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Potential Revolution in Bruton Doctrine: Is Bruton Applicable Where Domestic Evidence Rules Prohibit Use of a Codefendant's Confession as Evidence against a Defendant Although the Confrontation Clause Would Allow Such Use?

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A POTENTIAL REVOLUTION IN *BRUTON* DOCTRINE: IS *BRUTON* APPLICABLE WHERE DOMESTIC EVIDENCE RULES PROHIBIT USE OF A CODEFENDANT'S CONFESSION AS EVIDENCE AGAINST A DEFENDANT ALTHOUGH THE CONFRONTATION CLAUSE WOULD ALLOW SUCH USE?

JAMES B. HADDAD* AND RICHARD G. AGIN**

I. INTRODUCTION

In *Bruton v. United States*,[1] principles of domestic evidence law, namely the federal hearsay rule, prohibited the prosecution from using the confession of codefendant Evans as evidence against defendant Bruton.[2] Evans did not take the stand and was unavailable for cross-examination by Bruton's counsel.[3] The trial court admitted the confession as evidence against Evans.[4] It instructed the jury to disregard the confession in determining Bruton's guilt or innocence.[5] Under these circumstances, the United States Supreme Court found a violation of Bruton's sixth amendment right to "be confronted with the witnesses" against him, reasoning that the limit-

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1 391 U.S. 123 (1968). Throughout this article, we use the word "defendant" to designate the non-confessing accused person and the word "codefendant" to designate the confessing accused person. We use the word "confession" to include inculpatory admissions and statements which, unlike confessions in the strictest sense, do not necessarily admit to every element of an offense.

2 *Id.* at 126.

3 *Id.* at 127.

4 *Id.* at 124-25.

5 *Id.* at 125.

ing instruction was likely to be ineffective.[6]

After *Bruton*, however, in *Dutton v. Evans*[7] and in *Lee v. Illinois*,[8] the Supreme Court suggested that each jurisdiction can shape its own rules of evidence to admit some codefendant confessions as evidence against a defendant, under an exception to the hearsay rule, and still not be deemed guilty of a Confrontation Clause violation, even where the defendant has no opportunity to cross-examine the confessing codefendant.[9] Approximately one-half of all American jurisdictions, nevertheless, still do not recognize a hearsay exception which would allow the prosecution to use, under certain circumstances, a codefendant's confession as evidence against his or her fellow defendant.[10] In the legal vernacular, these jurisdictions

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[6] *Id.* at 137. *See infra* text accompanying notes 39-45 (concerning *Bruton*'s essential premise that, under domestic law, the confession of codefendant Evans was inadmissible hearsay as to the defendant Bruton.)

In Lee v. Illinois, 476 U.S. 530, 542 (1986), the Court agreed that a *Bruton* issue arises only because of the unwillingness or inability of *juries* to adhere to limiting instructions, saying, "[T]his is not strictly speaking a *Bruton* case because we are not here concerned with the effectiveness of limiting instructions in preventing spill-over prejudice to a defendant when his codefendant's confession is admitted against the codefendant at a joint trial." However, *Bruton* is not applicable to bench trials. *See generally* Haddad, *Post-Bruton Developments: A Reconsideration of the Confrontation Rationale, and a Proposal for a Due Process Evaluation of Limiting Instructions*, 18 AM. CRIM. L. REV. 1, 26-28 (1980) (arguing that *Bruton* is inapplicable to bench trials); *cf.* Garcia, *The Winding Path of Bruton v. United States: A Case of Doctrinal Inconsistency*, 26 AM. CRIM. L. REV. 401, 402 n.8 (1988) (suggesting that issue is open). *See also* People v. Moore, 128 Ill. App. 3d 505, 514, 470 N.E.2d 1284, 1290-91 (1984) (when trier of fact is trial judge, denial of motion for severance does not deprive defendant of fair trial). *But see* People v. Schmitt, 173 Ill. App. 3d 66, 92-93, 527 N.E.2d 384, 400 (1988) (*Bruton* applied to joint nonjury trial), *rev'd*, 131 Ill. 2d 128, 545 N.E.2d 665 (1989).

Nor does *Bruton* apply where the confessing defendant testifies and is available for cross-examination by the codefendant. Nelson v. O'Neil, 402 U.S. 622 (1971). *See also infra* text accompanying notes 126-134.

Finally, the codefendant's statement must have implicated the defendant for *Bruton* to apply. *See generally* Haddad, *supra* at 20-25 (noting the decided cases and criticizing some applications of this limitation). *See also infra* note 12.

[7] 400 U.S. 74 (1970). *See infra* text accompanying notes 51-57.

[8] 476 U.S. 530 (1986). *See infra* text accompanying notes 71-82.

[9] *Dutton*, 400 U.S. at 80-83; *Lee*, 476 U.S. at 543. Justice Marshall, dissenting in *Dutton*, suggested that states could engage in a "wholesale avoidance" of *Bruton* by allowing a codefendant's admissions to be used as evidence against a defendant. 400 U.S. at 107 (Marshall, J., dissenting). *See also* J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 804(b)(3)(03), at 804-151-52 (1975).

[10] Before adoption of the Federal Rules of Evidence, the overwhelming majority of American jurisdictions followed the English rule prohibiting the use of declarations against penal interest. *See generally* C. MCCORMICK, EVIDENCE § 278 (3d ed. 1984) (discussing the Sussex Peerage case, 8 Eng. Rep. 1034 (1844), which rejected the use of an exculpatory declaration against penal interest). The rare inroads made against this prohibition usually involved declarations against interest offered by the defense inculpating the declarant and exculpating the defendant. *See, e.g.*, People v. Letterich, 413 Ill. 2d 172, 108 N.E.2d 488 (1952), and other cases cited by MCCORMICK, *supra* at 823 n.7. The

do not recognize a hearsay exception permitting the use of "third-party inculpatory declarations against penal interest."

A hypothetical example illustrates the concern of this article. Assume that state *X* has jointly charged Able and Baker with murder. Under police interrogation, Able had given a full confession of his own role while also implicating Baker. Assume further that, under the applicable United States Supreme Court precedents, Able's accusations against Baker are deemed sufficiently reliable, so that state *X*'s admission of Able's confession as evidence against Baker would not violate the Confrontation Clause, even though Baker has no opportunity to cross-examine Able. Assume, however, that state *X* has no hearsay exception allowing Able's confession to be used as evidence against Baker.

The issue discussed in this article is now posed: can the state of *X* put Able and Baker on trial jointly and admit Able's confession, including those portions which implicate Baker, while instructing the jury not to consider Able's confession as evidence against Baker? Or does such a procedure violate the Confrontation Clause where Able does not testify and is unavailable for cross-examination?

In such a case, prosecutors might argue that if the Confrontation Clause would permit state *X* to instruct the jury to use Able's confession as evidence against Baker, then the courts logically can-

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few instances where prosecutors successfully introduced declarations against interest typically involved situations where in the case against *A*, the prosecution was required to establish that someone other than *A* committed an offense, for example, in accountability cases or possession of stolen property cases. *See infra* note 12.

The Federal Rules of Evidence permit the use of both exculpatory and inculpatory declarations against penal interest. If the declarant is "unavailable," as defined in Rule 804(a), then under FED. R. EVID. 804(b)(3), a hearsay exception exists where:

> A statement which . . . at the time of its making . . . so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. [Such (a)] statement . . . offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

FED. R. EVID. 804(b)(3). Nevertheless, approximately six "Federal Rules" states continue to exclude inculpatory declarations against penal interest. G. JOSEPH & S. SALTZBURG, EVIDENCE IN AMERICA, THE FEDERAL RULES IN THE STATES 16 (1987) (listing Arkansas, Florida, Main, Nevada, North Dakota and Vermont). Presumably, most of those states which have not adopted a version of the Federal Rules also retain the common law prohibition. However, New York, a "non-Federal Rules" jurisdiction, on rare occasions permits the prosecution to use such statements. *See infra* note 94. California limits admissibility of *A*'s statement as evidence against *B* to those parts that are specifically disserving to *A*'s interest, in effect rejecting use of "collateral" portions of declarations against interest. *See* People v. Leach, 15 Cal. 3d 419, 441, 541 P.2d 296, 311, 124 Cal. Rptr. 752, 767 (1975), *cert. denied*, 424 U.S. 926 (1976) (narrowly construing CAL. EVID. CODE § 1230 (West 1966)). *See also infra* note 12.

not find a Confrontation Clause violation where state *X* instructs the jury not to use Able's confession as evidence against Baker, even if the jury is likely to disregard the limiting instruction. The prosecutors would assert that a *de facto* use cannot violate the Confrontation Clause where the same clause would permit a *de jure* use.

We conclude that as long as confrontation rather than procedural fairness remains the rationale for the *Bruton* result, such a prosecutorial argument should succeed. Under such circumstances, a trial judge should be required neither to sever Able's trial from Baker's trial nor to find some other solution to the *Bruton* problem, such as redacting Able's confession to exclude all references to Baker.[11] This is so even if, applying the state *X* hearsay prohibition, the trial judge will exclude Able's confession as evidence against Baker, while using a limiting instruction of the very type deemed constitutionally inadequate in *Bruton*.

Such a conclusion would revolutionize *Bruton* doctrine in jurisdictions which recognize no hearsay exception for third-party inculpatory declarations against interest. It would add a new and complex level of analysis to every codefendant confession case in which an accused has advanced an otherwise meritorious *Bruton* claim.[12] Where domestic law prohibits use of a codefendant's con-

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[11] Concerning possible alternatives to severance, see *infra* note 87.

[12] In *Bruton* situations, courts are concerned about the "collateral" portion of a declaration against interest. For example, when *A* says, "I fired the gun while *B* stood lookout," the reference to *B*'s conduct is collateral to the declaration against interest. That portion is not truly against the declarant's interest. Those who would admit the collateral portion of declarations against interest suggest that the declarant against interest is in a truth-telling mood so that his or her entire statement is normally reliable. *See* J. WIGMORE, EVIDENCE § 1465 (Chadbourn Rev. 1974) (discussion in context of declarations against pecuniary interest). *Compare* Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 HARV. L. REV. 1, 60-61 (1944) (noting that Wigmore's rationale logically would require admission of those portions of a codefendant's confession which implicate a defendant, a result which Professor Jefferson assumed was totally unacceptable and which Wigmore himself did not urge—*see* J. WIGMORE, EVIDENCE § 1477, at 290, § 1076, at 116 (3d ed. 1940)).

In some instances, third-party declarations are "non-collateral." For example, *A*'s admission, "I stole the television," would be relevant to *B*'s prosecution for possession of stolen property even though it directly implicates *A*. This is because the state has to establish in *B*'s prosecution that the property in question was stolen. Similarly, where *B* is alleged to be accountable for *A*'s act of arson, *A*'s declaration, "I set fire to the building," can be very probative where *B* denies that the fire was of human origin. Courts have held that in such situations *Bruton* is inapplicable because the declarant has not accused the defendant. *See generally* Haddad, *supra* note 6, at 20-25 (providing a discussion of the cases and a criticism of this limitation). *See also* Rawls v. Patton, 585 F. Supp. 181, 187 (E.D. Pa. 1984) (noting debate over whether *Bruton* should apply where the codefendant's statement harms the defendant by admitting that a crime was committed but does not implicate the defendant in the crime). Some states, even those without a general declaration against penal interest hearsay exception, have recognized hearsay

fession as evidence against a defendant, courts resolving *Bruton* claims would have to determine whether the Confrontation Clause would have permitted such a use.[13] The time and energy needed to evaluate the prosecution's contention provide one reason for courts to mandate severance under a procedural fairness theory where *Bruton*'s confrontation rationale would permit utilization of an ineffective limiting instruction at a joint trial. More importantly, courts should require severance under a procedural fairness rationale to prevent an inadequate limiting instruction procedure from subverting a jurisdiction's rules of evidence by permitting jury consideration of a codefendant's inadmissible hearsay accusation against a defendant.

II. DEVELOPMENT OF THE CONFRONTATION CLAUSE ANOMALY

A. DOUGLAS AND BRUTON

A common misconception is that *Bruton* interpreted the Confrontation Clause so as to prohibit the use of a codefendant's confession or admission as evidence against a defendant.[14] This

exceptions permitting use of certain "non-collateral" third-person declarations against interest. *See, e.g.*, Hoover v. Beto, 467 F.2d 516, 523-25 (5th Cir. 1972), *cert. denied*, 409 U.S. 1086 (1972) (discussing Texas hearsay exception). For a good definition of terminology classifying various sorts of declarations against interest, see Comment, *Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest*, 66 CAL. L. REV. 1189, 1190 n.7 (1978).

[13] *See infra* text accompanying notes 148-149. Theoretically, if the conclusion reached in the article is correct, even in jurisdictions which have a declaration against penal interest exception to the rule against hearsay, a court which concluded that a particular accusation did not fit within the domestic law exception would have to determine whether use of that statement would violate the Confrontation Clause in order to determine whether *Bruton* requires severance. However, the authors know of no decision where a court in such a jurisdiction has concluded that the state hearsay analysis yields a different result than the federal confrontation analysis. Where prosecutors have offered declarations against penal interest, courts in such jurisdictions usually have assumed that the requirements for domestic law admissibility are identical to the requirements under the Confrontation Clause. They often have done so by reading into Fed. R. Evid. 804(b)(3) a requirement of corroboration for inculpatory declarations against penal interest. *See* S. SALTZBURG, FEDERAL RULES OF EVIDENCE MANUAL § 804, at 966-68 (4th ed. 1986). *See also* State v. Myren, 133 Wis. 2d 430, 435, 395 N.W.2d 818, 821 (Wis. Ct. App. 1986) (hearsay analysis is "academic"); United States v. Sarmiento-Perez, 633 F.2d 1092, 1100 (5th Cir. 1981), *cert. denied*, 459 U.S. 834 (1982) (" [W]here the confrontation clause is implicated, it will tend inevitably to place the threshold of admissibility under the applicable hearsay exception at a level that will pass constitutional muster"). *Contra* People v. Rios, 163 Cal. App. 3d 852, 866, 210 Cal. Rptr. 271, 279 (1985) (raising possibility, in dictum, that California hearsay exception might be satisfied but that Confrontation Clause would be violated).

[14] *See, e.g.*, SENATE COMM. ON THE JUDICIARY, REPORT ON FEDERAL RULES OF EVIDENCE, S. REP. No. 1277, 93d Cong., 2d Sess. 21-22 (1974), which asserted that "*Bruton* held that the admission of the extrajudicial hearsay statement of one co-defendant violated

"sloppy reading"[15] of *Bruton* might explain why courts and commentators have focused little attention upon the issue discussed in this paper. If the proposition were true, this issue would not arise.

When *Bruton* was before the Court in 1968, many people may have assumed that use of a codefendant's confession as evidence against a defendant would violate the Confrontation Clause. Three years earlier, while applying the clause to state prosecutions for the first time, the Supreme Court in *Pointer v. Texas*[16] had declared that "the right of cross-examination is included in the right of an accused in a criminal case to confront the witness against him."[17] In fact, however, the *Bruton* Court avoided the question of whether the Confrontation Clause would have prohibited the use of the Evans' statements as evidence against Bruton.[18] Instead, the decision rested upon the explicit assumption that under *domestic* law, the confession of codefendant Evans was inadmissible against defendant Bruton.[19]

The *Bruton* story began in 1965 with *Douglas v. Alabama*,[20] decided the same day as *Pointer*. In *Douglas* the prosecutor, in the presence of the jury, had read aloud the confession of a separately tried accomplice, under the guise of examining the accomplice.[21] The accomplice had refused to answer questions, invoking his privilege against self-incrimination.[22] The Supreme Court held that the defendant's inability to cross-examine his alleged accomplice concerning the out-of-court accusations "plainly" denied Douglas "the right of cross-examination secured by the Confrontation Clause."[23] Although the reading of the confession and the refusal to answer questions "were not technically testimony,"[24] the denial of an opportunity to cross-examine the accomplice violated the Confrontation Clause because "the jury might improperly infer both that the

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the Confrontation Clause of the sixth amendment." *See also* Comment, *The Sixth Amendment Right of Defendants to Confront Adverse Witnesses*, 26 AM. CRIM. L. REV. 1547, 1562 (1989), where the student wrote, "[s]imply stated, the rule of *Bruton* prohibits admissibility of a hearsay statement by one codefendant against another . . . if the codefendant does not testify at trial."

15 *See* Comment, *supra* note 12, at 1196.

16 380 U.S. 400 (1965).

17 *Id.* at 404.

18 *Bruton v. U.S.*, 391 U.S. 123 (1968).

19 *See infra* text accompanying notes 39-45.

20 380 U.S. 415 (1965).

21 *Id* at 416.

22 *Id.* at 416-17.

23 *Id.* at 419.

24 *Id.*

statement had been made and that it was true."[25] When *Douglas* reasoned that the procedure was the equivalent of admitting the accomplice's confession as evidence against the defendant and concluded that the procedure violated the Confrontation Clause, the Court assumed that admission of a codefendant's out-of-court confession as evidence against a defendant would violate the Confrontation Clause.[26]

The *Bruton* Court later observed that *Douglas* had involved "circumstances analogous" to Bruton's case.[27] George Bruton and William Evans were convicted by a jury in a joint trial on a federal charge of armed postal robbery.[28] A postal inspector had testified that he had obtained oral confessions from Evans during the course of interrogations at the city jail where Evans had been in custody.[29] The postal inspector claimed that Evans had admitted that he had an accomplice, and that, in a second confession, Evans had identified Bruton as that accomplice.[30] The Court of Appeals, relying on *Delli Paoli v. United States*,[31] affirmed Bruton's conviction because the trial judge had adequately instructed the jury to disregard the confession of Evans in determining Bruton's guilt or innocence.[32]

The *Bruton* majority expressly overruled *Delli Paoli* and reversed Bruton's conviction. The Court reasoned as follows: first, when the hearsay evidence is a codefendant's confession inculpating the defendant, an instruction to the jury to disregard that hearsay in the

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25 *Id.*

26 *Id.* at 419-20. The Court *perhaps* could have reached the same result by saying that, whether or not the Confrontation Clause prohibited use of an accomplice's confession as evidence against a defendant, once Alabama shaped its domestic evidence law to disallow such use, it violated fundamental fairness for an Alabama trial court to use a procedure fraught with the danger that the jury would do what state law prohibited. The Court, however, did not employ such a due process analysis. *See infra* text accompanying notes 138-140 (discussing procedural fairness approach that would prevent a court from subverting its own jurisdiction's rules of evidence).

27 Bruton v. U.S., 391 U.S. 123, 126 (1968).

28 *Id.* at 124.

29 *Id.*

30 *Id.*

31 352 U.S. 232 (1957).

32 Evans v. U.S., 375 F.2d 355 (8th Cir. 1967), *rev'd*, 391 U.S. 123 (1968). *Delli Paoli* had held that, under certain circumstances, a limiting instruction would adequately protect a defendant from a jury's misuse of a codefendant's confession. *Delli Paoli*, 352 U.S. at 241-42; Note, *The Admission of a Co-Defendant's Confession After Bruton v. United States: The Questions and a Proposal for Their Resolution*, 1970 DUKE L. REV. 329, 332 n.22. *Delli Paoli* had rejected the *conclusive* presumption that a limiting instruction was adequate in all codefendant confession cases; it thus rejected the approach of Blumenthal v. United States, 332 U.S. 539, 541 (1947).

case against the defendant is likely to be ineffective;[33] second, admission of the confession in a joint jury trial is, therefore, a *de facto* admission of the confession as evidence against the nonconfessing defendant;[34] and third, because the confession is both "inevitably suspect"[35] and "devastating"[36] to the defendant's case, this *de facto* admission of the confession without the test of cross-examination violates the defendant's right of confrontation.[37]

Having deemed accomplice confessions inherently suspect, and having referred to their "unreliability,"[38] the Court, nevertheless, withheld judgment as to whether a trial judge's decision to admit a codefendant's confession as evidence against a defendant would violate the Confrontation Clause:

> We emphasize that the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence, . . . the problem arising only because the statement was . . . admissible against the declarant Evans. . . . There is not before us, therefore, any recognized exception to the hearsay rule and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause.[39]

The reservation of the question appeared to contradict the rationale of the Court's holding. The Court seemed to say that *exclusion*, through limiting instructions, of a codefendant's confession as evidence against a defendant violates the Confrontation Clause where there is a danger that, disregarding the instructions, a jury will use the codefendant's confession as evidence against the defendant;[40] nevertheless, the Court did not intimate a view whether *admission* of the codefendant's confession as evidence against the defendant, under a recognized hearsay exception, would violate the defendant's confrontation rights. It seemed to say that procedures which amount to a *de facto* admission of a codefendant's confession as evidence against a defendant violate the Confrontation Clause although the *de jure* admission of the same codefendant's confession against the defendant might not violate the Confrontation Clause.[41]

The reservation also seemed to contradict the spirit of the decision. As the Court would note a few weeks later in *Roberts v. Rus-*

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33 391 U.S. at 126-37. *See infra* note 119 (discussing this premise and its validity). *See also infra* notes 70, 116, and 123 and accompanying text.

34 *Id.* at 127.

35 *Id.* at 136.

36 *Id.*

37 *Id.* at 136-137.

38 *Id.* at 136.

39 *Id.* at 128 n.3.

40 *Id.* at 137.

41 *Id.* at 128 n.3, 137.

sell,[42] the *Bruton* Court believed that the procedure it condemned created "a serious risk that the issue of guilt or innocence may not have been reliably determined."[43] If *de facto* admission of a codefendant's confession was held to create a constitutionally impermissible risk of convicting an innocent defendant, how could the *de jure* admission of an identical confession not be deemed to create the same impermissible risk?

Notwithstanding this inconsistency, the Court chose not to adopt the views expressed in Justice Stewart's concurring opinion.[44] Justice Stewart argued that a "basic premise of the Confrontation Clause," as reflected in cases like *Pointer* and *Douglas*, is that "certain kinds of hearsay [citations omitted] are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, *whatever* instructions the trial judge might give."[45] He added that "[i]t is for this very reason that an out-of-court accusation is universally conceded to be constitutionally *inadmissible* against the accused, rather than admissible for the little it may be worth."[46]

B. DUTTON V. EVANS

In 1970, two years after *Bruton*, Justice Stewart departed from his *Bruton* concurrence when he authored the plurality opinion in *Dutton v. Evans*.[47] Justice Stewart indicated that some post-arrest out-of-court accusations made by one alleged offender may be admitted against a purported accomplice, without an opportunity for cross-examination, and still not violate the Confrontation Clause.[48] In *Dutton*, Georgia prosecuted Alex Evans for the murder of three police officers.[49] The court severed the Evans trial from the trial of codefendant Williams.[50] A man named Shaw was one of the twenty prosecution witnesses:

> He testified that he and Williams had been fellow prisoners in the federal penitentiary in Atlanta, Georgia, at the time Williams was brought to Gwinnett County to be arraigned on the charges of murdering the police officers. Shaw said that when Williams was returned to the penitentiary from the arraignment, he had asked Williams:

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42 392 U.S. 293 (1968).
43 *Id.* at 295.
44 *Id.* at 295.
45 391 U.S. at 138 (Stewart, J., concurring) (emphasis added).
46 *Id.* (Stewart, J., concurring) (emphasis added).
47 400 U.S. 74 (1970).
48 *Id.* at 83.
49 *Id.* at 76.
50 *Id.*

"How did you make out in court?" and that Williams had responded, "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now."[51]

The defense made hearsay and Confrontation Clause objections to the use of Williams' out-of-court declaration against Evans.[52] The trial court rejected both objections, relying on a Georgia hearsay statute that, atypically, allowed use of such jailhouse declarations.[53]

When the matter reached the United States Supreme Court, a plurality of four declared that use of the hearsay was consonant with the Confrontation Clause.[54] The plurality distinguished *Bruton* by noting that the hearsay accusations against Bruton were not admissible under the governing domestic rules of evidence.[55] Deviating from the thesis he had advanced in his *Bruton* concurrence,[56] Justice Stewart observed for the plurality that *Bruton* had reserved the question of when the use of hearsay violated the Confrontation Clause.[57]

Justice Stewart's manner of distinguishing *Bruton* suggests that if Williams and Evans had been prosecuted together in a joint jury trial in a federal court, where the Williams statement would have been inadmissible hearsay as to Evans, admission of Williams' statement for use solely against Williams, subject to a limiting instruction, would have violated *Bruton*. Accordingly, the anomaly suggested in *Bruton* became clearer in *Dutton*: the Georgia court, consistent with the Confrontation Clause, could admit the Williams statement and instruct the jury that it could use the statement as evidence against Evans (the *de jure* use approved in *Dutton*); however, the Georgia court would be deemed to violate the Confrontation Clause if it admitted the Williams accusation against Williams, while directing the jury not to use that statement against Evans (the *de facto* use seemingly condemned in *Bruton*).

Commentators and lower courts have not focused upon this anomaly.[58] Instead, they have critically evaluated the *Dutton* "indicia

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51 *Id.* at 77.

52 *Id.* at 77-78.

53 Georgia's hearsay exception for coconspirator statements extended to the "concealment" phase and, in *Dutton*, allowed use of a statement made by an incarcerated coconspirator even though the statement did not promote concealment. *Id.* at 81. The Supreme Court recognized that the statement would not be admissible under the coconspirator exception applicable in federal courts. *Id.*

54 *Id.* at 83.

55 *Id.* at 85-86.

56 *See supra* text accompanying notes 44-45.

57 *Dutton*, 400 U.S. at 86.

58 In 1980, one of the present coauthors discussed the anomaly briefly. *See* Haddad, *supra* note 6, at 18-20. More recently, Professor Seidelson wrote that two lines of con-

of reliability" approach for judging whether, in the absence of an opportunity for the defendant to cross-examine the hearsay declarant, the use for its truth of another's out-of-court statement violates the right to confront witnesses.[59]

In providing the fifth vote needed to sustain the actions of the Georgia trial judge, Justice Harlan in *Dutton* declared that the Confrontation Clause was not meant to control the scope of the rules of evidence.[60] He concluded that the admission of hearsay against a criminal defendant is constitutional unless such admission would deny the defendants a fair trial in contravention of the Due Process Clause of the fourteenth amendment.[61] Relying upon English cases dating to 1663, Justice Harlan stated that he would be prepared "to hold as a matter of due process that a confession of an accomplice resulting from formal police interrogation cannot be introduced as evidence of the guilt of an accused, absent some circumstances indicating [the accused's] authorization or adoption" of the declarant's statement.[62] *Dutton*, however, did not involve a police-elicited statement; but, instead, it involved a statement allegedly made to the de-

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frontation cases have proceeded on parallel tracks, one involving single defendants, the other multiple defendants. Without specifically discussing the anomaly, he suggests that the two lines of cases may meet someday. *See* Seidelson, *The Confrontation Clause and the Supreme Court: Some Good News and Some Bad News*, 17 HOFSTRA L. REV. 51, 86-88 (1988). We sense that Professor Seidelson's position is that *Bruton* problems disappear where the admission of a codefendant's statement as evidence against a defendant would not violate the Confrontation Clause. Apparently no other commentator has discussed the anomaly or responded to Professor Haddad's 1980 observations.

59 *See, e.g.*, Kirst, *The Procedural Dimension of Confrontation Doctrine*, 66 NEB. L. REV. 485 (1987); Jonakit, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557 (1988); M. Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 MINN. L. REV. 523 (1988); Note, *Reconciling the Conflict Between the Coconspirator Exemption from the Hearsay Rule and the Confrontation Clause of the Sixth Amendment*, 85 COLUM. L. REV. 1294 (1985); Comment, *The Confrontation Clause and the Hearsay Rule: A Problematic Relationship in Need of a Practical Analysis*, 14 FLA. ST. U. L. REV. 949 (1987).

Older commentary concerning confrontation theory includes K. Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99 (1972); Baker, *The Right to Confrontation, the Hearsay Rules and Due Process—A Proposal for Determining When Hearsay May Be Used in Criminal Trials*, 6 CONN. L. REV. 529 (1974); Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567 (1978); Comment, *Federal Confrontation: A Not Very Clear Say on Hearsay*, 13 UCLA L. REV. 366 (1966).

Most commentators are critical of the Court's declaration that "indicia of reliability" can substitute for cross-examination so as to fulfill the Confrontation Clause guaranty. This criticism is wholly apart from their view of whether courts should require the prosecution to demonstrate the unavailability of the hearsay declarant before allowing it to introduce a hearsay declaration. *See infra* note 53.

60 *Dutton*, 400 U.S. at 94.

61 *Id.* at 94-99 (Harlan, J., concurring).

62 *Id.* at 98 (Harlan, J., concurring).

clarant's own friend or associate.[63] Justice Harlan concluded that due process is not offended when the court admits, under a declaration against interest hearsay exception, codefendant statements which are not elicited through formal police interrogation.[64]

Justice Marshall dissented, and was joined by Justices Brennan (author of *Bruton*), Black, and Douglas.[65]. Justice Marshall argued that, in the absence of a defense opportunity to cross-examine the declarant, use of an incriminatory extrajudicial statement of an alleged accomplice violates the defendant's right of confrontation.[66] Marshall deemed it irrelevant whether the hearsay statement was made "during official interrogation."[67]

The *Dutton* dissenters viewed the majority's opinion as inconsistent with *Douglas* and *Bruton*. Justice Marshall interpreted *Bruton* as if Justice Stewart's concurring opinion in *Bruton* had prevailed: use of an alleged fellow offender's statement as evidence against a defendant violates the defendant's right of confrontation, at least where, at trial, the defendant has no opportunity to cross-examine the fellow offender.[68]

If either the views of Justice Harlan or those of the *Evans* dissenters had prevailed, there would be no tension between *Bruton* and *Dutton*. Under either approach, the Constitution would require severance, or some other solution to the *Bruton* problem,[69] only in cases where the *Constitution*, as distinguished from domestic hearsay law, requires the exclusion of the codefendant's statement as evidence against the defendant. Justice Harlan and the dissenters differed only as to when and under what theory the Constitution would require such exclusion.[70]

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63 *Id.* at 77.

64 *Id.* at 99-100 (Harlan, J., concurring).

65 *Id.* at 100 (Marshall, J., dissenting)

66 *Id.* at 103 (Marshall, J., dissenting).

67 *Id.* at 105 (Marshall, J., dissenting).

68 *Id.* at 102-03 (Marshall, J., dissenting).

69 Concerning other possible solutions, see *infra* note 87.

70 Justice Harlan in *Dutton* did not abandon the position he had taken while joining Justice White's dissent in *Bruton*: a limiting instruction may be adequate to prevent a jury from using one defendant's confession as evidence against a codefendant. *Bruton*, 391 U.S. 123, 138-44 (White, J., dissenting). The *Bruton* dissent in which Harlan joined attacked the reliability of one defendant's police-elicited confession in so far as it implicated a codefendant, so that Harlan's views in *Bruton* were consistent with those he expressed in *Dutton*.

The *Dutton* dissenters, through Justice Marshall, observed that the result in *Bruton* could be avoided on a "wholesale" basis by an interpretation of the Confrontation Clause which often would allow prosecutors to use a codefendant's confession as substantive evidence against a defendant. *Dutton*, 400 U.S. at 107 (Marshall, J., dissenting). Interestingly, three of the four justices who dissented in *Dutton* later abandoned their

The tension, however, remained under the plurality approach. Read in light of *Bruton*, the plurality definitely suggested that, in the absence of some other solution to the *Bruton* problem, such as redaction or a prosecutor's willingness not to offer the confession even as evidence against the confessing codefendant, the Confrontation Clause required severance in codefendant confession cases where domestic law prohibited use of the codefendant's cross-implicating statement, even though the Constitution did not require such exclusion.

C. *LEE* AND *EARNEST*

In 1986, *Lee v. Illinois*[71] reaffirmed *Bruton*'s confrontation rationale and its emphasis upon the ineffectiveness of an instruction directing the jury to disregard an accomplice's confession that is both "inevitably suspect" and "devastating" to the defendant's case.[72] However, the Court distinguished *Bruton* on the ground that the case before it, arising from a bench trial, did not involve the effectiveness of a limiting instruction.[73] Indeed, the Court stated that the only question for consideration was "whether [the] substantive use of the hearsay confession denied Petitioner rights guaranteed her under the Confrontation Clause."[74] In resolving this issue, the Court concluded that an accomplice's inculpatory declarations are presumptively unreliable, but that this presumption may be overcome where sufficient "indicia of reliability" are present to ensure their trustworthiness.[75]

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position in *Nelson v. O'Neil*, 402 U.S. 622, 633 (1971) (Brennan, J., dissenting), where they argued that the result in *Bruton* depended upon the assumption that a codefendant's confession was inadmissible against the defendant under *domestic* law without regard to whether its use against the defendant would have violated the defendant's right to confront witnesses. *See infra* notes 126-37 and accompanying text.

71 476 U.S. 530 (1986).

72 *Id.* at 542 (quoting *Bruton*, 391 U.S. at 136).

73 *Id.* at 542.

74 *Id.* at 539. Having no hearsay exception for inculpatory declarations against penal interest, Illinois law prohibits use of a codefendant's confession as evidence against a defendant. *See generally* People v. Duncan, 124 Ill. 2d 400, 530 N.E. 2d 423 (1988); People v. Collins, 184 Ill. App. 3d 321, 539 N.E. 2d 736, *appeal denied*, 127 Ill. 2d 624 (1989); People v. Schmitt, 173 Ill. App. 3d 66, 527 N.E. 2d 384 (1988), *rev'd on other grounds*, 131 Ill. 2d 128, 545 N.E. 2d 665 (1989). *See also* Haddad, *supra* note 6, at 11-12 nn.48-49. In a joint bench trial, Lee's trial judge erroneously relied upon the Thomas confession in assessing the guilt of Lee. *Lee*, 476 U.S. at 538. The Illinois Appellate Court compounded the error by holding that the Thomas confession was *admissible* against Lee because it interlocked with Lee's own confession. In making this ruling, the court relied on Illinois cases which held merely that severance was not required under these circumstances. *Id.* at 538-39. The United States Supreme Court acknowledged that it was without authority to reverse an Illinois court for misinterpreting Illinois law. *Id.* at 539.

75 The *Lee* majority held that the confession of codefendant Thomas, when used as

Thus, in dictum, even the more liberal members of the Court in *Lee* appeared to embrace much of the indicia-of-reliability jurispru-

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evidence against defendant Lee, "did not bear sufficient independent 'indicia of reliability' " to meet Confrontation Clause standards. *Id.* (citing Ohio v. Roberts, 448 U.S. 56, 66 (1980)). The four dissenters agreed with the majority in *Lee*: sometimes the Constitution permits the prosecution to use a codefendant's confession as evidence against a defendant. *Lee*, 476 U.S. at 549. They appeared to depart not so much as to the standard used to determine when such admission would be constitutionally proper, but rather in the application of the standard to the facts of the case. *Id.* at 547 (Blackmun, J., dissenting).

Reliability may not be the only relevant concern. Issues may arise as to the availability of the hearsay declarant. Where the prosecution in a joint trial attempts to introduce one defendant's confession as evidence against a codefendant under a declaration against interest hearsay exception, it probably need not demonstrate the unavailability of the hearsay declarant in order to satisfy the Confrontation Clause. This is because a showing of unavailability is unnecessary where the rationale for a hearsay exception is that the circumstances surrounding the making of a hearsay statement tend to guarantee its trustworthiness. *See* United v. Inadi, 475 U.S. 387, 394 (1986), rejecting dictum in *Roberts*, 448 U.S. at 65, which had suggested that a showing of the declarant's unavailability is always essential to satisfy the Confrontation Clause.

On the other hand, a showing of unavailability is still required to satisfy the *domestic* law declaration against interest hearsay exception. *See, e.g.*, FED. R. EVID. 804. When the prosecution seeks to use codefendant *A*'s confession as evidence in its case-in-chief against defendant *B*, should the law consider *A* to be unavailable? Justice Stevens once suggested that *A* is available because the prosecution has the power to grant *A* immunity. Parker v. Randolph, 442 U.S. 62, 87 (1979) (Stevens, J., dissenting). By contrast Justice Blackmun, joined by three other justices, apparently was willing to presume that a codefendant is unavailable as a prosecution witness when he himself is on trial. *Lee*, 476 U.S. at 549 (Blackmun, J., dissenting).

Reviewing courts rather routinely say that a codefendant who did not testify on his own behalf was unavailable to the prosecution. *See, e.g.*, United States v. Lang, 589 F.2d 92, 95-96 (2d Cir. 1978) (rejecting argument that non-defendant declarant who claims the fifth amendment privilege is nevertheless available to the prosecution because of its power to secure an order of immunity); United States v. Kehm, 799 F.2d 354, 361 (7th Cir. 1986) (dictum suggesting same result as in *Lang*); United States v. Osticco, 580 F. Supp. 484, 488 (M.D. Pa. 1984), *aff'd*, 738 F.2d 424 (3d Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985) (following *Lang* in case of jointly indicted but not jointly tried defendant who invoked the privilege). *See also* United States v. Weiner, 578 F.2d 757, 771 (9th Cir. 1978), *cert. denied*, 439 U.S. 981 (1978) (non-defendant declarant unavailable because he invoked fifth amendment privilege). *Contra* United States v. Yates, 524 F.2d 1282, 1286 (D.C. Cir. 1975), *cert. denied*, 434 U.S. 986 (1977) (suggesting that non-defendant declarant could be rendered available at little cost if the prosecution granted the declarant immunity). The parties debated the issue of the availability of a codefendant in Cruz v. New York, 481 U.S. 186 (1987). *See* Brief for Petitioner at 19 n.8, *Cruz*, 481 U.S. at 186; Brief for Respondent at 32-33, *Cruz*, 481 U.S. at 186. The Court's opinion, however, made no reference to this debate.

Courts may deem a witness unavailable, without discussing the immunity possibility, simply because that witness invoked his or her fifth amendment privilege. *See, e.g.*, United States v. Woolbright, 831 F.2d 1390, 1395 (8th Cir. 1987); United States v. Dunn, 758 F.2d 30, 39 (1st Cir. 1985); Mattes v. Gagnon, 700 F.2d 1096, 1102 (7th Cir. 1983); United States v. McKinney, 707 F.2d 381, 383 n.1 (9th Cir. 1983) (dictum); People v. Howard, 44 Cal. 3d 375, 402, 243 Cal. Rptr. 842, 856, 749 P.2d 279, 293 (1988), *cert. denied*, 109 S. Ct. 188 (1988); People v. Thomas, 68 N.Y.2d 194, 196, 507 N.Y.S.2d 973, 975, 500 N.E.2d 293, 295 (1986), *cert. denied*, 480 U.S. 948 (1987). A codefendant

dence of the plurality opinion of *Dutton*. In so doing, the Court assumed that under some limited circumstances, though not in *Lee*, the Confrontation Clause permits use of a codefendant's confession as substantive evidence against a defendant.[76] Hence, in *Lee*, all nine justices agreed that, depending upon the precise substance of the confession made by codefendant Thomas, the prosecution, consistent with the Confrontation Clause, could have introduced the Thomas confession as evidence against defendant Lee, if domestic law so permitted.[77] Although two of the *Dutton* dissenters, Justices Marshall and Brennan, remained on the Court, the indicia-of-reliability approach of the *Dutton* four-person plurality now commanded unanimity.

Accordingly, the tension grew. The Court in *Lee* seemed to indicate that, under some circumstances, an instruction telling a jury not to consider a codefendant's confession in adjudicating a defendant's guilt was a *de facto* use of the confession, which would violate the defendant's confrontation rights; yet an instruction directing the jury to consider the same confession as evidence against the defendant (the *de jure* use) would not violate the defendant's constitutional rights.

The only way to escape this anomaly would be to hold that *Bruton* is applicable only where the Confrontation Clause would prohibit the *de jure* admission of the codefendant's confession as evidence against the defendant. This would require an individualized scrutiny of the reliability of the *particular* codefendant confession. However, the *Bruton* court had not so scrutinized the confession of codefendant Evans. Nor had it suggested that such scrutiny was necessary before the Court could determine whether the limiting instruction procedure violated the Confrontation Clause.

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may be deemed unavailable simply because he or she did not testify. *See, e.g.*, United States v. Monks, 774 F.2d 945, 952 (9th Cir. 1985).

The authors believe that trial courts should require the prosecution to call the confessing codefendant, out of the jury's presence, to determine whether the codefendant will refuse to testify, before the prosecution will be deemed to have satisfied the domestic law requirement of unavailability. In this we agree with seven Fifth Circuit judges who dissented from an en banc ruling in Hoover v. Beto, 467 F.2d 516, 549 (5th Cir. 1972) (Rives, J., dissenting). We do not believe the prosecution need grant the defendant immunity. If the codefendant declines to testify for the prosecution but later testifies on his own behalf, we do not believe that his belated availability should destroy the prosecution's earlier invocation of a domestic law declaration against interest hearsay exception. "Unavailability" should be measured at the time the prosecution offers the declarant's statement.

76 *See supra* the first paragraph of note 75.

77 *Lee*, 476 U.S. at 543; *id.* at 548 (Blackmun, J., dissenting).

After *Lee*, the Supreme Court in *New Mexico v. Earnest*[78] granted the prosecution's certiorari petition and, in a single sentence, remanded to the New Mexico Supreme Court[79] a case in which the prosecution argued that, consistent with the Confrontation Clause, a trial judge could admit a codefendant's police-elicited confession as evidence against a defendant under a declaration against interest hearsay exception.[80] Justice Rehnquist wrote a concurring opinion, joined by Chief Justice Burger, Justice Powell, and Justice O'Connor.[81] He noted that, under *Lee*, lack of cross-examination of a hearsay declarant is not necessarily violative of the Confrontation Clause. He added, "the State is entitled to an opportunity to overcome the weighty presumption of unreliability attaching to codefendant statements by demonstrating that the particular statement at issue bears sufficient 'indicia of reliability' to satisfy Confrontation Clause concerns."[82]

Under the view expressed in the concurring *Earnest* opinion, the *Bruton*-severance-confrontation anomaly was apparent. If New Mexico law prohibited use of a codefendant's confession against a defendant, in the absence of redaction or some other solution, *Bruton* arguably required severance lest the procedure violate the defendant's right of confrontation. If, however, state law permitted use of the codefendant's accusation as evidence against a defendant, the procedure would not violate the Confrontation Clause if sufficient "indicia of reliability" surrounded the hearsay declaration so as to overcome the presumption of unreliability.

D. THE LOWER COURT DECISIONS

The degree to which a declaration against interest theory could erode *Bruton* depends upon the frequency of the prosecution's success in convincing courts that declarations against interest are reliable enough to satisfy the Confrontation Clause. Despite the result in *Lee*, post-*Lee* decisions in state and federal reviewing courts suggest that the prosecution often will prevail in contending that a particular third-party declaration against interest is reliable enough to satisfy the Confrontation Clause. Numerous decisions have con-

78 77 U.S. 648 (1986) (per curiam).

79 *Id.*

80 New Mexico v. Earnest, 477 U.S. 648 (1986).

81 *Id.* at 649 (Rehnquist, J., concurring). Significantly, O'Connor had been among the majority of justices who had agreed in *Lee* that the use of the codefendant's confession as evidence against Lee had violated the Confrontation Clause. *Lee*, 476 U.S. at 546.

82 *Earnest*, 477 at 649-50 (Rehnquist, J., concurring).

cluded that the prosecution has overcome the presumption of unreliability described in *Lee*.[83] A minority of these decisions, including the *Earnest* case on remand, have allowed use of statements made by a declarant at a time when the declarant knew that he or she was dealing with the authorities, either during custodial police interrogation or while entering a plea of guilty.[84] A few of these decisions have involved statements of codefendants.[85]

In jurisdictions that admit inculpatory declarations against penal interest, admission of the codefendant's "constitutionally reliable" confession as evidence against a defendant will avoid *Bruton*, just as Justice Marshall predicted in *Dutton*.[86] The *Bruton* limiting instruction problem disappears once such a statement is admitted against the defendant.

In those jurisdictions whose evidentiary rules would prohibit use of the codefendant's confession as evidence against the defendant, even though the Confrontation Clause would not mandate such exclusion, the question remains whether *Bruton* requires severance lest juries improperly consider against the defendant a statement of a codefendant. The next section examines this question.

III. The Absence of a Confrontation Violation Where the Codefendant's Statement, Though Constitutionally Admissible, Is Inadmissible Against the Defendant Under Domestic Law

Since *Bruton*, prosecutors have invoked a wide variety of theories in efforts to avoid severance in codefendant confession cases.[87]

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[83] These cases include United States v. Garcia, 897 F.2d 1413 (7th Cir. 1990); United States v. Fields, 871 F.2d 188 (1st Cir.), *cert. denied*, 110 S. Ct. 369 (1989); United States v. Holland, 880 F.2d 1091 (9th Cir. 1989); United States v. Candoli, 870 F.2d 496 (9th Cir. 1989); United States v. Koskerides, 877 F.2d 1129 (2d Cir. 1989); United States v. Scopo, 861 F.2d 339 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1750 (1989); United States v. Kusek, 844 F.2d 942 (2d Cir.), *cert. denied*, 109 S. Ct. 157 (1988); United States v. Layton, 855 F.2d 1388 (9th Cir. 1988), *cert. denied*, 452 U.S. 972 (1989); United States v. Patterson, 819 F.2d 1495 (9th Cir. 1987); People v. Parks, 168 Ill. App. 3d 978, 523 N.E.2d 130 (1988); State v. Earnest, 106 N.M. 411, 744 P.2d 539, *cert. denied*, 484 U.S. 924 (1987); People v. Thomas, 68 N.Y.2d 194, 500 N.E.2d 293, 507 N.Y.S.2d 973 (1986), *cert. denied*, 480 U.S. 948 (1987); State v. St. Pierre, 111 Wash. 2d 105, 759 P.2d 383 (1988) (declaration-against-interest theory approved as to some statements but not as to others); State v. Anderson, 107 Wash. 2d 745, 733 P.2d 517 (1987).

[84] *See, e.g.*, *Garcia*, 897 F.2d 1413; *Scopo*, 861 F.2d 339; *Earnest*, 106 N. Mex. 411, 744 P.2d 539; *Thomas*, 68 N.Y.2d 194, 500 N.E.2d 293, 507 N.Y.S.2d 973; *St. Pierre*, 111 Wash. 2d 105, 759 P.2d 383.

[85] *See, e.g.*, *Candoli*, 870 F.2d 496; *Parks*, 168 Ill. App. 3d 978, 523 N.E.2d 130; *St. Pierre*, 111 Wash. 2d 105, 759 P.2d 383.

[86] Dutton v. Evans, 400 U.S. 74, 107 (1970) (Marshall, J., dissenting).

[87] They have argued that *Bruton* is inapplicable in any one of a variety of circum-

One would have thought, therefore, that, at least after the 1970 *Dutton* decision,[88] they would have argued in both the United States Supreme Court and in the lower courts that *Bruton* requires severance, in the absence of some other remedy, only where the Confrontation Clause would have mandated the exclusion of the codefendant's confession as evidence against the defendant. They surely would have contended that where domestic evidence rules exclude the confession as evidence against the defendant, but where the Confrontation Clause would not mandate exclusion, a limiting instruction procedure is adequate and does not violate the Confrontation Clause.

Thousands of post-*Dutton*, pre-*Lee* decisions, from 1970 to 1986, however, appeared not to reflect such an argument.[89] Perhaps prosecutors paid too little attention to the theory underlying the decisions. Perhaps they acquiesced in the "sloppy reading" of *Bruton* as holding that the Confrontation Clause prohibits the use of a codefendant's confession as evidence against a defendant.[90] In any event, rarely before *Cruz v. New York*[91] in 1987 did prosecutors advance such an argument. Even so, the *Cruz* Court did not reach

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stances, for example: 1) where the case is tried without a jury; 2) where the confessing codefendant testifies; 3) where the defendant has himself confessed; 4) where the codefendant's statement is admissible against the defendant as non-hearsay or under a hearsay exception such as those for excited utterances or coconspirator declarations; 5) where the statement of the codefendant on its face does not implicate the defendant; 6) where the court has redacted the codefendant's statement to mask references to the defendant. Moreover, many prosecutors have avoided completely separate trials by using a "dual" jury procedure or by agreeing not to use the confession even as against the confessing defendant. *See generally* Garcia, *supra* note 6 at 401 (discussing various methods of avoiding *Bruton*); Haddad, *supra* note 2, at 3-33 (discussing subdoctrines arising after *Bruton*).

88 400 U.S. at 107 (Marshall, J., dissenting). *See also supra* note 9.

89 *See infra* note 91.

90 *See supra* text accompanying notes 14-42.

91 481 U.S. 186 (1987). Michigan authorities also made a similar argument before the United States Supreme Court in the October, 1986 term. See discussion of Richardson v. Marsh, 481 U.S. 200 (1987) *infra* note 96. Of course, we cannot say for certain how often prosecutors in lower courts advanced this argument before *Cruz*. However, in connection with his participation in a continuing legal education program since 1971, coauthor Haddad has systematically reviewed state and federal reviewing court decisons treating *Bruton* issues. He has noted very few cases before *Cruz* where a court even arguably addressed such an argument.

One exception was United States v. Cogwell, 486 F.2d 823 (7th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974). There the district court admitted statements allegedly made by defendant Pugh to his friends. *Id.* at 832. The statements implicated codefendant Fort. *Id.* The trial court ruled them inadmissible hearsay as to Fort and instructed the jury to consider them only as evidence against Pugh. *Id.* The reviewing court, applying *Dutton*, found the statements to meet the "indicia of reliability" test. *Id.* at 834. Accordingly, it held that the limiting instruction procedure did not violate the Confrontation

the issue.[92] Since lower courts similarly have not spoken on the issue, we have little guidance as to how courts might react to such an argument.

A. THE SUPREME COURT OPINIONS

In *Cruz v. New York*, the State of New York, supported by the United States as amicus, presented the claim that no *Bruton* violation had occurred because the Confrontation Clause would not have prohibited the use of the codefendant's admissions as evidence against the defendant.[93] In *Cruz*, the state trial judge, applying New York law, had limited use of the codefendant's statement to the codefendant alone.[94] The *Cruz* majority, through Justice Scalia, without pausing to acknowledge the argument, reversed on *Bruton* grounds.[95] The Court refused to consider the State's argument, apparently because the State had not presented to the New York courts this defense to the *Bruton* claim.[96]

Clause, *id.*, even though it assumed arguendo that no hearsay exception would permit the use of the Pugh statements as evidence against Fort. *Id.* at 832 n.5.

It also appears that after *Lee* but before *Cruz*, the prosecution in United States v. Kurka, 818 F.2d 1427 (9th Cir. 1987), *appeal after remand*, 867 F.2d 614 (9th Cir. 1989), sought to avoid a *Bruton* problem by arguing that the statement of Combs, which had been admitted solely against Combs, was reliable enough as to defendant Kurka so that its admission against Kurka would not have violated Kurka's confrontation rights. *Id.* at 1431. The court responded by concluding that the statement failed to bear adequate indicia of reliability to satisfy the *Dutton* standard. *Id.* at 1432.

92 The *Cruz* opinion makes no reference at all to the prosecution's argument.

93 Brief of Respondent at 36-38, *Cruz*, 481 U.S. at 186; Brief of Amicus Curiae United States of America in Support of Respondent at 10-18, *Cruz*, 481 U.S. at 186. The Solicitor General phrased the first issue as "whether the judgment can be supported on the ground that the non-testifying co-defendant's confession was sufficiently reliable to satisfy the Confrontation Clause." *Id.* at I.

94 *Cruz*, 481 U.S. at 189. New York domestic law permits prosecutors to use inculpatory declarations against interest under limited circumstances. People v. Thomas, 68 N.Y.2d 194, 500 N.E.2d 293, 507 N.Y.S.2d 973 (1986), *cert. denied*, 480 U.S. 948 (1987); People v. Maerling, 46 N.Y.2d 289, 385 N.E.2d 1245, 413 N.Y.S.2d 316 (1978); People v. Brensic, 119 A.D.2d 281, 506 N.Y.S.2d 570 (1986), *rev'd*, 70 N.Y.2d 9, 509 N.E.2d 1226, 517 N.Y.S.2d 120, *modified*, 70 N.Y.2d 722, 513 N.E.2d 1302, 519 N.Y.S.2d 641 (1987); People v. Ryan, 121 A.D.2d 34, 509 N.Y.S.2d 545 (1986), *cert. denied*, 481 U.S. 1059 (1987), *vacated*, 134 A.D.2d 300, 520 N.Y.S.2d 528 (1987); People v. Young, 122 A.D.2d 863, 505 N.Y.S.2d 729 (1986), *rev'd*, 70 N.Y.2d 9, 509 N.E.2d 1226, 517 N.Y.S.2d 120 (1987), *modified*, 70 N.Y.2d 722, 513 N.E.2d 1302, 519 N.Y.2d 641 (1987). *See also* Goodman & Waltuch, *Declarations Against Penal Interest: The Majority Has Emerged*, 21 N.Y.L. SCH. L. REV. 51 (1983). However, the *Cruz* trial prosecutor did not offer the codefendant's statement as evidence against the defendant under this domestic law hearsay exception. *See* People v. Cruz 70 N.Y.2d 733, 514 N.E.2d 379, 519 N.Y.S.2d 959 (1987), *rev'd*, 481 U.S. 186 (1987).

95 *Cruz*, 481 U.S. at 194.

96 *See id.* at 189-94. During oral argument, in Richardson v. Marsh, 481 U.S. 200 (1987), when a Michigan prosecutor made a similar argument, Justice Scalia, through his questioning, elicited the fact that the prosecution had not made the argument in the

Thus far, only a few Supreme Court justices have written even briefly concerning the claim that *Bruton* does not mandate severance where domestic law prohibits use of a codefendant's hearsay accusations against a defendant, but where the Confrontation Clause would not disallow such use. Their statements give us little insight as to how the full Court would resolve the matter if the Court squarely confronted the issue.

In 1974, Justice Stevens, dissenting in *Parker v. Randolph*,[97] alluded to a situation where a state court has prohibited use of a codefendant's statement as evidence against a defendant even though such use would not violate the Confrontation Clause.[98] He suggested that in such a case an issue would arise as to whether the use of limiting instructions in a joint trial would violate the Confrontation Clause,[99] but he did not resolve the question.[100]

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courts below. *See* 41 Crim. L. Rep. (BNA) 4156 (1987). The question of waiver also arose at oral argument in *Cruz*. Transcript of Argument at 33-35. Even though a respondent normally can sustain a judgment based upon any ground which appears in the record, some decisions recognize an exception where the petitioner, for lack of fair notice of respondent's theory, did not have an adequate opportunity to develop the record. *Compare* United States v. New York Tel., 434 U.S. 159, 166 n.8 (1977) (court has discretion to consider any basis for supporting the judgment below even if the prevailing party did not advance the claim in the court below) *with* Hayes v. Florida, 470 U.S. 811, 814-15 n.1 (1985) (court declined to consider argument which appellee had not made in court below) *and* Steagald v. U.S., 451 U.S. 204, 209 (1981) (court would not consider appellee's argument where appellee expressly refused to advance such argument in court below). A middle ground is for the reviewing court to remand for an evidentiary hearing on the point not originally developed at trial. *See* Combs v. United States, 408 U.S. 224 (1972). In *Combs*, the prosecution had won in trial court on the merits of a fourth amendment claim without challenging defendant's standing, *id.* at 227; when the prosecution defended the trial court's judgment on the alternative ground of "no standing," the Supreme Court remanded to permit litigation of the standing question. *Id.* at 228. Presumably, the petitioner in *Cruz* was deprived of a fair opportunity to make a record demonstrating the unreliability of his codefendant's statement. *See infra* note 111 and accompanying text.

Cruz held that there is no exception to *Bruton* where each defendant has made a substantially similar statement which, under domestic law, is admissible against the declarant but not against his or her codefendant. Presumably, because of the prosecution's procedural default, *Cruz* did not consider whether a different result would follow if one defendant's statement was reliable enough to be admitted against the codefendant without violating his or her confrontation rights. Interestingly, while arguing that the issue was not properly before the Court, that the codefendant's confession was not reliable as to defendant Cruz, and that the declarant was available to the prosecution, Petitioner Cruz did not challenge the respondent's contention that *Bruton* is inapplicable where the trial court, under domestic law, excluded the codefendant's statement as evidence against the defendant, but the Confrontation Clause would have allowed such use.

97 442 U.S. at 62, 81 (1979) (Stevens, J., dissenting).

98 *Id.* at 85-86 (Stevens, J., dissenting).

99 *Id.* at 87 (Stevens, J., dissenting).

100 Justice Stevens, at least as of 1974, believed that the Confrontation Clause re-

In 1986, Justice Blackmun seemingly suggested in his *Lee* dissent that *Bruton* is inapplicable where the Confrontation Clause would not prohibit use of the codefendant's confession as evidence against a defendant. In a footnote, he wrote: "The *Bruton* rule thus necessarily applies only to situations in which the out-of-court statements are constitutionally inadmissible against the defendant."[101]

Justice Blackmun did not offer an argument in support of this claim, which appeared to contradict the implications to be drawn from *Bruton*, the *Dutton* plurality, the *Lee* majority, and the *Earnest* concurrence.[102] Moreover, the context in which Justice Blackmun made this assertion weighs against a definitive conclusion that he meant that *Bruton* would not require severance, even if domestic law prohibited admission of the codefendant's statement against the defendant, as long as the Confrontation Clause did not prohibit admissibility. In the same footnote, Justice Blackmun, without referring to a sixth amendment objection, stressed that because of *domestic* law, the codefendant's statement was not admitted against defendant Bruton.[103] Moreover, he cited a case which holds that where a codefendant's statement, under domestic law, is *admitted* against a defendant, there is no *Bruton* problem.[104]

Despite this context, and although no *Bruton* limiting instruction problem faced the *Lee* Court in reviewing a conviction from a trial without a jury, perhaps Justice Blackmun simply meant what he said when he indicated that the *constitutional* inadmissibility of the codefendant's statement as evidence against the defendant is a prerequisite for a *Bruton* claim.[105] However, the reader of Justice Blackmun's *Lee* dissent simply cannot be certain.

Dissenting in *Cruz*, Justice White cited with approval Justice

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quires a showing of the unavailability of the hearsay declarant before a declaration against penal interest could be received against a third person. He argued that, because it is armed with the power of immunity, the prosecution cannot demonstrate the unavailability of a person who is present in court as a defendant. *See supra* note 75.

Thus, under a Stevens approach, *Bruton* severance problems could not be avoided by a claim that the use of codefendant's statement against the defendant would be constitutionally permissible. The issue would not arise because, in light of the availability of the codefendant-declarant, the use of such evidence would always violate the defendant's confrontation rights.

101 *Lee*, 476 U.S. at 552 n.5. (Blackmun, J., dissenting).

102 *See supra* text accompanying notes 13-76.

103 *Lee*, 476 U.S. at 552 n.5 (Blackmun, J., dissenting) (citing Bruton v. U.S., 391 U.S. 123 (1968)).

104 The case was United States v. Kelley, 526 F.2d 615, 620 (8th Cir. 1975), *cert. denied*, 424 U.S. 971 (1976).

105 *See supra* text accompanying note 100.

Blackmun's assertion in *Lee*.[106] Justice White wrote that *Lee* "suggest[s] that a codefendant's interlocking confession will often be admissible against the defendant, in which event there would not be the Confrontation Clause issue *Bruton* identified."[107] He added that he read the majority opinion to permit New York courts on remand to consider "the admissibility of that confession against Cruz."[108]

Justice White's comments are ambiguous. Admissibility has two components. The use of a codefendant's confession against a defendant must be permitted by a domestic law exception to the hearsay rule. Beyond that, such use must not violate the Confrontation Clause. Was Justice White saying that there is no *Bruton* problem as long as a codefendant's admission would not violate the Confrontation Clause even if domestic law prohibited use of the statement? Or, was he making the unremarkable assertion that no *Bruton* problem exists where a statement is actually admitted under a domestic law exception to the hearsay rule where such statement is sufficiently reliable to meet confrontation standards? The reader cannot know for sure whether Justice White meant to address the issue which is the focus of the present paper.

B. STATE AND LOWER FEDERAL COURT OPINIONS

After *Lee* and *Cruz*, prosecutors have sometimes argued that *Bruton* does not mandate severance unless the Confrontation Clause would prohibit a trial court from admitting the codefendant's statement as evidence against a defendant.[109] The prosecutors have used this argument particularly during efforts to save convictions where the trial court, before *Cruz*, had relied upon the later discredited interlocking confession exception to *Bruton*.[110]

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106 481 U.S. 186, 198-99 n.4, (White, J., dissenting) (citing Lee v. Illinois, 476 U.S. 530, 553 n.5 (1986) (Blackmun, J., dissenting)).

107 481 U.S. at 198 (White, J., dissenting).

108 481 U.S. at 199 (White, J., dissenting).

109 *See, e.g.*, People v. Mahaffey, 128 Ill. 2d 388, 539 N.E.2d 1172 (1989), *cert. denied*, 110 S. Ct. 203 (1989); People v. Collins, 184 Ill. App. 3d 321, 539 N.E.2d 736 (1989); People v. Dixon, 169 Ill. App. 3d 959, 523 N.E.2d 1160 (1988); People v. Parks, 168 Ill. App. 3d 978, 523 N.E.2d 130 (1988); People v. Lincoln, 157 Ill. App. 3d 700, 510 N.E.2d 1026 (1987); People v. Gibson, 156 Ill. App. 3d 459, 509 N.E.2d 563 (1987); People v. Cruz, 70 N.Y.2d 733, 514 N.E.2d 379, 519 N.Y.S.2d 959 (1987), *on remand from* Cruz v. New York, 481 U.S. 186 (1987); People v. Alvarado, 141 A.D.2d 738, 529 N.Y.S.2d 835 (1988).

110 In each case cited in *supra* note 109, with the possible exception of *Collins*, it appears that statements of both the defendant and the codefendant were admitted at a joint trial, subject to a limiting instruction. *Collins*, 184 Ill. App. 3d at 328-30, 539 N.E.2d at 739-41. The *Collins* opinion is equivocal, but it suggests that the court there also gave limiting instructions. *Id.* at 327, 539 N.E.2d at 740 (reference to limiting instructions in context of discussion of *Bruton*). The codefendant-appellant relied upon

In some instances, reviewing courts have told prosecutors that it is too late to raise this claim for the first time in defending a conviction on appeal because, where the trial court under domestic law excluded the codefendant's statement as evidence against the defendant, the parties had no occasion to litigate whether the codefendant's accusations against the defendant bore adequate indicia of reliability so that their use would comport with the Confrontation Clause.[111]

In other instances, courts have rejected on the merits claims that the codefendant's accusations were reliable enough so that their use as evidence against the defendant would have satisfied the Confrontation Clause.[112] Perhaps an eager prosecutor would read the latter cases as implicitly recognizing that no severance would have been required if the codefendant's statement had been reliable enough to satisfy the Confrontation Clause, even though domestic law did not permit admission of the codefendant's statement against the defendant. However, any such implication would be in the nature of dictum. Moreover, in most of these cases, the reviewing court has not even paused to note the distinction between domestic law admissibility and constitutional admissibility.[113]

The cases do not include a clear statement declaring that even though the trial judge excluded use of the codefendant's statement as evidence against the defendant, and even though state law required such exclusion, *Bruton* would not command reversal unless the Confrontation Clause would have required exclusion of the codefendant's statement as evidence against the defendant. None of the lower court cases cite the previously discussed statements of Jus-

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Cruz in each of these cases. *Cruz* had rejected an exception which had been accepted by the plurality opinions in Parker v. Randolph, 442 U.S. 62 (1979). *See supra* note 96. In each case, the prosecution responded by asserting that the statements were reliable enough to overcome the presumption of unreliability described in *Lee*.

111 *See, e.g., Cruz*, 70 N.Y.2d 733, 514 N.E.2d 379, 519 N.Y.S.2d 959; *Alvarado*, 141 A.D.2d 738, 529 N.Y.S.2d 835. *Lincoln*, 157 Ill. App. 3d 70, 510 N.E.2d 1026, was reversed for a new trial but suggested that the prosecution could make its indicia of reliability argument in the context of the new trial. *See generally* note 96.

112 *See, e.g., Mahaffey*, 128 Ill. 2d 388, 539 N.E.2d 1172; *Gibson*, 156 Ill. App. 3d 459, 509 N.E.2d 563; *Dixon*, 169 Ill. App. 3d 959, 523 N.E.2d 1160.

113 The Illinois cases especially demonstrate enormous confusion. Despite a clear Illinois domestic law prohibition, *see supra* note 74, some post-*Lee* cases say that if the prosecution overcomes the *Lee* presumption of unreliability, the trial court can admit a codefendant's confession as evidence against a defendant. *See, e.g., Collins*, 184 Ill. App. 3d 321, 539 N.E.2d 130; *Parks*, 168 Ill. App. 3d 978, 523 N.E.2d 130; *Lincoln*, 157 Ill. App. 3d 70, 510 N.E.2d 1026. But for this confusion, prosecutors could properly cite *Parks* for the proposition that *Bruton* does not mandate severance where domestic law excludes the codefendant's statement as evidence against the defendant as long as the statement is reliable enough to satisfy the Confrontation Clause.

tice Blackmun in *Lee* and Justice White in *Cruz*, even though these are the only statements by Supreme Court justices which arguably voice an opinion on the issue.[114] Thus the lower court decisions shed no useful light on this important question.

C. THE AUTHORS' VIEWS

At the outset, we state our bias: we favor the result reached in *Bruton*. Once a jurisdiction decides for whatever reason that a codefendant's cross-implicating confession is inadmissible against a defendant, because alternatives such as severance and redaction exist, its courts should not allow a prosecutor to place that confession before the defendant's jury subject only to a presumptively ineffective limiting instruction. Residing in a state that reached the "*Bruton* result" decades before *Bruton*—on procedural fairness grounds rather than on confrontation grounds[115]—we are not troubled that the Court invoked the Constitution to outlaw the limiting instruction procedure in both state and federal codefendant confession cases. We wish, moreover, that courts would apply a procedural fairness analysis to prevent the use of certain ineffective limiting instructions in other contexts. One of the authors has provided a detailed analysis of criteria arguably relevant to an assessment of the fairness of various sorts of limiting instructions.[116]

However, we do not believe that courts can properly interpret the Confrontation Clause to prohibit the limiting instruction tech-

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[114] *See supra* text accompanying notes 101-108.

[115] *See* Haddad, *supra* note 6, at 11-12 n.48-49; People v. Duncan, 124 Ill. 2d 400, 530 N.E. 2d 423 (1988). Most pre-*Bruton* decisions which required severance in codefendant confession cases did so from a concern that otherwise a jury would consider evidence which the law deemed inadmissible. They did not do so because of a concern that denial of severance would lead to the conviction of the innocent. Haddad, *supra* note 6, at 44-45. Hence our reference to *procedural* fairness.

[116] Haddad, *supra* note 6, at 39-49. Claims that limiting instructions are likely to be ineffective can arise in many contexts, such as where "other crime" evidence is admitted solely on the question of the accused's motive; where evidence relevant only to sentencing is admitted before a jury in a unified proceeding to determine both guilt-innocence and appropriate punishment, as in Spencer v. Texas, 385 U.S. 554 (1967); and where the *Miranda*-violative statement of a defendant or the prior inconsistent statement of a witness is admitted solely for impeachment. Which uses are so unfair that courts should prohibit them? In his article, Professor Haddad considered five possible criteria for evaluating the relative fairness of limiting instruction procedures: (1) the degree of ineffectiveness of the instruction; (2) the fact that *if* the jury disregarded the instruction it would be considering *constitutionally* inadmissible evidence; (3) the degree of danger of convicting an innocent person if the jury disregards the instruction; (4) the likely impact of the evidence if the jury improperly considers it; and (5) the availability and costs of alternatives to the limiting instruction procedure. He concluded that the fourth and especially the fifth criteria are the most useful guides to comparing the relative fairness of limiting instruction procedures. Haddad, *supra* note 6 at 49. *See also infra* note 138.

nique where, despite a jurisdiction's domestic law bar against the use of a codefendant's confession as evidence against a defendant, the Confrontation Clause would not prohibit such a use.

One argument favoring our conclusion would assert that the Supreme Court should not prohibit the "lesser" course of conduct where it interprets the Constitution so as to permit the "greater." Under that analysis, once the Court reads the Confrontation Clause to allow the greater conduct, namely the admission of a codefendant's statement as evidence against a defendant, it cannot interpret the same clause to prohibit the "lesser conduct," namely the exclusion of the evidence subject to a limiting instruction that might well be ineffective.

This "greater includes the lesser" approach has been advanced in several constitutional contexts, from free speech to the use of presumptions in criminal cases.[117] However, courts do not always accept the greater-lesser analysis in other areas; therefore, we choose not to rely upon it.[118] Instead, we look to the terms of *Bruton* itself.

According to *Bruton*, the worst thing that can happen under the

117 *See, e.g.*, Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328, 346-47 n.10 (suggesting that the power to prohibit advertisement of a product flows from the power to ban the product even if the legislature has chosen to permit its sale); Ferry v. Ramsey, 277 U.S. 88 (1928) (as long as legislature could create personal liability for bank directors if circumstance *B* were present, the legislature can make directors liable if circumstance *A* is present and then can declare that evidence of circumstance *B* is prima facie evidence of circumstance *A*).

118 A state legislature could make the presence of mitigating circumstances reducing murder to manslaughter a partial affirmative defense to murder, relieving the prosecution of the burden of proving the absence of these circumstances. However, once a state defines the absence of those circumstances as an element of murder, due process mandates that the prosecution prove the absence beyond a reasonable doubt. *See* Mullaney v. Wilbur, 421 U.S. 684 (1977); Patterson v. New York, 432 U.S. 197 (1977). *See also* United States v. Romano, 382 U.S. 136 (1965) (seemingly inconsistent with *Ferry*, 277 U.S. 88, in its holding that due process requires a rational connection between the established fact *A* and the presumed fact *B*).

A state need not provide the right to appeal to convicted criminals; however, once it has done so, it thrusts upon itself certain burdens under both due process and equal protection. *See* Griffin v. Illinois, 351 U.S. 12 (1956) (establishing indigent appellant's right to free transcript or its equivalent); Douglas v. California, 372 U.S. 353 (1963) (establishing indigent's right to appellate counsel for first felony appeal). It need not provide welfare benefits, but by doing so it may acquire procedural due process obligations. Goldberg v. Kelly, 397 U.S. 254 (1970).

A state need not define a jury's role in capital sentencing procedures, but once it does so, the eighth amendment prohibits it from tolerating prosecutorial arguments which might lead a jury to conclude that its role is not so important. Caldwell v. Mississippi, 472 U.S. 320 (1985). By structuring penal statutes one way, a state may be prohibited by double jeopardy principles from imposing a penalty equivalent to one permissible under differently structured penal statutes. *See* Thomas, *An Elegant Theory of Double Jeopardy*, 1988 U. ILL. L. REV. 827, 838-39, 857-58.

limiting instruction procedure is that the instruction will fail, and the jury will use the statement of the codefendant as evidence against the defendant.[119] The codefendant, in effect, will become a witness against the defendant. Where the codefendant has not testified, the defendant will not have the opportunity to stand face-to-face with his or her accuser and to cross-examine him or her while he or she is under oath and while the jury is able to scrutinize the demeanor of the accuser.

However, in cases where the Confrontation Clause would permit a trial court to direct the jury to consider hearsay as evidence against a defendant, the Supreme Court has decided that the lack of such an opportunity to cross-examine does not necessarily violate the sixth amendment.[120] Once it appears that, under *Dutton* and *Lee*, an out-of-court accusation bears sufficient indicia of reliability to permit recognition of an exception to the requirements of oath, face-to-face meeting, demeanor scrutiny, and cross-examination, the matter is at an end. There is no way to avoid this result without rejecting the jurisprudence appearing in decisions from *Dutton* through *Lee*.

A defendant may be in an awkward position where a codefendant's statement is deemed inadmissible hearsay in the defendant's case, and, nevertheless, the defendant's jury has heard the codefendant's hearsay accusations. At least in cases where the prosecution can survive a defendant's motion for a directed verdict without having to rely upon the codefendant's statement, a defendant might prefer to have the trial court admit the codefendant's confession as evidence against the defendant. Then the defendant could make a frontal assault upon the codefendant's hearsay accusations.

This, however, is not a sixth amendment problem. As long as the defendant is allowed normal modes of impeaching hearsay declarants—just as if the hearsay had been admitted against him or her—it is hard to see how he or she can claim denial of confrontation. The problem is a tactical one, much like that faced by a defendant in *Nelson v. O'Neil*.[121] In that situation, the codefendant's hearsay statement also remains inadmissible as to the defendant even though the codefendant testifies and is available for confronta-

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119 For a discussion of the claim that limiting instructions will be ineffective in codefendant confession cases, see Haddad, *supra* note 6, at 40-42, which asserted that empirical data was not available to measure the effectiveness of limiting instructions in any particular context and that intuitively other limiting instructions are as likely to be disobeyed as is the codefendant instruction condemned in *Bruton*.

120 *See, e.g.*, Bourjaily v. United States, 483 U.S. 171 (1987); United States v. Inadi, 475 U.S. 387 (1986). *See also supra* text accompanying notes 47-82.

121 402 U.S. 622 (1970). *See infra* notes 129-132.

tion.[122] In both situations, the defendant must decide whether to attack the codefendant's hearsay accusations even though the court will direct the jury not to consider that accusation in determining the defendant's guilt.

On the other hand, as Justice Brennan suggested by implication in *Nelson v. O'Neil*,[123] the limiting instruction problem that gave rise to *Bruton* is not solved simply because there has been no violation of the Confrontation Clause. If a particular jurisdiction deems a codefendant's confession inadmissible hearsay as to a defendant, there is a danger that the jury in a joint trial will misuse the evidence. The substantial probability of such misuse is an essential premise of the *Bruton* decision.[124] Where domestic law prohibits the jury from considering a codefendant's confession as evidence against a defendant, such misuse is possible in a joint trial even when the defendant testifies, as in *Nelson*. Misuse is also possible where the jurisdiction chooses not to admit a non-testifying codefendant's confession as evidence against a defendant even where the Confrontation Clause would permit use of such hearsay.

In jurisdictions which still prohibit use of a codefendant's confession as evidence against a defendant, as did almost every American jurisdiction did before the advent of the Federal Rules of Evidence in the 1970's,[125] the essential problem of codefendant confession cases is that by utilizing an ineffective limiting instruction in a joint trial, courts would subvert a domestic law hearsay prohibition in a limited class of cases, namely, those where the codefendants are jointly tried before a jury and the evidence shows that one defendant has made a statement implicating the other in a crime. Jurisdictions which long before *Bruton* reached the "*Bruton* result" recognized this problem.[126]

Justice Brennan, the author of *Bruton*, also recognized this problem when he later dissented in *Nelson v. O'Neil*.[127] In *O'Neil* the confessing codefendant took the stand and underwent cross-examination by the defendant.[128] The trial court, under domestic law, deemed the codefendant's post-arrest statement inadmissible hearsay as to the defendant, and it so informed the jury through a limit-

122 *Id.* at 626. For a discussion of *O'Neil*, see *infra* text accompanying notes 121-132.
123 *Id.* at 633-35 (Brennan, J., dissenting).
124 At least *Bruton* assumes that the jury will not be able to adhere to the limiting instruction. *See supra* notes 33, 70, 116, and 119.
125 *See supra* note 10.
126 *See* Haddad, *supra* note 6, at 44-45. *See also* People v. Duncan, 124 Ill. 2d 400, 413-15, 530 N.E.2d 423, 429-30 (1988).
127 *O'Neil*, 402 U.S. at 632-33 (Brennan, J., dissenting).
128 *Id.* at 624.

ing instruction.[129] The dissenters, through Justice Brennan, argued that, as in *Bruton*, the jury was likely to disregard the limiting instruction.[130] It was likely to use against the defendant a statement of the codefendant which domestic law had deemed inadmissible hearsay against the defendant.[131] Justice Brennan, joined by Justices Douglas and Marshall, framed the issue as one of procedural fairness:

> The question, therefore, is whether California, having determined for whatever reason that the statement involved in this case was inadmissible against respondent, may nevertheless present the statement to the jury that was to decide respondent's guilt, and instruct that jury that it should not be considered against respondent. . . . In the present case, California itself has made the judgment that, although Runnels did take the stand, his extrajudicial statements could not be considered by the jury as evidence against respondent. . . . [H]aving made the determination that Runnels' statement could not be considered as evidence against O'Neil[, California] may not subvert its own judgment in some but not all cases by presenting the inadmissible evidence to the jury and telling the jury to disregard it. For the inevitable result of this procedure is that, in fact, different rules of evidence will be applied to different defendants depending solely upon the fortuity of whether they are jointly or separately tried. This is a discrimination that the Constitution forbids.[132]

The *Nelson* majority did not reject the dissenters' premise that the jury was unlikely to adhere to the limiting instruction in cases where the confessing defendant testified. Rather, the majority said that every requirement of the Confrontation Clause was satisfied once the confessing codefendant testified and was subject to full cross-examination by the defendant in a face-to-face confrontation between accuser and accused in the presence of the jury.[133]

If the *Nelson* majority's interpretation of the Confrontation Clause was wrong, then confrontation protections would extend even to some cases where the accused has been allowed to stand face-to-face with his accuser and to cross-examine him in the jury's presence. Quite properly there is no support in United States Supreme Court decisions for this extension of the Confrontation Clause protection.[134]

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129 *Id.*

130 402 U.S. at 633-34 (Brennan, J., dissenting).

131 *Id.* (Brennan, J., dissenting).

132 *Id.* (Brennan, J., dissenting).

133 *Id.* at 629-30.

134 *See* California v. Green, 399 U.S. 149 (1970) (admission of declarant's prior inconsistent statement does not violate Confrontation Clause when declarant testified as witness at trial and was subject to full cross-examination). One lower court has suggested that, except in the case of prior inconsistent statements, a defendant has a sixth amendment right to *immediately* cross-examine a declarant, at least where the declaration does

The problem with the *Nelson* dissent is that Justice Brennan did not say which constitutional provision prohibits California from subverting its own rules of evidence. Because he relied upon *Bruton*, a sixth amendment case, he was presumably referring to the Confrontation Clause. However, one cannot find in that clause such a prohibition. To do so, one would have to reason as follows: because the Confrontation Clause sometimes helps to promote fairness, the Confrontation Clause therefore prohibits any procedure which undermines fairness. This is a classical fallacy.[135] It is akin to arguing that because the exclusionary rule promotes deterrence of police misconduct, the exclusionary rule therefore prohibits any procedure, such as an enforcement of a standing requirement, that undermines deterrence of police misconduct.[136] Similarly, it is like asserting that because the fifth amendment privilege against self-incrimination promotes personal privacy, the amendment prohibits any testimonial compulsion that undermines personal privacy.[137]

The solution to the "*Bruton* problem" lies in a substitution of a procedural fairness analysis for a confrontation approach, as one of the authors has argued at length elsewhere.[138] If it is unfair for a state to exclude evidence as to a particular defendant, but then to use a joint trial approach which creates a grave danger that a jury will improperly use such evidence against that defendant, even where the Confrontation Clause does not mandate exclusion of such hearsay as against the defendant, then state courts should require severance, wholly apart from constitutional principles. If a state has determined that a jury should not consider one defendant's confes-

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not bear adequate indicia of reliability. *See* People v. Bastien, 129 Ill. 2d 64, 541 N.E.2d 670 (1989), which overlooks *Nelson*. The opinion offers no textual or historical basis in the Confrontation Clause requiring immediate cross-examination.

135 Expressed as a syllogism, the argument would be:

(1) The Confrontation Clause promotes fairness;

(2) The prohibition against the limiting instruction procedure promotes fairness;

(3) Therefore, conformity to the Confrontation Clause requires a prohibition against the limiting instruction procedure.

For an example of the fallacy in the *Bruton* context, see Note, *Nelson v. O'Neil*, 5 CREIGHTON L. REV. 199 (1971).

136 "Neither those cases [which acknowledge the deterrent aim of the exclusionary rule] nor any others hold that anything which deters illegal searches is thereby commanded by the Fourth Amendment." Alderman v. U.S., 394 U.S. 165, 174 (1969).

137 *See* Ullmann v. United States, 350 U.S. 422, 430-31 (1956), rejecting the view that a grant of immunity was inadequate to satisfy privacy concerns. *Contra id.* at 446-54 (Douglas, J., dissenting).

138 *See* Haddad, note 6, at 39-49. *See also supra* note 116. Professor Haddad referred to a "due process" rather than a "procedural fairness" approach. This label, however, quite improperly assumed, without discussion, that the Due Process Clause prohibits states from undermining their own rules of evidence, at least under some circumstances. *See infra* note 140.

sion as evidence against another defendant, then it should prohibit on domestic law grounds the use of a limiting instruction that is inadequate to prevent a jury from making such use of the confession. This is exactly what some courts did before *Bruton*.[139] We leave for another day the question of whether courts can properly invoke the Due Process Clause to prohibit use of an unfair limiting instruction procedure where a jurisdiction's decision to admit such evidence would not violate the Constitution.[140]

For now, our main conclusion is that the Confrontation Clause is useless to solve the problem of misuse of evidence under consideration in this paper, just as it is useless to cure the problem of misuse of evidence when the confessing codefendant is subject to cross-examination in the *Nelson v. O'Neil* situation.

The situation is reminiscent of the invocation in *United States v. Wade*[141] of the sixth amendment right to counsel to address the problems of fallible eye-witness testimony and suggestive police identification procedures. The Supreme Court in *Kirby v. Illinois*[142] may have been correct when it interpreted the sixth amendment as attaching only upon the initiation of formal adversary judicial proceedings.[143] Once the *Kirby* Court so narrowly construed the right established in *Wade*, because the great majority of lineups and showups occur before the initiation of formal adversary proceedings, the sixth amendment right to counsel was unavailable to remedy what the Court in *Wade* had deemed to be problems of extraordinary magnitude.[144] The fact that the Court found no sixth amendment

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139 *See* Haddad, *supra* note 2, at 33 n.164.

140 For such an argument to prevail, a defendant would have to overcome the barrier of the "greater-lesser" analysis described in *supra* note 117. Even a court which rejected such an approach might not accept a due process claim. If a defendant advanced a generalized due process-irrationality claim, the prosecution would respond that government has a legitimate interest in the consolidation of the trials of jointly indicted defendants, so that the need to avoid severance justifies use of the limiting instruction procedure. If the defendant advanced an "entitlement" theory rooted in the state's adoption of a rule excluding certain kinds of hearsay, the prosecution might cite a series of recent cases that severely limit earlier entitlement doctrines. *See, e.g.*, Kentucky Dep't of Corrections v. Thompson, 109 S. Ct. 1904, 1909 (1989) (requiring state-created " 'substantive predicates' to guide official action") (citing Hewitt v. Helms, 459 U.S. 460, 472 (1983)); Shango v. Jurich, 681 F.2d 1091, 1100-01 (7th Cir. 1982) (procedural protections established by state law, including such things as a state-created right to a hearing, are not accorded federal due process protections because "[c]onstitutionalizing every state procedural right would stand any due process analysis on its head").

141 388 U.S. 218 (1967).

142 406 U.S. 682 (1972).

143 *See* Israel, *Criminal Procedure, Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320, 1363 n.24 (1977).

144 *Wade*, 388 U.S. at 227-39.

violation in *Kirby*[145] did not mean that the problems were solved. It meant only that the sixth amendment, as interpreted by the Supreme Court, was inadequate to resolve the problems.[146]

The sixth amendment similarly is unavailable to address the limiting instruction problem where state law excludes a statement that it could have admitted consonant with the Confrontation Clause. Thus, courts should use a procedural fairness rationale to reach situations where the limiting instruction procedure is inadequate to assure fairness even though the sixth amendment confrontation guarantee is satisfied.[147]

If the authors are correct in concluding that confrontation analysis cannot mandate severance to protect a defendant against the possible use of a codefendant's confession against him where the Confrontation Clause would allow the court to admit such confession against the defendant, and if courts do not substitute a fairness basis for the confrontation rationale, a revolution will occur in consideration of *Bruton* claims, at least in jurisdictions which recognize no declaration against interest hearsay exception.

We envision a situation where, before granting severance under *Bruton* in any codefendant confession case in which domestic law excludes the codefendant's confession as evidence against the defendant, the judge will have to determine whether the Confrontation Clause hypothetically would have allowed such use. This process will involve a complicated case-by-case reliability analysis of the type the Supreme Court has gone great lengths to avoid in decisions like *Bourjaily v. United States*.[148] Even if prosecutors do not often ultimately succeed in convincing courts that the Confrontation Clause would have permitted use of the codefendant's confession as evidence against the defendant, their efforts will consume extensive

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145 406 U.S. at 690.

146 Perhaps, if the use of counsel provides the appropriate solution to problems of misidentification, the Supreme Court should have found in the general language of the fifth and fourteenth amendment due process clauses a right to counsel that extended even to many pre-trial identification procedures not governed by the counsel clause of the sixth amendment. *See* Miranda v. Arizona, 384 U.S. 436 (1966), finding, in the fifth amendment, a right to counsel that sometimes attaches sooner than does the sixth amendment right to counsel.

147 See Haddad, *supra* note 6, at 33. It bears repeating that George Henry Bruton did not make a confrontation claim at *any* stage of the litigation. The United States Supreme Court opinion in *Bruton* thus relied upon a constitutional provision not once cited by the prevailing party.

148 483 U.S. 171 (1987). *Bourjaily* held that the Confrontation Clause is automatically satisfied where a statement falls within a "well-rooted" hearsay exception, thus obviating a need for a reliability analysis of the particular statement. *Id.* at 184.

time and energy of both the trial and reviewing courts.[149]

Under a procedural fairness approach, by contrast, courts will not be required to make such decisions. Once domestic law mandates exclusion of the codefendant's confession as evidence against the defendant, it will be irrelevant to the severance issue whether the Confrontation Clause would have prohibited use of the codefendant's confession as evidence against the defendant.

IV. CONCLUSION

Jurisdictions which have made a policy judgment banning the use of inculpatory third-party declarations against penal interest should not permit that judgment to be undermined by the use of the kind of limiting instruction procedure condemned in *Bruton*. However, where the Confrontation Clause would permit use of a codefendant's confession as evidence against the defendant, courts cannot properly interpret the Confrontation Clause as prohibiting use of the joint trial-limiting instruction procedure. Accordingly, those jurisdictions should invoke a procedural fairness rationale for requiring severance absent some other means of satisfying the concerns expressed in *Bruton*.[150]

149 The authors believe that often prosecutors will convince courts of the reliability of third-party inculpatory declarations against interest. *See supra* note 83.

150 We refer to redaction or other means of complying with Bruton. *See supra* note 87.