagnosis or treatment. Moreover, numerous post-White courts have admitted statements under cover of the exception and over Confrontation Clause objections even though the trustworthiness rationale of the exception was not satisfied because the declarant was too young to appreciate that "the efficacy of her medical treatment depends upon the accuracy of the information provided to the doctor."[33]***

On the other hand, in ***Lee v. Illinois, 476 U.S. 530 (1986)Lee v. Illinois, 476 U.S. 530 (1986), this Court held that the Illinois courts had erred in admitting an accomplice's confession against his codefendant. The majority rejected the state's "characterization of the hearsay involved . . . as a simple 'declaration against penal interest,'" explaining that "[t]hat concept defines too large a class for meaningful Confrontation Clause analysis." Id. at 544 n.5. Consequently, the confession was not automatically admissible as "firmly rooted," even though the Federal Rules, and numerous state codifications, had expanded the hearsay exception for declarations against interest to encompass statements against penal interest.***

Viewed together, ***White and Lee lead to circular reasoning. White indicates that when a state proffers a statement that fits within an exception that is "firmly rooted" -- i.e., widely accepted by the states for some time, and present in the Federal Rules -- trustworthiness can be inferred. Thus, the need for confrontation disappears -- even if the exception was extended by the Rules themselves beyond prior law and even if the particular application is poorly grounded in the rationale of the exception. Lee says that an inherently***

untrustworthy statement cannot be automatically admitted as "firmly rooted" even if the exception under which it is offered has been generally accepted for a while, and is incorporated in the Federal Rules. Taken together, these cases beg the question of how a court should respond when reviewing evidence proffered under a refashioned traditional class exception, or a nontraditional class exception, that has been accepted for some period of time in its jurisdiction and others.

The default test of "particularized guarantees of trustworthiness," which applies when an exception is not firmly rooted, also fails to offer sufficient guidance or to protect a defendant adequately, as this case illustrates. Nothing in the actual holding of *Lee bars a court from admitting an accomplice confession, such as the statement in this case, if it concludes that the particular confession is sufficiently reliable.*[34] *So long as the Court retains its trustworthiness view of confrontation, and does not abandon Lee in favor of a per se rule that certain kinds of confessions never satisfy the Confrontation Clause, courts will continue to have enormous, virtually unreviewable, discretion in determining trustworthiness on a case-by-case basis.*

The facts of this case demonstrate the amorphous nature of a trustworthiness inquiry. True, Mark Lilly admitted to participation in a series of crimes. But the "totality of circumstances that surround the making of the statement," *see Idaho v. Wright, 497 U.S. 805 (1990)Idaho v. Wright, 497 U.S. 805, 820 (1990), raises numerous factors -- which we assume petitioner will present to this Court -- that might plausibly account for Mark Lilly falsely incriminating his brother.*

It cannot be fair to deprive a defendant of the ancient right to face his accuser because a judge mixes some dubious generalizations about human behavior -- such as that one is unlikely to make a statement confessing a crime unless the entirety of the statement is substantially true, or that brothers would not falsely incriminate each other -- with his own view of the surrounding facts to conclude that the statement is probably true.[35] Hearsay exceptions may hinge on such cliches, but a defendant should have the right to challenge his accuser in the courtroom when the out-of-court statement falls within the perimeter of core values on which the Sixth Amendment right of confrontation rests.

Neither the "firmly rooted" test nor the requirement of "particularized guarantees of trustworthiness" provides a satisfactory test of confrontation that guides the lower courts or ensures that a defendant is accorded the procedural protection guaranteed by the Sixth Amendment.

B. A Categorical Approach Would Exclude In-Custody Confessions Unless The Defendant Was Afforded His Right Of Confrontation

Our arguments indicate that the constitutional right of confrontation is independent of, and should not be made subordinate to, the ordinary law of hearsay. We contend that applicability of the Confrontation Clause to an out-of-court statement does not depend on a court's assessment of the statement's reliability. Rather, the Clause states a fundamental procedural protection, and applies categorically to certain types of statements.[36] In this section, we will present two proposals for defining that category of statements. While we urge the Court to declare that such a categorical right exists, we do not believe that to decide this case the Court must choose one of these variants, or any other particular proposal, or that it must define the boundaries of the Clause with precision. Under *any reasonable demarcation of the category of statements covered by the Clause, accomplice confessions like the one here of Mark Lilly lie at the heart of the Clause, and nowhere near the edge.*

1.A Testimonial View

Under one approach, the key question is this: In making the statement at issue, should the declarant be deemed to have been acting *as a witness within the meaning of the Confrontation Clause? If not, then under this approach the Clause does not apply. On the other hand, if the declarant was acting as a witness, and the accused has not had an adequate opportunity to confront her, then the statement may not be admitted against the accused (unless he has forfeited the confrontation right by causing the witness's unavailability). See, e.g., Amar, Akhil Reed, The Constitution and Criminal Procedure (1997)Akhil Reed Amar, The Constitution and Criminal Procedure 125-31 (1997); Friedman, Richard D., "Confrontation: The Search for Basic Principles," 86 Geo.L.J. 1011 (1998)Richard D. Friedman, "Confrontation: The Search for Basic Principles," 86 Geo. L.J. 1011, 1022-26 (1998).*

This view finds obvious support in the language of the Confrontation Clause -- which speaks in unqualified terms of the accused's right to confront "the witnesses against" the accused. It is supported also by the history of the Clause and in its manifest role in our system of criminal procedure. As we have shown, the Clause constitutionalizes a long-established procedural rule governing the manner by which witnesses give testimony for adjudication in the Anglo-American system, a manner far different from the inquisitorial style used by Continental courts.

When, then, should a declarant be deemed to have acted as a witness in making a statement against an accused? Put another way, when is her statement testimonial? Obviously, she acts as a witness if she testifies in court, at the trial of the defendant; the defendant then has a right to be present at the trial and cross-examine her. It is hardly less obvious that the declarant is acting as a witness if she gives the prosecution an affidavit, or otherwise makes a formal pre-trial statement under oath about the alleged crime to the authorities.[37] Indeed, it has often been said that *ex parte affidavits and other "formalized testimonial materials" were the focus of the Confrontation Clause. White v. Illinois, 502 U.S. at 365 (Thomas and Scalia, JJ., partially concurring); Mattox v. United States, 156 U.S. at 242-43.*

Justices Scalia and Thomas explicitly included "confessions" in the category of "formalized testimonial materials." Thus, their analysis would -- properly -- bring statements like Mark Lilly's in this case within the ambit of the Confrontation Clause. A better and less strained approach to the same result, we suggest, is to recognize that formality is not a prerequisite to deeming a statement testimonial, and so bringing it within that ambit. Rather, formality is a necessary but not sufficient condition for making testimony *acceptable. In particular, the oath is perhaps the oldest and most nearly universal requirement for the giving of testimony. See generally, e.g., Silving, Helen, "The Oath: I," 68 Yale L.J. 1329 (1959)Helen Silving, "The Oath: I," 68 Yale L.J. 1329 (1959). If unsworn confessions to the authorities were not deemed to be statements within the protection of the Confrontation Clause, then we would have a system in which the authorities could take statements for use at trial, made by declarants knowing they would be so used -- testimony in any real sense of the word -- absent not only confrontation but also the basic protection of the oath; indeed, the authorities would have an incentive to take the statement without the oath, simply so that the Confrontation Clause could not be invoked. Thus, it appears that statements made knowingly, even informally, to the authorities investigating a crime should be considered testimonial and so within the coverage of the Confrontation Clause.*

In short, under the testimonial approach, this is an easy case. Mark Lilly's custodial confession lies at the core of the Confrontation Case, not near its fringes.

2.A Prosecutorial Restraint View

A somewhat different focus rephrases the key question to ask whether *the government participated in making the declarant a witness against the defendant.[38] This approach views the Confrontation Clause as integral to a central objective of the Bill of Rights -- to restrain the capricious use of governmental power.[39] The colonists were well aware that the criminal law is a powerful tool in controlling perceived enemies of the state, and knew of the potency and secrecy with which a government can act. To counter these dangers, out-of-court statements procured by the prosecution or police, or their agents, should stand on a different footing than statements obtained without governmental intrusion. Requiring confrontation when the prosecution has played a part in producing the evidence enables the public to scrutinize the process by which the government is exercising its power, and complements the other rights that the Sixth Amendment grants -- trial by jury, a public trial, specification of the charges, and right to counsel.*

Under this approach, confrontation protects the defendant against statements that the government might elicit through its enormous power to coerce or induce. If confrontation is not required, the government has the huge advantage of choosing whether to offer the contents of the statement through the testimony of the often discreditable declarant, or through the testimony of a presumptively upright person involved in law enforcement (assuming a hearsay exception otherwise applies).

There may be instances in which the prosecutorial restraint model might yield a different result than the testimonial approach.[40] But this is not such a case. Mark Lilly's in-custody statement to the police falls squarely within the ambit of the confrontation right a prosecutorial restraint approach would grant.

C. A Categorical Approach Is Consistent With The Results Reached By The Court In Its Prior Decisions

Plainly, the approach to the Confrontation Clause that we suggest and the doctrine enunciated by the Court are different analytically. Our approach is, however, consistent with all, or virtually all, of the *results reached by the Court. Indeed, we believe that, though the Court has not consciously articulated our approach, its decisions have reflected the force of that approach. We do not contend, of course, that adoption of our approach will answer all questions under the Confrontation Clause*[41] *or that it will eliminate all difficult cases.*[42] *But some cases that have appeared troublesome to the Court become very straightforward under our approach.*

First consider *Pointer v. Texas, 380 U.S. 400, the case that first established that the confrontation right is a fundamental one incorporated by the Fourteenth Amendment, its companion Douglas v. Alabama, 380 U.S. 415 (1965)Douglas v. Alabama, 380 U.S. 415 (1965), and Lee v. Illinois, 476 U.S. 530. These cases all had two features. First, in each of these cases, the declaration at issue was a statement knowingly made in a judicial proceeding or to investigative authorities, providing information material to a criminal investigation. Thus, under any variation of the approach we have presented, the declarants must be deemed to have been witnesses within the meaning of the Confrontation Clause. Indeed, in both Douglas and Lee, as in this case, the declaration was the confession of an alleged accomplice. Second, in these cases the accused did not have an adequate opportunity to confront the witness. Thus, in each of these three cases the conclusion is easy that the accused's confrontation rights were violated -- without any need for anything like the dubious reliability analysis of Lee.*

By contrast, in *Dutton v. Evans, 400 U.S. 74 (1970)Dutton v. Evans, 400 U.S. 74 (1970), and United States v. Inadi, 475 U.S. 387, the first of these features was not present, and so the statements appear not to have been within the realm of the Confrontation Clause as we have defined it. In Dutton, the statement was made by one prisoner to another. In Inadi, the statements were made by one member of a conspiracy to another, without any inducement by agents of the prosecution; they were not testifying but carrying on the ordinary business of the conspiracy. Thus, in neither of these cases were the declarants acting as witnesses when they made the statements in issue.*[43] *A similar argument has force with respect to at least some of the statements made by the four-year-old declarant -- such as those to her babysitter and to her mother -- in White v. Illinois, 502 U.S. 346.*[44]

In other cases, the second aspect of the *Pointer-Douglas-Lee line has not been present, because the accused was held to have had an adequate opportunity to confront the witness before trial. That was so in Mattox v. United States, 156 U.S. 237, one of the oldest Confrontation Clause cases, in which the witness had testified, subject to cross-examination, at the accused's first trial but died before his second trial. And in California v. Green, 399 U.S. 149 (1970)California v. Green, 399 U.S. 149 (1970), the accused had an opportunity at a preliminary hearing to examine the witness, who appeared at trial but was then uncooperative.*[45]

In *Mattox, the prosecution could not have produced the witness at the trial in question, and in Green the prosecution did produce him. In other cases, though the accused had some previous opportunity to examine the witness, he still raised a Confrontation Clause argument that the prosecution had not done what it could to secure the live testimony of the witness at the trial in question. In Barber v. Page, 390 U.S. 719 (1968)Barber v. Page, 390 U.S. 719 (1968), the Court agreed that the prosecution had failed to make a good faith attempt to secure the attendance of the witness at trial; in addition, it held that in the circumstances the defendant's prior opportunity to examine the witness had not been sufficient. Plainly, the holding of Barber is not inconsistent with our approach. Even assuming the defendant has had a previous opportunity to confront the witness, it is still preferable that the witness testify live, and the prosecution ought to make reasonable efforts to secure his attendance. In Mancusi v. Stubbs, 408 U.S. 204 (1972)Mancusi v. Stubbs, 408 U.S. 204 (1972), and Ohio v. Roberts, 448 U.S. 56 (1980)Ohio v. Roberts, 448 U.S. 56 (1980), the Court held that the prosecution's efforts were satisfactory. Again, nothing in these cases is inconsistent with our approach: Given that the accused had previously had an adequate opportunity to examine the witness,*[46] *if the witness was unavailable at trial despite good faith efforts, the Confrontation Clause should not preclude use of the earlier testimony.*[47]

Finally, we note *Williamson v. United States, 512 U.S. 594. A straightforward result would have recognized that admission of the statement at issue, an accomplice's confession to the police, presumptively violated the*

Confrontation Clause. Instead, the Court issued a highly restrictive construction of the hearsay exception for declarations against penal interest, expressed in Fed.R.Evid 804(b)(3). The basis for this decision is unfortunate. If extended to declarations against interest in general -- and neither the Court's decision nor the Rule give any basis for declining to do so -- it limits the usefulness of a much-used exception across a broad range of cases, civil as well as criminal; the interpretation in Williamson was far more restrictive than most prior authorities suggested, see 2 McCormick on Evidence (4th ed. 1992)McCormick on Evidence 344-45 (4th ed. 1992). Williamson is thus a good indication that the melding of the Confrontation Clause and of hearsay doctrine tends not only to denigrate the constitutional protection, but also to make hearsay law unduly rigid.

The Court will, we believe, continue to make decisions that reflect the demands of the confrontation right, because that right is such a fundamental, and intuitively appealing, aspect of civilized jurisprudence. But if it continues to use hearsay law as the vehicle for those decisions, it will be unable to articulate either a robust understanding of the constitutional right or a sensible, truth-oriented, doctrine of hearsay.

CONCLUSION

The Court could reach the proper result in this case without revisiting its approach to the Confrontation Clause. But to do so would just be to put one more patch on a tattered garment. It would leave lower courts perplexed on how to apply the Clause, because there would still be no constant guide to the Court's decisions. It would continue to make effective appellate review impractical, because decisions would still depend so heavily on analysis of the evidence in the particular case. It would require continuing reliance on hearsay doctrine to do the work that should be performed by the Confrontation Clause -- to the detriment of both. It would mean that the Court's stated grounds of decision lack persuasive power. And it would miss out on the great principle underlying the Clause, one integral to the Sixth Amendment and with roots booth deep and broad: When the government prosecutes an accused, the accused has a categorical right to confront "the witnesses against him."

The decision of the Virginia Supreme Court should be reversed.

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TABLE OF AUTHORITIES

Cases

Case of the Union of the Realms,
Moore (K.B.) 790, 72 E.R. 908 (1604)

Case of Thomas Tong and Others,
Kelyng 17, 84 E.R. 1061 (1662)

Colledge's Case,
8 How.St.Tr. 549 (1681)

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

Delta v. France,
16 E.H.R.R. 574 (190)

Douglas v. Alabama,
380 U.S. 415 (1965)

Duke of Somerset's Trial,
1 How.St.Tr. 515 (1551)

Dutton v. Evans,
400 U.S. 74 (1970)

Earl of Somerset's Case,
2 How.St.Tr. 966 (1616)

Greene v. McElroy,
360 U.S. 474 (1959)

Idaho v. Wright,
497 U.S. 805 (1990)

Kostovski v. Netherlands,
12 E.H.R.R. 434 (1989)

Lee v. Illinois,
476 U.S. 530 (1986)

Lilburne's Case,
4 How.St.Tr. 1270 (1649)

Lord Audley's Case,3 How.St.Tr. 401 (1631)

Lüdi v. Switzerland,
15 E.H.R.R. 173 (1992)

Mancusi v. Stubbs,
408 U.S. 204 (1972)

Maryland v. Craig,
497 U.S 836 (1990)

Massiah v. United States,
377 U.S. 201 (1964)

Mattox v. United States,
156 U.S. 237 (1895)

Mordant's Case,

5 How.St.Tr. 907(1658)

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

Pointer v. Texas,
380 U.S. 400 (1965)

R. v. Paine,
1 Salk. 281, 91 E.R. 246,
1 Ld. Raym. 729, 91 E.R. 1387,
5 Mod. 161, 87 E.R. 584,
Holt 294, 90 E.R. 1062,
Comb. 358, 90 E.R. 527 (1696)

R. v. Westbeer,
1 Leach 12, 168 E.R. 108 (1739)

Reynolds v. United States,
98 U.S. 145 (1879)

Rock v. Arkansas,
483 U.S. 44 (1987)

Rushworth v. Countess de Pembroke
& Currier,
Hardres 472, 145 E.R. 553 (1668)

Saïdi v. France,
17 E.H.R.R. 251 (1993)

Seymour's Case,
1 How.St.Tr. 483 (1549)

State v. Earnest,
106 N.M. 41, 744 P.2d 539,
cert. denied, 484 U.S. 924 (1987)

State v. Sheppard,
197 N.J.Super. 411, 484 A.2d 1330,
(Burlington Co. 1984)

Taylor v. Commonwealth,
821 S.W.2d 72 (Ky. 1990),
cert. denied, 502 U.S. 1121 (1992)

United States v. Gomez-Lemos,
939 F.2d 326 (6th Cir. 1991)

United States v. Inadi,
475 U.S. 387 (1986)

United States v. Joe,
8 F.3d 1488 (10th Cir. 1993),
cert. denied, 510 U.S. 1184 (1994)

United States v. Owens,
484 U.S. 554 (1988)

United States v. Tome,

61 F.3d 1446, 1455 (10th Cir. 1995)

Van Mechelen v. Netherlands,
25 E.H.R.R. 647, 673 (1997)

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

Williamson v. United States,
512 U.S. 594 (1994)

Windisch v. Austria,
13 E.H.R.R. 281 (1991)

Statutes and Regulations Fed.R.Evid. 804(b)(3)

Stats. 1 & 2 Phil.& M., ch.10, §11 (1554)

Stat. 13 Car.2, ch.1, §5 (1661)

Stats. 5 & 6 Edw.6, ch.11, §9 (1552)

Stat. 1 Eliz.1, ch.1, §21 (1558)

Stat. 1 Eliz.1, ch.5, §10 (1558)

Stats. 11 & 12 Vict. ch.42 §17 (1848)

Other Authorities

Amar, Akhil Reed, The Constitution and
Criminal Procedure (1997)

Bailyn, Bernard, The Ideological Origins
of the American Revolution (1967)

Berger, Margaret A., "The Deconstitutionalization of the Confrontation Clause: A
Proposal for a Prosecutorial Restraint Model,"
76 Minn.L.Rev. 557 (1992)

Blackstone, W., Commentaries

Book of the General Lauues and
Libertyes Concerning the Inhabitants
of Massachusetts (Cambridge 1648),
in Laws and Liberties of Massachusetts
1641-1691 (John D. Cushing ed. 1975)

De Republica Anglorum
(Mary Dewar ed. 1982)

Emlyn, Sollon, State Trials (1730)

Fortescue, Sir John,
"In Praise of the Laws of England,"
in On the Laws and Governance
of England (Shelley Lockwood ed. 1997)

Friedman, L. M., A History of
American Law (2d. ed. 1985)

Friedman, Richard D., "Confrontation: The Search for Basic Principles," 86 Geo.L.J. 1011 (1998)

Friedman, Richard D., "Confrontation and the Definition of Chutzpa," 31 Israel L.Rev. 506 (1997)

Gilbert, Geoffrey, The Law of Evidence (1754)

Hale, Sir Matthew, The History of the Common Law of England (written between 1660 and 1676; Charles M. Gray ed. 1971)

Hall, Edward, The Union of the Two Noble and Illustre Famelies of Lancastre & Yorke (1548), published under the title Hall's Chronicle (1809)

Hawkins, William, A Treatise of the Pleas of the Crown (1721)

Heller, Francis H., The Sixth Amendment (1969)

Hudson, William, A Treatise of the Court of Star Chamber (Francis Hargrave ed. 1792; repr. 1986)

Jonakait, Randolph N., "The Origins of the Confrontation Clause: An Alternative History," 27 Rutgers L.J. 77 (1995)

Kirst, Roger W., "The Procedural Dimensions of Confrontation Doctrine," 66 Neb.L.Rev. 485 (1987)

Landsman, Stephen, "From Gilbert

to Bentham: The Reconceptualization of Evidence Theory," 36 Wayne L.Rev. 1149 (1990)

Langbein, John H., "Historical Foundations of the Law of Evidence: A View from the Ryder Sources," 96 Col.L.Rev. 1168 (1996)

Langbein, John H., "The Criminal Trial Before Lawyers," 45 U.Chi.L.Rev. 263 (1978)

Langbein, John H., Prosecuting Crime in the Renaissance (1974)

Larkin, Murl A., "The Right of Confrontation: What Next?", 1 Tex.Tech.L.Rev. 67 (1969)

McCormick on Evidence (4th ed. 1992)

Mosteller, Robert P., "Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions," 1993 Ill.L.Rev. 691

New English Bible (2d ed. 1970)

Perry, Richard L., Sources of Our Liberties (1955)

Silving, Helen, "The Oath: I," 68 Yale L.J. 1329 (1959)

Singer, N.J., Sutherland Statutory Construction (C. Dallas Sands 5th ed. 1992)

Story, Joseph, Commentaries on the Constitution (1833)(1991 ed.)

Symposium, "Historical Development of the American Lawyer's Library," 61 L.Libr.J. 440 (1968)

The Federalist No. 51 (James Madison) (Clinton Rossiter ed. 1961)

"The Reports of Sir John Spelman," Publications of the Selden Society (J.H. Baker, ed. 1976)

The Stuart Constitution (J.P. Kenyon ed., 2d ed. 1986)
The Times (London), Oct. 7, 1998

van Caenegem, C., History of European Civil Procedure, in 16 Int'l Encyc. of Comp. L. (c. 1972)

Wigmore, Evidence (Chadbourn rev. 1974)

NOTES:
1Pursuant to Rule 37.6, counsel for amici states that no counsel for a party authored this brief in whole or in part and no person, other than amici, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. 2The Book of Acts quotes the Roman Governor Festus as saying: "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges." Acts 25:16, quoted in Coy v. Iowa, 487 U.S. 1012 , 1015-16 (1988); Greene v. McElroy, 360 U.S. 474 (1959)Greene v. McElroy, 360 U.S. 474, 497 (1959). The New English Bible (2d ed. 1970) translates the key passage as "before he is confronted with his accusers." 3C. van Caenegem, History of European Civil Procedure, in 16 Int'l Encyc. of Comp. L., ch.2 (Civil Procedure), at 19, 58-59, 62 (c. 1972). 4Around 1470, even before the roles of witnesses and juries were clearly distinguished, Sir John Fortescue praised the openness of the English system in contrast to that

of the civil law. "In Praise of the Laws of England," in On the Laws and Governance of England (Shelley Lockwood ed. 1997)"In Praise of the Laws of England," in On the Laws and Governance of England 38-39 (Shelley Lockwood ed. 1997). 5The History of the Common Law of England (written between 1660 and 1676; Charles M. Gray ed. 1971)

*63 W. Blackstone, COMMENTARIES at *373. Hale and Blackstone spoke of "confronting" one witness against another. Similarly, in 1730, Sollon Emlyn, in the Preface to his monumental collection, STATE TRIALS, at iii-iv, emphasized the "Excellency" of English criminal procedure. "In other Countries," he wrote, "the Witnesses are examined in private, and in the Prisoner's Absence; with us, they are produced face to face, and deliver their evidence in open Court, the Prisoner himself being present, and at liberty to cross examine them.." Also, in the Case of the Union of the Realms, Moore (K.B.) 790, 798, 72 E.R. 908, 913 (1604), Lord Chief Justice Popham, arguing for the superiority of English over Scots law, contented that "the testimonies, being viva voce before the judges in open face of the world" was "much to be preferred" over "written depositions in a corner."*

71 Salk. 281, 91 E.R. 246, 1 Ld. Raym. 729, 91 E.R. 1387, 5 Mod. 161, 87 E.R. 584, Holt 294, 90 E.R. 1062, Comb. 358, 90 E.R. 527.

8See, e.g., William Hudson, A TREATISE OF THE COURT OF STAR CHAMBER 204 (Francis Hargrave ed. 1792; repr. 1986). The equity courts did, however, carefully preserve the ability of the parties to examine adverse witnesses, albeit on written questions. See, e.g., Rushworth v. Countess de Pembroke & Currier, Hardres 472, 145 E.R. 553 (1668).

9E.g., Seymour's Case, 1 How.St.Tr. 483, 492 (1549); Duke of Somerset's Trial, 1 How.St.Tr. 515, 520 (1551).

10According to Edward Hall, THE UNION OF THE TWO NOBLE AND ILLUSTRE FAMELIES OF LANCASTRE & YORKE (1548), published under the title HALL'S CHRONICLE (1809), p.623, the witnesses against the Duke of Buckingham in 1521 were produced at his request. Hall's account of Buckingham's trial appears to be the ultimate source for the one offered by Shakespeare and Fletcher in King Henry VIII, II:1.

John Spelman, a judge of the King's Bench, was careful to note in his report of a treason trial of 1531 that the accuser confronted the defendant "face to face." R. v. Rice ap Griffith, in 1 J.H. Baker, ed., "The Reports of Sir John Spelman," 93 PUBLICATIONS OF THE SELDEN SOCIETY (1976).

11Stats. 5 & 6 Edw.6, ch.11, §9 (1552), and 1 & 2 Phil.& M., ch.10, §11 (1554), required witnesses to be "brought forth in person" before the accused. Stats. 1 Eliz.1, ch.1, §21 (1558), 1 Eliz.1, ch.5, §10 (1558), 13 Eliz.1, ch.1, §9 (1571), and 13 Car.2, ch.1, §5 (1661), all used the "face to face" formulation.

12For example, in the celebrated case of John Lilburne in 1649, there was no doubt that the witnesses would testify live in front of Lilburne; "hear what the witnesses say first," said the presiding judge in postponing one of Lilburne's arguments. 4 How.St.Tr. 1270, 1329. When the witnesses did testify, Lilburne was allowed to pose questions to them, through the court. Id. at 1333, 1334, 1335, 1340. In John Mordant's Case, just nine years later, there does not seem to have been any doubt that he could question the witnesses directly, which he did, 5 How.St.Tr. 907, 919-21. Indeed, at one point the presiding judge solicitously inquired whether Mordant wished to ask a witness any questions, id. at 922, a practice that soon became routine. E.g., Colledge's Case, 8 How.St.Tr. 549, 599, 603, 606 (1681).

13Earl of Somerset's Case, 2 How.St.Tr. 966, 986 (1616)(Coke, C.J.).

14In 1631, the judges concluded that, at the trial of a peer before the House of Lords, "[c]ertain Examinations [clearly confessions from the context] having been taken by the lords without an oath . . . could not be used until they were repeated upon oath." Lord Audley's Case, 3 How.St.Tr. 401, 402 (1631).

15Case of Thomas Tong and Others, Kelyng 17, 18, 84 E.R. 1061, 1062 (1662).

16For important early endorsements of this principle, see Geoffrey Gilbert, THE LAW OF EVIDENCE 99 (1754); 2 William Hawkins, A TREATISE OF THE PLEAS OF THE CROWN 429 (1721).

17See Taylor v. Commonwealth, 821 S.W.2d 72 (Ky. 1990), cert. denied, 502 U.S. 1121 (1992); State v. Earnest, 106 N.M. 41, 744 P.2d 539, cert. denied, 484 U.S. 924 (1987)(confessions of murder coconspirators who at defendants' trials asserted privilege against selfincrimination admitted, as in this case, on grounds of presumed reliability).

18This importation was no doubt aided, especially towards the end of the seventeenth century, by the arrival of substantial numbers of lawyers who had been trained at the Inns of Court "and brought with them, applied, and enforced the procedural modifications enacted in England after the Revolution of 1688." Francis H. Heller, THE SIXTH AMENDMENT 20 (1969). See also Bernard Bailyn, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 30-31 (1967).

19BOOK OF THE GENERAL LAUUES AND LIBERTYES CONCERNING THE INHABITANTS OF MASSACHUSETTS 54 (Cambridge 1648), in 1 LAWS AND LIBERTIES OF MASSACHUSETTS 1641-1691 60 (John D. Cushing ed. 1975). The same statute provided that in other cases the testimony of a witness might be taken by a magistrate or a commissioner, but that if the witness lived within ten miles of the court and was not disabled, this pretrial statement "shall not be received, or made use of in the Court, except the witnes be also present to be farther examined about it."

20See Randolph N. Jonakait, "The Origins of the Confrontation Clause: An Alternative History," 27 Rutgers L.J. 77 (1995).

21See generally Murl A. Larkin, "The Right of Confrontation: What Next?", 1 Tex.Tech.L.Rev. 67 (1969).

22They had access to the reports of the state treason trials first published in 1719 (Symposium, "Historical Development of the American Lawyer's Library," 61 L.Libr.J. 440, 444 (1968)), standard treatises such as Gilbert's and Hale's that relied heavily on the state trials, and they read and revered Blackstone. See L. M. Friedman, A HISTORY OF AMERICAN LAW 101 (2d. ed. 1985).

23E.g., Mass. Const., pt. I, art. XII (1780), in Richard L. Perry, SOURCES OF OUR LIBERTIES (1955), at 376 (right of accused "to meet the witnesses against him face to face"); N.H. Const., pt. I, art. XV (1784), id. at 384 (identical language).

24See Md. Const. §19 (1776), in Perry, SOURCES, at 348, providing that "in all criminal prosecutions, a man hath a right . . . to be confronted with the witnesses against him." See also Va. Const. §8 (1776), id. at 312 ("a right . . . to be confronted with the accusers and witnesses"); N.C. Const. §7 (1776), id. at 355 ("a right . . . to confront the accusers and witnesses with other testimony"); Pa. Const. §9 (1776), id. at 330 ("a right . . . to be confronted with the witnesses"); Vt. Const. §10 (1777), id. at 366 (identical language).

*25Hale, for example, argued that crossexamination "beats and boults out the Truth much better" than privately taken examinations with "limited . . . Interrogatories in Writing." HISTORY OF THE COMMON LAW, at 164. Similarly, Blackstone contended, "This open examination of witnesses viva voce, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing" in the manner of the civil law. 3 COMMENTARIES *373.*

26Quoted in John H. Langbein, "Historical Foundations of the Law of Evidence: A View from the Ryder Sources," 96 Col.L.Rev. 1168, 1186 1190 (1996); see also, e.g., Robert P. Mosteller, "Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions," 1993 Ill.L.Rev. 691.

27See 5 Wigmore, EVIDENCE ch.47 (Chadbourn rev. 1974)("The Hearsay Rule Satisfied by Confrontation").

28See generally Stephen Landsman, "From Gilbert to Bentham: The Reconceptualization of Evidence Theory," 36 Wayne L.Rev. 1149 (1990); John H. Langbein, "The Criminal Trial Before Lawyers," 45 U. Chi.L.Rev. 263 (1978).

29Indeed, Justice Story faulted the drafters of the Sixth Amendment for failing to incorporate the law of evidence into the Sixth Amendment even while showing "undue solicitude" for procedural protections. Joseph Story, COMMENTARIES ON THE CONSTITUTION (1833)(1991 ed.).

30See 2a N.J. Singer, SUTHERLAND STATUTORY CONSTRUCTION §46.05, at 103 (C. Dallas Sands 5th ed. 1992).

31E.g., Sa•di v. France, 17 E.H.R.R. 251, 270 (1993)("Neither at the stage of the investigation nor during the trial was the applicant able to examine or have examined the witnesses concerned. The lack of any confrontation deprived him in certain respects of a fair trial"). See also Van Mechelen v. Netherlands, 25 E.H.R.R. 647, 673 (1997); LŸdi v. Switzerland, 15 E.H.R.R. 173 (1992); Windisch v. Austria, 13 E.H.R.R. 281 (1991); Delta v. France, 16 E.H.R.R. 574 (190); Kostovski v. Netherlands, 12 E.H.R.R. 434, 448-49 (1989).

32R. v. Radak, The Times (London), Oct. 7, 1998.

33United States v. Tome, 61 F.3d 1446, 1455 (10th Cir. 1995)(on remand)(Holloway, J., dissenting in part and finding no guarantee of trustworthiness under the circumstances of the case). See also United States v. Joe, 8 F.3d 1488, 1494, n.5 (10th Cir. 1993)(noting split in federal circuits on this issue), cert. denied, 510 U.S. 1184 (1994).

34Although this Court has held that only the self-inculpatory portion of a declaration against penal interest satisfies the rationale of Fed.R.Evid. 804(b)(3), the decision in Williamson v. United States, 512 U.S. 594, 600 (1994), acknowledges that "Congress certainly could, subject to the constraints of the Confrontation Clause, make statements admissible based on their proximity to self-inculpating statements." Virginia, is of course, free to make the same choice, subject to the same condition.

35The situation would not be helped if, contra to Wright, the Court allowed corroborating evidence to play a role in the determination of trustworthiness. First, such a test would increase the bounds of trial court discretion. Second, corroborating evidence, like the testimony of Barker in this case, is often itself highly suspect. Third, such an approach turns the Confrontation Clause test, for all practical purposes, into the question: Does the judge think the defendant is guilty?

36One aspect of a categorical rule is that, if a statement is of the defined type and the accused has not had an opportunity to confront the witness, use of the statement at trial is, at least in general, unacceptable even if the witness is then unavailable. This treatment of unavailability and the question (which the Court need not reach for purposes of this case) of whether qualifications to it are appropriate, are discussed briefly below in n.47.

37Statements made at a grand jury proceeding therefore should not be usable at trial unless the declarant testifies and is subject to crossexamination. This rule would eliminate the current practice of subjecting grand jury statements to a "particularized guarantees of trustworthiness" analysis when they are offered under a residual hearsay exception. See, e.g., United States v. Gomez-Lemos, 939 F.2d 326, 332-33 (6th Cir. 1991), quoting Wright, 497 U.S. at 816.

38 See Margaret A. Berger, "The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model," 76 Minn.L.Rev. 557 (1992); Roger W. Kirst, "The Procedural Dimensions of Confrontation Doctrine," 66 Neb.L.Rev. 485 (1987).

39See THE FEDERALIST No. 51, at 323 (James Madison)(Clinton Rossiter ed. 1961)("guard . . . society against the oppression of its rulers").

40A statement that is deliberately elicited by a law enforcement agent during a covert instigation, from a declarant who is unaware that her statement was being solicited for use in investigation and trial, falls within the prosecutorial restraint view of the coverage of the Confrontation Clause, as the statement is created through active government participation. See Margaret A. Berger, "The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model," 76 Minn.L.Rev. at 608-09. It might arguably also be considered testimonial. But this issue, too, need not be reached: Mark Lilly knew he was speaking to the authorities.

41Our focus here is on when confrontation is necessary, not on what is required for confrontation. Thus, we do not discuss the questions of whether faulty memory of the witness may render confrontation insufficient, see United States v. Owens, 484 U.S. 554 (1988), or whether, to be constitutionally valid, the confrontation

must always place the accused and the witness in the same room. See Maryland v. Craig, 497 U.S 836 (1990); Coy v. Iowa, 487 U.S. 1012.

42For instance, statements by children pose special issues. See n.44, infra.

43Even when the Confrontation Clause does not apply, a hearsay statement might be considered so egregiously prejudicial, and lacking in probative value, that admissibility would violate due process. Such cases would be quite rare, however.

44Statements made by children often pose difficult issues -- none of which need be resolved for purposes of this case. Professor Berger would treat within the ambit of the Confrontation Clause the statements at issue in Idaho v. Wright, 497 U.S. 805, because they were deliberately elicited by a physician who had been selected by the police and briefed on the facts of the case. By contrast, the statements to the police in White were made much more spontaneously. Professor Friedman would consider other factors with respect to children. For example, a very young child might have so little understanding that she should not be deemed a witness for Confrontation Clause purposes -- just as a barking bloodhound should not be deemed a witness. Children may also be more susceptible to the kind of intimidation that might lead a court to conclude that the accused had forfeited his confrontation rights. See State v. Sheppard, 197 N.J.Super. 411, 435-42, 484 A.2d 1330, 1345-48 (Burlington Co. 1984).

45We do not mean to express an opinion as to whether this opportunity should have been deemed sufficient.

46In Mancusi, the witness had testified at a prior trial of the same case; in Roberts, she had testified at a preliminary hearing, which Green held to offer an adequate opportunity for confrontation.

Furthermore, if the witness is unavailable at trial but the accused has caused that unavailability, then, as has long been held, the accused forfeited a right to confrontation. See, e.g., Reynolds v. United States, 98 U.S. 145, 158-60 (1879); see generally Richard D. Friedman, "Confrontation and the Definition of Chutzpa," 31 Israel L.Rev. 506 (1997). If the accused has not engaged in such misconduct, we believe that the prosecution rather than the accused should bear the risk that the declarant will later become unavailable. The prosecution could presumably have protected itself and preserved the defendant's confrontation right by taking the declarant's deposition, except perhaps in those cases where death unexpectedly occurs.

But this case does not raise the question of whether such a strong doctrine of unavailability is necessary, and therefore this issue is not discussed further. This case is not comparable to one in which the witness died suddenly and naturally, so that the prosecution might argue plausibly that it could not reasonably have anticipated having to preserve the accused's ability to confront the declarant. When, as in this case, the asserted cause of unavailability is a claim of privilege, all the cards are in the state's hands. It could try the witness first; it could strike a plea bargain; it could grant use immunity. If the state refuses to play any of those cards, it -- not the accused -- should pay the price of that refusal.