OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

# THE SUPREME COURT

# OF THE

# UNITED STATES

CAPTION: BENJAMIN LEE LILLY, Petitioner v. VIRGINIA.

CASE NO: 98-5881 C.2

PLACE: Washington, D.C.

DATE: Monday, March 29, 1999

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IN THE SUPREME COURT OF THE UNITED STATES

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BENJAMIN LEE LILLY, :

Petitioner :

v. : No. 98-5881

VIRGINIA. :

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Washington, D.C.

Monday, March 29, 1999

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

IRA S. SACKS, ESQ., New York, New York; on behalf of the Petitioner.

KATHERINE P. BALDWIN, ESQ., Assistant Attorney General, Richmond, Virginia; on behalf of the Respondent.



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P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 98-5881, Benjamin Lee Lilly v. Virginia.

Mr. Sacks.

ORAL ARGUMENT OF IRA S. SACKS

ON BEHALF OF THE PETITIONER

MR. SACKS: Mr. Chief Justice, and may it please the Court:

Over the years, this Court has spoke in disparate, sometimes sharply divided voices regarding many Confrontation Clause issues. However, this Court has been of one voice concerning confessions of an accomplice given in custody incriminating a defendant. They have been consistently viewed as inevitably suspect, inherently unreliable, less reliable than ordinary hearsay, and presumptively inadmissible. The opportunity to cross examine an accomplice regarding a statement incriminating the accused lies at the core of the Confrontation Clause.

QUESTION: What if the -- what if the statement of the accomplice also is a declaration against penal interest?

MR. SACKS: Your Honor, I think the -- the test for that is as follow. I think the -- the test for that depends on many other things about the statement.

First, a court needs to look at whether it's against that person's penal interest and then you start with the test. And then the question becomes whether the statement is such, the circumstances and whether one looks in Wright at just the circumstances of making the confession or the totality of the circumstances -- whether the circumstances are such that cross examination of the declarant, of the accomplice, would be of marginal utility. That's the bedrock.

QUESTION: Well, you -- you can say that about any number of well established hearsay exceptions, that perhaps it would have been better if -- if there had been cross examination, but those have, nonetheless, been rooted in the hearsay exception. And it seems to me that you've got to deal with not just the statements in our opinions about confessions of accomplices, but also about declarations against penal interest.

MR. SACKS: I -- I agree with that, Mr. Chief Justice. I think, however, that in dealing with the firmly rooted hearsay exceptions that were viewed as an exception, if you will, under the Confrontation Clause, this Court has observed that those exceptions were such that cross examination of virtually any declarant who fell within such an exception would be of marginal utility, and that is not the case with statements of an accomplice for



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two reasons.

One, with respect to a statement of an accomplice incriminating a defendant, those statements are, as this Court has observed and in situations where it's against the accomplice's penal interest, that those are inevitably suspect and inherently admissible. On the one --

QUESTION: Can -- can you give me an example of a case in which we have held that a declaration against penal interest which was also the confession of an accomplice -- and that may be a fairly narrow class of cases -- was inherently suspect?

MR. SACKS: Lee.

QUESTION: Was there a declaration against penal interest there?

MR. SACKS: Oh, no question. Your Honor, if you consider the confession of the accomplice Thomas in Lee where the core of that confession is, is that Lee and I planned the murder of Aunt Beedie, Thomas would not have been responsible at all for the murder of Aunt Beedie absent that confession, as -- as was -- was noted in the dissent by Justice Blackmun in the Lee case.

QUESTION: Which several of us joined.

MR. SACKS: The -- the confession of Mr. Thomas in the Lee case was unambiguously against his penal

interest, and despite that, it was held by the Court in Lee that the right of Lee to confront Thomas on the stand on cross examination was required by the Confrontation Clause.

QUESTION: So -- so, you think that our doctrine then is that the -- if it's a confession of -- of an accomplice, the -- the declaration against penal interest is simply swallowed up.

MR. SACKS: No, Your Honor, I don't. I think that -- that what -- that what a court has to first do is recognize that there's a different test for custodial statements of an accomplice that incriminated a defendant than just declarations against penal interest. I think that's what this Court was getting at in footnote 5 of Lee when it said that in looking for whether there's a Confrontation Clause exception for this category, the category we're dealing with is not declarations against penal interest, but confessions of an accomplice. And then what one has to look is whether the circumstances are such that cross examination would be of marginal utility.

I can imagine -- and I think there are situations where -- because we do not ask for a per se rule -- where there would be circumstances that were such that cross examination would be of marginal utility. The types of factors that a court could look at would be, one

-- and these are all suggested by these -- by this Court's decisions. One, is the -- is the accomplice admitting or implicating himself in something more than he's implicating the accused?

Two, is there blame-shifting involved in the sense that blame-shifting was defined by Justice Kennedy's concurrence in Williamson? Is there blame-shifting? Is the -- is the accomplice attempting to shift blame? If he's not, that's another factor in favor of finding an exception.

Third, was the statement spontaneous? Was the statement done in response to leading questions?

But the -- fourth, was it in custody? Because this Court's decisions have also made very plain that situations in custody are different than a situation --

QUESTION: Well, it's made it plain so far is admissibility of evidence against the declarant. The Miranda warnings, for example. I don't know that it's said that custody makes a great deal of -- of difference so far as the -- say, an admission against penal interest where the declarant isn't present.

MR. SACKS: Your Honor, Mr. Chief Justice, with all due respect, I think that in Williamson, which I agree is a -- is a Federal rule 804(b)(3) case, that the -- that the discussion in Williamson about the difference under

the Federal rules, 804(b)(3), of a -- of a -- of a statement to another prisoner, as in Dutton v. Evans, as opposed to a statement in custody makes a great deal of difference. And -- and that makes sense, Mr. Chief Justice.

This -- this case -- in this case you have a situation where Gary Barker was questioned before Mark Lilly. The police -- and this is not to ascribe any bad motives of the police, but just to talk about the normal situation. Mark Lilly is then questioned, but both of his statements indicate, on the face of the statements, that there was questioning of Mark Lilly before the tape was turned on.

In the first statement that was taken from Mark Lilly, he gets to a point where he -- where he says to -- to -- to Investigator Price in response to tell us what happened, nothing that you -- you already don't know, man.

In the second one -- in the -- in the statement taken by Mr. -- by Investigator or Detective Hamlin, the tape is turned on at 2 o'clock. Mr. Hamlin says, it's 2 o'clock. Then they paused for him to sign the Miranda statement, and then it goes back on at 2:30.

In situations like that, there's every reason to say that there's something different about a carefully tailored confession in custody in terms of its reliability

than a statement that somebody walks up to somebody else on the street or walks up to somebody else in the prison yard and says, you know, by the way, you know, if it wasn't for that guy Evans, I wouldn't be here right now.

But the bedrock it seems to me, Your Honor, under this Court's decisions is you have a right to confrontation and there's an exception to the right to confrontation if the nature of the statement is such that cross examination of the declarant would be of marginal utility. Now, that may be a hard test, but that's what the Sixth Amendment is about.

QUESTION: May I ask you, if you're at a break in your argument, have you read Justice Thomas' opinion in White against Illinois?

MR. SACKS: Yes.

QUESTION: How would you apply the analysis in that opinion to this case?

MR. SACKS: Well, you know, it's -- it's at -- the answer is that we would be happy if this Court decided to adopt the view of Justice Thomas, joined by Justice Scalia, in Wright because we believe that either under Lee and what I would call existing case law or under the suggestion by Justice Thomas in White and the concurrence that a hard and fast rule be used for the Confrontation Clause, we think that either way, the decision has to be

reversed because as I understand the concurring opinion in White it would extend the right of confrontation to witnesses who testify and to testimonial material such as affidavits, depositions, prior testimony, and confessions, and there would not be an exception for reliable statements.

In the words of Justice Thomas at page 363 of the opinion, nor does it seem likely that the drafters of the Sixth Amendment intended to permit a defendant to be tried on the basis of ex parte affidavits found to be reliable.

So, although we believe --

QUESTION: But, of course, this is not an affidavit.

MR. SACKS: Well, it's -- it's -- but the -- the extension that Justice Thomas used there was formalized testimonial material such as affidavits, depositions, prior testimony, or confessions. And I think the -- the thrust of the concurrence --

QUESTION: It's or confessions that you relying on.

MR. SACKS: Yes. And the thrust of the concurrence, as -- as we understand it is, it would -- it would divorce Confrontation Clause jurisprudence from the hearsay rule. It would look at the literal language of

the clause. It would apply it to witnesses and to testimonial materials and not other extrajudicial materials, and it would be a hard and fast rule. And it wouldn't matter how reliable the -- the -- those statements were or were not.

And although we believe that petitioner is entitled to a reversal of the judgment of the Supreme Court of Virginia based on existing law, we believe it's also plain that there would be reversal required under the view of the Sixth Amendment that Justice Thomas, joined by Justice Scalia, had described in the concurrence in White.

I want to deal with the issue of firmly rooted and whether the evidence in this case fell within a firmly rooted hearsay exception mostly because the State of Virginia and the amici in support of the State of Virginia spend so much time on it.

QUESTION: But before you get to that, may -- I'm a little confused about the declaration against penal interest. I can understand it if the defendant had been trying to introduce a statement that was made that was exculpatory vis-a-vis the defendant, inculpatory vis-a-vis the -- the person who was apprehended with him.

The Confrontation Clause says you have a right to be confronted with the witnesses against you. It doesn't say anything about hearsay and exceptions, and the

confrontation principle has been adopted widely throughout the world in many systems where they never have a hearsay rule. So, I don't understand. You seem to be conceding that they go together, when in fact the Confrontation Clause states a general principle of the right of a criminal defendant, and that has been well accepted throughout the world, including in places that have the only qualification on -- on evidence coming is relevance.

MR. SACKS: Justice Ginsburg, the -- the reason why -- and conceding is probably -- is -- is probably too -- too strong a word. We are -- we are -- under this Court's current case law, as we understand it, we understand that this Court's current case law has to some degree linked hearsay, hearsay exceptions --

QUESTION: To some degree is an understatement. Ohio v. Roberts just spells that out, doesn't it?

MR. SACKS: As a general rule, but this Court in Inadi indicated that -- that Roberts did not intend to have its rule as a rule that applied in all circumstances, and that, at least in the words of the Court in Inadi, that -- that there -- there would be exception that courts in -- that the Court in Roberts was not seeking to have a rule that applied in all circumstances. And in fact, in both Inadi and in White, this Court has disregarded a portion of the Roberts general rule.

QUESTION: And in favor of admitting evidence, not in favor of excluding it.

MR. SACKS: That's truly correct, Mr. Chief Justice.

But getting back --

QUESTION: So, I mean, that tends to show that you're going to -- so far as being able to exclude things, you're not going to be able to exclude them if they're a recognized hearsay exception. You may be able to get them admitted even though they're not a recognized hearsay exception.

MR. SACKS: With all due respect, Mr. Chief Justice, it went way beyond a recognized hearsay exception. It went in my view, in terms of what the Court was looking at in White and Inadi, to situations where the Court recognized that the hearsay -- that the evidence there fell within -- and the category of evidence there fell within a hearsay exception that was firmly rooted and firmly rooted in the sense that cross examination -- and this is in the opinion in White, adopting from the opinion in Wright -- that cross examination of the declarant would be of marginal utility. That is the bedrock principle that is linked with firmly rooted hearsay exceptions. And I don't think that this Court has meant to suggest that merely on the basis of a hearsay exception, that you lose

your right to confrontation. I think it's far more than that.

Now, to -- to -- to finish the -- the concept, Justice Ginsburg, it's -- our understanding is on the Court's -- this Court's current case law that there is a link to some degree, to a significant degree, under Roberts between hearsay, hearsay exceptions, and firmly rooted hearsay exceptions on the one hand and confrontation on the other. We believe that even under that standard, we are entitled -- petitioner is entitled to reversal of the decision of the Supreme Court of Virginia.

We also adopt the views, as I -- as I said to Justice Stevens -- we adopt the views expressed in the concurrence in White in the -- and in the amicus petition submitted by the American Civil Liberties Union in support of petitioner that would separate the notion of confrontation from the hearsay rules.

We think that what has happened with the hearsay rules is -- is that you've wound up with a lot of labels and not a lot of answers. And one of my disabilities as a -- as a lawyer as I grew up as an antitrust lawyer, and I was thinking about this argument, and there is a phrase in BMI v. CBS which -- which is 441 U.S. 1, which has nothing to do with this case other than being an apt phrase, which

is that easy labels do not always supply ready answers. And that's the problem with firmly rooted hearsay exceptions.

If you deal with firmly rooted hearsay exceptions, as this Court has done, one has to not forget why one is looking at that.

QUESTION: Was -- was this argued to the Supreme Court of Virginia in anything else other than firmly rooted hearsay exceptions? Was there any broader principle urged upon that court?

MR. SACKS: The broader principle that was urged below in the -- in the Supreme Court of Virginia was that these statements were not sufficiently reliable to be admitted under the Confrontation Clause.

And when you get to the notion of firmly rooted, the problem with the firmly rooted label is that some courts, particularly some lower courts, forget why this Court has asked courts to look at that. The reason for looking at whether something is a firmly rooted hearsay exception, one, you're supposed to be looking at whether the evidence or the category of evidence falls within a firmly rooted hearsay exception.

And two, the reason for looking at it is because this Court has observed with respect to some firmly rooted hearsay exceptions that virtually all evidence within them

meets the constitutional norm and makes the declarant someone whose cross examination would be of marginal utility. And it is important for this Court and other courts not to forget that that's the reason why we look at firmly rooted exceptions.

In this case, if you look at the key piece of evidence -- and there's lots of stuff in Mark Lilly's statement that shouldn't come in, but let's look at the statement by Mark Lilly, petitioner was the triggerman. That is not within a firmly rooted hearsay exception. You can start off with the principle that that is not self-inculpatory. It is the classic --

QUESTION: It's not a declaration against penal interest.

MR. SACKS: Well, you know, that's -- and -- and maybe -- and maybe that's the reason to -- to just overturn. Maybe what you really have to say, Mr. Chief Justice, is that the Virginia Supreme Court got it right when they said that Mark Lilly's statement was self-serving, and then they got it wrong when they said that went to -- went to weight, not admissibility.

It's -- it's surely not against his self-interest. It is surely self-serving. It would not be admissible under rule 804(b)(3) of the Federal Rules of Evidence. It would not be admissible under at least 30,

if not 35 --

QUESTION: Are you saying declarations that are inculpatory of accomplices are by definition not against penal interest?

MR. SACKS: Oh, no. It's -- it's -- I don't think that that statement was inculpatory of Mark Lilly at all.

QUESTION: Of accomplices.

MR. SACKS: As -- putting aside Mark Lilly's statement, Justice Kennedy? No, I'm -- I'm saying that if you have a statement --

QUESTION: Mark made the statement and it's inculpatory as to Benjamin.

MR. SACKS: Yes.

QUESTION: So, are you saying that statements that are inculpatory of an accomplice are by definition not against penal interest?

MR. SACKS: No. They might be. If you take -- if you take some of the examples that --

QUESTION: Because I thought you would extend it out and say, well, this is always in order to get favorable consideration from the police.

MR. SACKS: I think that you look at several --

QUESTION: And -- and therefore, it's



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exculpatory as to the declarant.

MR. SACKS: Well, it's -- it's -- in answering the broad question, Justice Kennedy, as to whether ever a statement which incriminates -- a statement by a declarant that incriminates the defendant could be a declaration against penal interest that fell within -- that was such that cross examination would be of marginal utility, I could conceive of such a case based on the factors that I talked about before which would be does it inculpate the declarant more than the defendant, does it attempt to shift blame, was it spontaneous, and -- and -- and although I don't think this is so much a matter of corroboration as adoption, whether there is a confession by the defendant that matches in all significant respects the statement by the declarant. That's not what we have here.

But I think as a general category, we're not seeking a per se rule. We concede under current doctrine, as opposed to under the position advanced in the concurrence by Justice Thomas in the White case -- we can -- we would concede under current doctrine that there might be circumstances where a statement by an -- by a declarant which incriminated the defendant might be such where the circumstances made it that cross examination of the declarant would be of marginal utility. We don't



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think this is remotely close to the line because here, as the Chief Justice indicated in response to my comment, the statement, petitioner was the triggerman, isn't even self-inculpatory of Mark Lilly. It isn't even self-inculpatory. It wouldn't come in under the Federal rules. It wouldn't come in under 30 or 35 out of the 36 State laws that were surveyed in our brief.

Now, the Commonwealth of Virginia --

QUESTION: You would say no portion of -- I mean, suppose the whole statement contains a number of provisions that are inculpatory of -- of the declarant. Would you say that those portions that are not inculpatory cannot come in?

MR. SACKS: I -- I think at some point the whole -- the whole confession has to go, but I think that -- that, Justice Scalia, you're quite right that our view is that you look at the specific statements, as this Court suggested under rule 804(b)(3) you look at specific statements, and you take those specific statements and you test those specific statements.

Now, at some point, it may be that the confession as a whole is so -- is -- is so self-serving as opposed to inculpatory that even the statements that were against Mark Lilly's penal interest purely would be excluded. But I think the -- the answer in the abstract

is, yes, some portions could come in and some portions would be excluded.

QUESTION: And -- and even statements that, for example, just describe the surrounding circumstances of the crime and that corroborate perhaps other witnesses -- they couldn't come in simply because they are not --

MR. SACKS: Well, let me -- let me take that --

QUESTION: -- immediately inculpatory.

MR. SACKS: -- in two -- in two pieces, Justice Scalia. I think that you have to start off with the proposition that there's a Confrontation Clause and that the petitioner had the right to cross examine the witnesses against him. And if all Mark Lilly had said was, it was cold and the moon was out down at Whitethorn near the side tracks, I don't know why that comes in under the Confrontation Clause. It may be that counsel might not choose to object to that if that was the only part that was coming in, but under the Confrontation Clause, that's not within a hearsay exception. It's surely not within a firmly rooted hearsay exception.

Perhaps someone wouldn't want to cross examine. So, therefore, maybe that's one where you would toss out the -- the labels and say, well, cross examination would be of marginal utility because you could look in the

Roanoke Times and see that it was cold and the moon was out.

QUESTION: Why wouldn't that be against penal interest if it should that he was there and that was one of the big issues in the case?

MR. SACKS: It might be if that was the -- if that was an issue in the case, but as -- as -- as I understood the hypothetical and as -- and I was -- as I was responding to Justice Scalia, just saying it was cold and the moon was out might not be against Mark Lilly's penal interest. It also could be. It also very well could be.

QUESTION: But you would agree you couldn't judge it by whether there was other evidence that the moon was out and so forth.

MR. SACKS: Well, Justice Stevens, I think that if you get to what I believe is a bedrock test, which is whether cross examination of the declarant would be of marginal utility, I think that one would have to concede, if the Court could take judicial notice that it was cold and if the Court could take judicial notice that there was a full moon, that perhaps cross examination would be of marginal utility. I think that in the abstract under the current way that this Court has tested statements of an accomplice, that it doesn't fall within -- it probably

doesn't fall within a hearsay exception and it probably doesn't fall within a firmly rooted hearsay exception.

Now, looking -- looking at the arguments that the Commonwealth and -- and their -- the amici in support of the Commonwealth make, they spend a lot of time talking about the widespread nature of declarations against penal interest and how they're way more widespread today than they were in 1968. And the point that that misses is that under current doctrine -- and again, you know, put -- separating current doctrine from the alternative test of just a -- a flat Sixth Amendment bar to -- to statements like confessions coming in --

QUESTION: You say it's an alternative test, the -- the flat bar. Has that ever been adopted in any of our cases?

MR. SACKS: No, Your Honor. Mr. Chief Justice, I was using that as a shorthand to the suggestion in the questioning that what position would the petitioner take with respect to this Court's adoption of the position asserted by Justice Thomas, joined by Justice Scalia, in the concurrence in White. And -- and it is -- it is an alternative only in terms of our advocacy and not in terms of this Court's doctrine. That is quite correct.

But the -- the issue for the firmly rooted question is whether the evidence at issue or the category

of evidence at issue falls within a firmly rooted hearsay exception and not whether there is an exception out there in the abstract. And this Court in footnote 5 in Lee indicated we think plainly -- and I realize it was in a footnote -- and correctly that in cases like this, saying that it's a declaration against penal interest is too broad a category for Confrontation Clause analysis, and you have to -- and -- and that the courts have to recognize that what this is is a statement of an accomplice incriminating the defendant.

And there's a good reason for making that distinction because as we pointed out in our reply brief, the treatment of declarations against penal interest and the treatment of the subcategory of -- of statements of an accomplice incriminating a defendant under the Federal rules is different and under various State laws are different.

Now, the Criminal Justice Legal Foundation also spends a lot of time talking about how in 1968 when Bruton was decided, declarations against penal interest were not as widespread, but they're very widespread now. And we think that also misses the point. We think the point is not how widespread declarations against penal interest as an exception to hearsay was in 1968, or in 1994 when Williamson was decided, but whether custodial statements

of an accomplice which incriminate a defendant are more reliable today than they were in 1968 when Bruton was decided or 1994 when Williamson was decided.

QUESTION: Does the amicus venture any opinion as to why there are a lot more declarations against penal interest in 1999 than there are -- were in 1968?

MR. SACKS: Well, I think -- I think that -- that what has happened -- and this is -- and this is -- this is true I think even in -- in the decisions of this Court looking at the issue of -- in the context of rule 804(b)(3). The common law, in having -- in carving out penal interest as a hearsay exception, has evolved, and people -- and -- and the courts have recognized and legislatures have recognized that the pure category of statements against penal interest without the additional, if you will, baggage of being self-serving or also incriminating the -- a defendant, can be reliable and can meet the test of reliability necessary to qualify as an exception for the hearsay rule. And that is why the general exception for declarations against penal interest is more widespread today.

What --

QUESTION: So, the -- the position is not that people are making more declarations, but that more of them are being admitted in court?

MR. SACKS: No. It's that -- it's that more States -- more States have a statute or a rule of law that --

QUESTION: Which would authorize it or --

MR. SACKS: -- that -- that -- that would admit as a hearsay exception a declaration against penal interest, but not that would admit a statement of a declarant which was in part inculpatory -- self-inculpatory but which also incriminated a defendant. And our review, which we set forth in our reply brief of -- that law indicates that under the Federal Rules and under 30 to 35 of the 36 States where we found legislation or rules would exclude that.

I think at bottom what you come down to in this case is there is nothing in the -- nothing about the circumstances of this confession or, if one goes beyond Wright and looks at the other corroborating evidence which makes cross examination of Mark Lilly of marginal utility, that's the bedrock current principle. And for that reason and that reason alone, the decision of the Virginia Supreme Court should be reversed.

And I'd like to reserve the rest of my time

QUESTION: Very well, Mr. Sacks.

Ms. Baldwin, we'll hear from you.

ORAL ARGUMENT OF KATHERINE P. BALDWIN

ON BEHALF OF THE RESPONDENT

MS. BALDWIN: Mr. Chief Justice, and may it please the Court:

My procedural argument has not been argued this morning, and -- and I will not belabor it, but I do want to make the point that Benjamin Lilly is asking this Court -- it is our position, is asking this Court to reverse his conviction on the basis of arguments that were not presented to the Virginia Supreme Court in a timely manner. For the first time in a petition for rehearing below was where there was any argument that there was a per se rule, that the Confrontation Clause did not allow these types of confessions, although I understand it sounds this morning as though the petitioner is backing away from that argument of it being a per se rule. And he certainly never made the argument, until his petition for rehearing, about the nature of his particular case involving a co-defendant's confession being some subcategory of -- of the exception which is not firmly rooted.

QUESTION: Was the argument made -- was the argument made to the Supreme Court of Virginia that the admission was -- violated the Federal Confrontation Clause?

MS. BALDWIN: Yes, Mr. Chief Justice. He

definitely argued and cited to the Sixth Amendment Confrontation Clause all the way through, but it was always secondarily. It was mainly a State evidentiary matter that was being argued, and when he cited the Confrontation Clause --

QUESTION: Well, but the -- the point I think is that the State Supreme Court expressly addressed the Confrontation Clause question, and the issue is whether it dealt with it correctly under our law. And can we not address that?

MS. BALDWIN: Justice O'Connor, I do not believe it's the same argument that was made below.

QUESTION: He doesn't have to make the same argument.

QUESTION: You don't have to make exactly the same argument. Presumably if you lost below, you'd make a little -- little different argument, somewhat.

(Laughter.)

QUESTION: Sometimes people hire better lawyers on appeal presumably because they'll make better arguments. I --

MS. BALDWIN: Our only point on this issue is that I think it's unfair to reverse a conviction and a judgment of the Virginia Supreme Court on bases that literally were not argued or addressed by the court. They

did argue -- there's no question. They did argue and the court did address in a broad sense the Confrontation Clause, but it was a general argument that I did not get to cross examine Mark Lilly, therefore the Confrontation Clause was violated. And none of these --

QUESTION: Well, that's sort of unfair to your Supreme Court, but, you know --

MS. BALDWIN: I -- I --

QUESTION: -- that they didn't have the advantage of these arguments. But I don't think it stops us from addressing it.

MS. BALDWIN: I understand, Justice Scalia, and -- and I will definitely move on.

Regarding the firmly rooted issues in this case --

QUESTION: Before you get to that, I would like to be clear on why this declarant was unavailable. That is, you had two -- there were three people involved in -- in this crime. One of them did testify in open court because his case had already been settled. That was Barker. But Mark Lilly had not yet been tried, and that was -- that made him unavailable because he was going to plead the Fifth. It was within the State's control, was it not, to deal with Mark just as it had dealt with Barker? And in that case, then Mark would have been

available. He would not have had access to the Fifth Amendment.

MS. BALDWIN: Well, Justice Ginsburg, I have two answers to that.

First of all, Benjamin Lilly conceded below that Mark Lilly was unavailable. So, that was not an issue that the petitioner has ever brought up or challenged in any way until some of the briefs that have been filed in this Court. But his unavailability was conceded below.

Secondly, the timing or the -- the -- or Mark Lilly being able to testify or not or take the Fifth Amendment or not was not in the State's control. Mark Lilly was the one who decided to take the Fifth Amendment. The arguments that have been made for the first time on brief are essentially that the -- that the State could have tried him first, which they could have, but that would have not taken away his Fifth Amendment right not to testify in Virginia. And -- and -- especially through direct appeal.

QUESTION: Well, so, why wouldn't he have been in any different situation than Barker? Barker did testify, did he not?

MS. BALDWIN: Barker made a deal with the Commonwealth in return for his truthful testimony. That's correct. He pled guilty and he made a deal. But Mark

Lilly was unwilling to make any kind of plea agreement with the Commonwealth. That was in Mark Lilly's complete ability to do that or not. That had nothing to do with the State controlling it. In fact, I mean, Mark Lilly obviously was unwilling to testify against his brother. In fact, he testified post verdict to what was pretty obviously perjured testimony in favor of his brother.

So -- so, there was -- the State was caught in this case. It had an accomplice who had given a confession, and the accomplice decided not to take the -- not to testify against his brother. And in Virginia, that clearly makes him unavailable and under Federal law that -- for the Federal law for the same hearsay exception it makes him unavailable.

There -- there's no -- there's been some argument that the Commonwealth could have extended some kind of immunity to him. Well, in Virginia, there is no way to force a -- a witness to testify under these circumstances --

QUESTION: Your answer is that it was Mark Lilly's --

MS. BALDWIN: It was his decision. It had --

QUESTION: -- and not the State's.

MS. BALDWIN: It was not within the control of -- of the Commonwealth of Virginia. He took himself out



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of the trial, and -- and -- and the Commonwealth would have liked to have had his testimony, but it did not.

Back to the firmly rooted nature of this -- of the hearsay exception, this Court has never found some type of subcategory that's being argued now of the statements against penal interest.

QUESTION: It doesn't have to be a subcategory. I mean, that's one way to put it, but -- but another way to put it is that's simply the admission of this testimony comes within a firmly rooted exception. You don't just ask whether in general there is an admission against penal interest, but whether a firmly rooted exception against penal interest would admit this testimony, this particular testimony.

MS. BALDWIN: Well, and I think another way --

QUESTION: If you want to call that a subcategory, then I guess that's okay, but do you -- do you --

MS. BALDWIN: I don't disagree with the statement of the question, Justice Scalia. Another way maybe of putting it, which I think is -- is the issue, is does this particular evidence in this case, the confession, meet the requirements of this -- of this established hearsay exception. If it meets it, if a trial court judge decides like he decides any other piece of

evidence, whether it's reliable or not, does it fulfill the requirements, then it comes in the -- into evidence.

QUESTION: And to decide whether it fulfills the requirements, you don't just proceed with a general definition, you know, admission against interest. You look to whether those courts who have an admission against interest general exception include this within it. Correct?

MS. BALDWIN: Well, that's correct, but also I think we have to know what we're talking about here. Statements against penal interest I think can -- is capable of having two different meanings, and I think those have gotten fudged in the petitioner's argument.

Statement against penal interest is a term of art. It also might have a -- a layman's sense that anytime somebody says something which on the surface looks like it's against their interest. We're not arguing and have never argued -- and in Virginia, that doesn't come in under a statement -- statement against penal interest. It has to be --

QUESTION: Well, a statement is -- the statements of -- of a party can always come in, and the ones that are introduced are usually adverse because they're introduced by the person who is opposing the party. A declaration against penal interest can come in

against anybody, and it's a very narrow exception.

MS. BALDWIN: It is a very narrow exception, Mr. Chief Justice. There's no question about it. And not a lot of evidence qualifies under it. And probably not a lot of accomplice confessions qualify under it. In fact, the Commonwealth of Virginia has -- has never argued and -- and I'm not arguing today. We don't need this Court to find this is a firmly rooted exception. There's nothing magic about that as far as governing the issue in this case. This is an evidentiary matter. Did it violate the Confrontation Clause?

And this Court has made very clear two things, that such -- such evidence can come in under exceptions to the hearsay rule and not violate the Confrontation Clause if it's either firmly rooted or if it otherwise has some indicia of reliability associated with it. And -- and in Virginia, that is what is looked at in every single case. So, we don't need this Court to rule that it's firmly rooted.

QUESTION: May I --

MS. BALDWIN: I don't think there's any question but --

QUESTION: May I ask on the second part, the otherwise reliable and so forth, do you think you can rely on evidence extraneous to the statement itself to

determine reliability?

MS. BALDWIN: I think that there's nothing to prevent a court from doing that, Justice Stevens, but I don't think that -- that in this case, for instance, that that's what was done. And I think it's the nature of the --

QUESTION: Well, didn't -- the Virginia Supreme Court did that, didn't it?

MS. BALDWIN: I don't believe they do if you look at how -- how this particular hearsay exception works and what the Virginia -- Virginia Supreme Court has always required.

First of all, it's -- it's a two-step hurdle that it -- that the evidence has to pass before it comes in. It's got to meet the general common law hearsay exception, but that hearsay exception itself requires that you look at the circumstances of the statement because it has to be a statement that is, yes, on its surface against his interest. He has to know it's against his interest. It has to be genuinely self-inculpatory.

So, once you pass that hurdle, my argument is that meets the corroboration rule even of idaho v. Wright, even though I don't think there's any requirement that that applies to anything except the type of residual hearsay exceptions that don't have their own indicia of



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reliability with them.

Statements against penal interest do, and this is a separate argument from whether it's firmly rooted or not --

QUESTION: Ms. Baldwin --

MS. BALDWIN: -- whether it's widely accepted --

QUESTION: Ms. Baldwin , I understand what you said in the abstract, but I keep thinking of the -- the statement here that was resisted was the statement that was highly inculpatory for Benjamin and made things look better. It cast -- the statement that was most damning for Benjamin cast Mark in a better light. So, I keep hearing statement against penal interest and it seems to me what is resisted here is the statement that is very much in Mark's interest and against Benjamin's interest.

MS. BALDWIN: I don't believe that any statement that Mark Lilly made in these confessions were in any way exculpatory of Mark Lilly, and that includes everything he said about his brother. You have to --

QUESTION: Well, isn't there something comparative? I mean, one thing is to say, yes, I was there caught red-handed at the scene of the crime, but I wasn't the triggerman. He was.

MS. BALDWIN: The only issue in this case -- and



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I think this is a significant factor for this case, and I think it completely distinguishes it from Lee v. Illinois and any of the other cases that have found -- that have found this type of evidence inadmissible in those particular cases -- and that is that the only issue in this case -- the only issue -- was who pulled the trigger. There were no other issues in the case.

QUESTION: But at the time the statement was given, it was quite evident I think that Mark might have been charged with being the trigger or being directly complicit in pulling the trigger or in doing the killing. And so, at that point it is, it seems to me, exculpatory of -- of Mark.

MS. BALDWIN: Justice Kennedy, I disagree. I don't think the record proves that point which I know is what the petitioner has argued.

QUESTION: We can talk about the burden of proof later, but I mean, it's pretty common sense that you've got --

MS. BALDWIN: No, I don't --

QUESTION: -- a murder and three people. The first man to say, well, I didn't do it. That's -- that's -- that's seems to me exculpatory.

MS. BALDWIN: But by the time Mark Lilly was interviewed, Gary Barker had already confessed, had



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already interviewed. The police knew what had happened. And the most important thing is that they came to Mark Lilly and they said, no one is --

QUESTION: You're the one -- you're the one that's introducing the statement. If you -- if you want to rely just on the other man, fine.

MS. BALDWIN: Maybe, Justice Kennedy, I didn't understand your question, but -- but I think it's significant here that Mark Lilly was never suspected -- never suspected -- of being the triggerman and he was told that by the police officer who was -- who was interviewing him. And so, the only issue in the case then -- if the only issue in the case is who pulled the trigger, Mark Lilly by definition was not trying --

QUESTION: When was -- when was Mark charged or indicted?

MS. BALDWIN: They were -- I'm not sure of the exact date, but they were all charged --

QUESTION: Are you saying that at no -- at no point after the time that this third person, Barker, made his statement, that at no point did the State consider charging Mark with a capital offense?

MS. BALDWIN: That's correct.

QUESTION: And that's -- was there a finding to that effect?



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MS. BALDWIN: No, Your Honor. The -- we have that from the statements themselves, and there is -- there is nothing in the record anywhere --

QUESTION: Well, one statement was recanted. Maybe Barker would recant his statement.

QUESTION: From what statements themselves? From the statements that the officers made to him?

MS. BALDWIN: Yes, from -- from the record of -- - of --

QUESTION: -- often --

MS. BALDWIN: -- of the confession.

QUESTION: Sure, I mean, but officers never tell them things that are false?

MS. BALDWIN: Well, but I don't -- I don 't think in -- for -- for the --

QUESTION: You know, they say, you know, you're home free. Just -- just tell us really who -- who pulled the trigger.

(Laughter.)

MS. BALDWIN: But, Justice Scalia, for the point that we're arguing, it wouldn't matter whether the police were lying or not because the point we're trying to look at now is what was Mark Lilly thinking when he made these statements.

QUESTION: Oh, and -- and witnesses always

believe what the police tell them when he says, you know, you're home free. Just tell us who pulled the trigger.

QUESTION: You're not -- you're not arguing then that this is a declaration against penal interest.

MS. BALDWIN: Mark Lilly's statements were a declaration against penal interest.

QUESTION: Well, I think it's very difficult to make out the case that when he says that his -- his brother who -- Ben was the triggerman, that that's a declaration against Mark Lilly's penal interest.

MS. BALDWIN: It's what caused Mark Lilly to be indicted, tried, and convicted of first degree murder. He was not -- this is not a -- a bystander watching something down the road occur. This is an active participant witness accomplice who tells the police information, and every piece of information is -- and it's crucial, what his brother did, the shooter -- made Mark Lilly guilty of the crimes that he is in prison for now.

QUESTION: Now, how did the statement that his brother Ben pulled -- was the triggerman -- how did that incriminate Mark?

MS. BALDWIN: It made him an accomplice to first degree murder which in Virginia he is punished as a principal in the first degree except for capital murder. He cannot receive the death penalty, but he receives -- he



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can receive up to a life sentence for first degree murder.

QUESTION: Well, how -- how did that statement by itself -- Ben Lilly pulled -- was the triggerman. How did that make Mark Lilly an accomplice?

MS. BALDWIN: It established the murder. It established a -- a premeditated murder to which Mark Lilly was the accomplice. It absolutely was crucial to -- to be -- as far as being inculpatory as to Mark. Without that --

QUESTION: But he had said other things that said, here I was. Yes, the three of us were all in it together, and -- but then he said, but I didn't pull the trigger. He did. So, that -- I can see the rest of it saying, yes, he admitted to being at the scene of the crime and participating in it. But the one statement -- that seems to me you cannot say --

MS. BALDWIN: But -- but Mark Lilly -- and I have to go back to this. There's nothing in the record, and in fact there's everything in the record against it, and that is Mark Lilly was never a suspect for being the triggerman. He was told that when he was being interrogated.

QUESTION: Do the prosecuting attorneys in the State of Virginia -- are they always bound by what the police tell the suspects when they charge?



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MS. BALDWIN: No, they're not.

QUESTION: Of course, not.

MS. BALDWIN: But here we're talking about the reliability of Mark Lilly's statements, and that's all we're talking about.

QUESTION: Ms. Baldwin, in -- in deciding whether something is inculpatory or not, don't you have to take into account what information the police already have and what information the declarant knows the police already have? I mean, if he tells them stuff that he knows, they got him dead to rights on anyway, I guess you could say technically it's inculpatory, but for purposes of -- of -- of this rule as to whether it provide indicia of reliability, it seems to me it -- it's worthless. Just -- just giving the police something you -- you know they already have that the three of us were in it together, they knew all of that stuff.

MS. BALDWIN: I think that's what the Miranda rights, though, told Mark Lilly, is anything you say is going to be used against you. In fact, I think --

QUESTION: That's fine. Use it against me. I know you have all that anyway.

MS. BALDWIN: Well --

QUESTION: I mean, it's not significantly inculpatory. He knew they -- they had him dead to rights



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on all of that stuff. The only thing he was giving them that was new was -- was, you know, my brother was the triggerman.

MS. BALDWIN: I have to disagree. I think that everything that Mark Lilly said was the basis upon which he was charged with first degree murder and convicted of first degree murder.

QUESTION: All right. Assuming that, you're --

MS. BALDWIN: So, they were self-inculpatory.

QUESTION: Assuming that, you're still left with the point that everything he said also formed a pretty good predicate, if it was accepted, for avoiding the possibility of the death penalty. And your answer to that, as I understand it, is, well, the police had told him that -- that he wouldn't be charged or they didn't believe that he was the triggerman. Well, one good way to try to ensure that the police continue to -- to feel that way is to make a statement that fingers someone else as the triggerman. And to that extent, it is certainly very much to his advantage to say exactly what he said about his brother.

MS. BALDWIN: I'm not sure the test is does -- is the statement that the -- the individual is giving to his advantage as to whether it's reliable or not. I'm not



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even sure the test is, is the statement he's giving -- does he think that's going to please the police. Of course. That would be every single confession situation. The test is, is this an individual who is making a genuinely self-inculpatory statement believing that it will result in his imprisonment or -- or something like that.

QUESTION: And let's assume --

MS. BALDWIN: And he tells us that.

QUESTION: Let's assume that it is, and let's assume also that it has a separate function, that it has a different character, and that different character is making certain that it will be his brother and not himself who is charged and convicted of, if anyone is convicted, of -- of -- or sentenced to death.

MS. BALDWIN: But, Justice --

QUESTION: And -- and your answer to that, as I understand it, is, well, the police had indicated to him in advance that they did not understand him to be the triggerman. And it seems to me that that is beside the point. It is still in his interest to make sure that someone else is seen as the triggerman, and in that respect his statement has an entirely different function from its function against penal interest with respect to everything other than the death penalty.

MS. BALDWIN: I think that the cases have never held that if it is -- if it is something that isn't in his best interest to say, that that somehow makes it unreliable. Absent some additional evidence in the case showing that this is a person who was trying to fabricate a statement to get out of trouble for -- as in Lee where in Lee v. Illinois, the declarant is refusing to talk until the police come in and say essentially the other person is saying you did it, and so there is a reason on that issue for that person to fabricate information on that point. No, the other person did the shooting.

We don't have that in this case. It is strikingly absent. To this day, Benjamin Lilly has never claimed that his brother was either the shooter or was any more guilty than what he said in his own statements. There's just -- there's nothing in there to indicate it. There's never been -- in fact, there's never been any evidence anywhere in this case that anyone other than Benjamin Lilly was the shooter, the only issue in the case again.

When -- and I think other indicia of reliability connected with these statements which come again from the confessions -- and I think it's important that one of the indicia of reliability is the fact that we have transcripts of the statements, that we have the tape of

the statement that this Court can listen to, that the trial court could listen to, that you can determine by listening to the entire statement is this a person who is making this up trying to get out of a death penalty or is this something that has the ring of truth, that has reliability to it?

QUESTION: Well, but I think when you -- when you state those tests, you're getting away from the declaration against penal interest, and saying that may be this is a residual hearsay exception, that there are indicia of reliability. But I don't think you make it a declaration against penal interest.

MS. BALDWIN: Well, Mr. Chief Justice, I think that -- that that's the way it came in. I mean, the Virginia Supreme Court found that this met the requirements for the exception for statements against penal interest.

QUESTION: But I -- I think it's very difficult just to see the statement in the abstract. A says B was the triggerman, that that's a declaration against penal interest. Now, I know you feel differently about it, but I have trouble with that.

MS. BALDWIN: Well, otherwise Mark Lilly would not be guilty today. I mean, these are -- these are statements that -- and I think one of the tests that the

Court can look at is, is a statement that any accomplice would say in a confession -- is it something that could be used against him in his own trial? If it is --

QUESTION: Why -- why wasn't Barker's testimony good enough to put Mark away?

MS. BALDWIN: Well, it certainly was, but --

QUESTION: Well, then you --

MS. BALDWIN: And that was additional evidence.

QUESTION: Well, you know, but -- but you say that Mark would not be in prison but for these statements. That's just not right.

MS. BALDWIN: Well, if --

QUESTION: They had plenty of evidence. They caught them at the scene. Barker testified, et cetera.

MS. BALDWIN: I can tell you this, that if Mark Lilly had not pled guilty, if he had had a trial with a jury, this statement would have come in and the prosecutor would have argued that this statement showed that Mark Lilly committed first degree murder -- was responsible for first degree murder.

QUESTION: You're saying the only reason he's in jail today is because of the statement he made to the officers, and that's just not correct, unless I -- unless I misinterpreted --

MS. BALDWIN: I misspoke then. No, that's not

the only reason. Yes, the -- the Commonwealth certainly would have had other evidence. But if we're looking at the self-inculpatory nature of the statements themselves. And -- and the questions I've been getting are -- is that if he says somebody else did the shooting, somehow that's not self-inculpatory. My argument is it certainly is. At his own trial it would have been admitted against him as proof of guilt.

QUESTION: Let's conceded that it's both inculpatory and exculpatory. I still don't think the penal interest rule has been established.

MS. BALDWIN: Well, I think that there are other indicia of reliability. I think that you have to look at the totality of the circumstances under which the statement was given.

QUESTION: But that was not the basis on which it came in. Is that correct?

MS. BALDWIN: I think it is. I think --

QUESTION: Then I misunderstood your -- your answer to the Chief Justice. I thought it came in -- I thought Virginia -- the Virginia court sustained its admission on the basis of the firmly established exception.

MS. BALDWIN: Yes, it does.

QUESTION: Okay. So, it didn't come in under

the residual hearsay exception.

MS. BALDWIN: Correct. This was a statement against penal interest. The Virginia Supreme Court found this came under that and in addition found -- and in Virginia what is required is that it meet the common law exception. And in addition to that, the prosecutor has to show that the evidence is also corroborated by other evidence.

QUESTION: But in any case, it would not be open to us if -- if we think that -- that it was not properly admitted insofar as -- as a -- an -- a firmly established exception, it would not be open to us here to hold in your favor on grounds of -- of -- its carrying sufficient indicia of -- of reliability. We would have to send it back to Virginia if that were our view, wouldn't we?

MS. BALDWIN: If -- if -- no, Your Honor. I don't think you would.

QUESTION: I mean, we in the first place are not going to litigate that issue.

MS. BALDWIN: No. In the Virginia Supreme Court it was -- what was litigated under the State evidentiary law was whether this was reliable because that is the touchstone for the State evidence to come in under this exception.

QUESTION: Yes, but wasn't the reliability

established by virtue of the statements being within the firmly established exception?

MS. BALDWIN: Oh, no. No, Justice Souter, it was not. The Virginia Supreme Court found that this was a genuinely self-inculpatory statement, that Mark Lilly knew was self-inculpatory when he made it. In other --

QUESTION: They said regardless of the penal interest exception, this is reliable, independently reliable regardless of the penal interest exception. Is that what they said?

MS. BALDWIN: No. They found that it met the penal interest exception because it was a genuinely -- it was genuine statements against his interests that he knew were against his interests.

QUESTION: That's what I thought.

MS. BALDWIN: And then in addition to that, there was also corroborating evidence to show its reliability.

And then in addition to that, the Virginia Supreme Court found that for Confrontation Clause purposes, that this was a firmly rooted exception.

QUESTION: May I ask on that question, in your view, to decide whether an exception is firmly rooted, is it sufficient that it's firmly rooted in Virginia?

MS. BALDWIN: We're not taking that -- we're not

taking --

QUESTION: You don't take that position.

MS. BALDWIN: No.

QUESTION: All right. So, you have to look at what happened in other States.

MS. BALDWIN: Yes.

QUESTION: And if you've surveyed the States and you find that a -- a given State, a hypothetical State, that says, yes, we have a -- a declaration against penal interest exception to the hearsay rule, however that does not encompass declarations when they are by an accomplice against a third party, which side of the line would we count that State, as supporting a firmly rooted or as not supporting a firmly rooted?

MS. BALDWIN: I suppose the Court would have to put that in the not firmly rooted. I -- I don't know how to -- I think there's a -- there's a confusion between something that's firmly rooted and whether the evidence in a particular case was reliable enough to come in.

QUESTION: Well, I'd like to keep it categorical for the purpose of my question.

MS. BALDWIN: Correct.

QUESTION: And if you had a category in a given State the totally excluded accomplice statements even though they were self-incriminating, you would say that



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should not count.

MS. BALDWIN: I would think that would not count, but there's a minority of States that have said that in those terms --

QUESTION: I understand.

MS. BALDWIN: -- to my knowledge of any States ---

QUESTION: But there's a debate between the two of you on the extent to which there are those States --

MS. BALDWIN: I understand.

QUESTION: So, that's a question we really have to research the State laws at some depth.

MS. BALDWIN: I think there are very few States that have said that in such categorical terms. Now, what a lot of cases have said is that in a particular case, the evidence doesn't -- is not reliable. And --

QUESTION: I'm staying away from the reliability inquiry and looking at the cases that they tied to subcategorize in their reply brief.

MS. BALDWIN: Correct. I think -- I think you -- we have no argument with the fact that there could be, I guess, a subcategory of factual situations where the evidence doesn't come in, but I think the question is who gets to decide whether the evidence is reliable enough. And -- and obviously, the petitioner's argument is that -

- at least until argument this morning, has been that there should be a per se rule. It just -- it doesn't come in at all. It can't even be considered by the lower courts.

And -- and -- and I think, you know, our argument is -- is actually pretty simple, and that is that this is just a pure evidentiary matter to be decided upon the facts of individual cases, the facts and circumstances, and that that's what occurred here.

And I think that the -- the factors in the case, the fact that during this confession there were no promises of leniency made, the fact that Mark Lilly had the Miranda warnings given to him, the fact that he was caught when he was arrested before he even had a chance to talk to Gary Barker or anybody else to decide who was going to fabricate some story, the fact that these were statements against his own brother, the fact that he made these statements and clearly the tenor of the statements in the confession on the audiotapes was that he was very reluctant to say anything bad about his brother -- in fact, it was Gary Barker who said a lot more, went to much more extreme and more detail as to what Ben Lilly had done and said. Mark Lilly was reluctant, and the fact that his -- his statements were I believe genuinely self-inculpatory.



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And to the extent that a particular statement this Court would believe was not self-inculpatory, it -- Virginia allows in an entire statement, including collateral statements, to a -- an inculpatory statement. And there's nothing in the Constitution that prevents such a rule. Williamson --

QUESTION: Ms. Baldwin, the Constitution does says something about the right to be confronted with the witnesses against him. And Mr. Sacks emphasized that whether we talk about a hearsay rule, the main thing is would cross examination be of marginal utility. Would you agree that that's really the underlying theme here that you -- you say, well, you don't need to have the witness if cross examination would be of marginal utility?

MS. BALDWIN: Mr. Chief Justice, I see my light. May I answer the question?

QUESTION: Yes.

MS. BALDWIN: That is not our position, Justice Ginsburg. Our position is --

QUESTION: I think you've answered the question.

MS. BALDWIN: Thank you.

(Laughter.)

QUESTION: Mr. Sacks, you have 3 minutes remaining.

MR. SACKS: Mr. Chief Justice, we waive our

rebuttal.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 12:00 p.m., the case in the above-entitled matter was submitted.)



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BENJAMIN LEE LILLY, Petitioner v. VIRGINIA.
CASE NO: 98-5881

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY: Ilona M. May
(REPORTER)