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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?

James B. Haddad

Richard G. Agin

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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-

* Professor of Law, Northwestern University.
** Associate, Sidley & Austin, Chicago, Illinois. The authors gratefully acknowledge the helpful criticisms of Professor J. Alexander Tanford of Indiana University at Bloomington School of Law and of Ronald Jay Allen and Ian Ayres, both of Northwestern University School of Law.

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.\textsuperscript{6}

After \textit{Bruton}, however, in \textit{Dutton v. Evans}\textsuperscript{7} and in \textit{Lee v. Illinois}\textsuperscript{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.\textsuperscript{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.\textsuperscript{10} In the legal vernacular, these jurisdictions

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

In \textit{Lee v. Illinois}, 476 U.S. 530, 542 (1986), the Court agreed that a \textit{Bruton} issue arises only because of the unwillingness or inability of \textit{juries} to adhere to limiting instructions, saying, "[T]his is not strictly speaking a \textit{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, \textit{Bruton} is not applicable to bench trials. \textit{See generally Haddad, Post-Bruton Developments: A Reconsideration of the Confrontation Rationale, and a Proposal for a Due Process Evaluation of Limiting Instructions}, 18 \textit{Am. Crim. L. Rev.} 1, 26-28 (1980) (arguing that \textit{Bruton} is inapplicable to bench trials); \textit{cf.} Garcia, \textit{The Winding Path of \textit{Bruton v. United States}: A Case of Doctrinal Inconsistency}, 26 \textit{Am. Crim. L. Rev.} 401, 402 n.8 (1988) (suggesting that issue is open). \textit{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). \textit{But see People v. Schmitt}, 173 Ill. App. 3d 66, 92-93, 527 N.E.2d 384, 400 (1988) (\textit{Bruton} applied to joint nonjury trial), \textit{rev'd}, 131 Ill. 2d 128, 545 N.E.2d 665 (1989).

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

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

\item \textit{400 U.S. 74} (1970). \textit{See infra} text accompanying notes 51-57.

\item \textit{476 U.S. 530} (1986). \textit{See infra} text accompanying notes 71-82.


\item 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. \textit{See generally C. McCormick, Evidence} \textsection 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. \textit{See, e.g., People v. Letterich}, 413 Ill. 2d 172, 108 N.E.2d 488 (1952), and other cases cited by \textit{McCormick, supra} at 823 n.7. The
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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—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. SALTBURG, 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.\(^1\) 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.\(^2\) 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. 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. 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).

sloppy reading” 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 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.” 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. Instead, the decision rested upon the explicit assumption that under domestic law, the confession of codefendant Evans was inadmissible against defendant Bruton.

The Bruton story began in 1965 with Douglas v. Alabama, 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. The accomplice had refused to answer questions, invoking his privilege against self-incrimination. 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.” Although the reading of the confession and the refusal to answer questions “were not technically testimony,” the denial of an opportunity to cross-examine the accomplice violated the Confrontation Clause because “the jury might improperly infer both that the

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.
19 See infra text accompanying notes 39-45.
21 Id at 416.
22 Id. at 416-17.
23 Id. at 419.
24 Id.
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.

The Bruton Court later observed that Douglas had involved “circumstances analogous” to Bruton’s case. George Bruton and William Evans were convicted by a jury in a joint trial on a federal charge of armed postal robbery. 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. 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. The Court of Appeals, relying on Delli Paoli v. United States, 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.

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

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).

28 Id. at 124.
29 Id.
30 Id.
case against the defendant is likely to be ineffective; 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; and third, because the confession is both "inevitably suspect" and "devastating" 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.

Having deemed accomplice confessions inherently suspect, and having referred to their "unreliability," 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.

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; 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.

The reservation also seemed to contradict the spirit of the decision. As the Court would note a few weeks later in Roberts v. Rus-
sell, the Court believed that the procedure it condemned created "a serious risk that the issue of guilt or innocence may not have been reliably determined." 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. 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." 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."

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. 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. In Dutton, Georgia prosecuted Alex Evans for the murder of three police officers. The court severed the Evans trial from the trial of codefendant Williams. 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).
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." 

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

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. The plurality distinguished Bruton by noting that the hearsay accusations against Bruton were not admissible under the governing domestic rules of evidence. Deviating from the thesis he had advanced in his Bruton concurrence, Justice Stewart observed for the plurality that Bruton had reserved the question of when the use of hearsay violated the Confrontation Clause.

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. 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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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. 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.

Justice Marshall dissented, and was joined by Justices Brennan (author of Bruton), Black, and Douglas. 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. Marshall deemed it irrelevant whether the hearsay statement was made “during official interrogation.”

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.

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, 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.

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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 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. Illinois71 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

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.

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 jurisprud-

- 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 against its 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. Ostico, 580 F. Supp. 484, 488 (M.D. Pa. 1984), aff'ed, 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.\(^\text{76}\) 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.\(^\text{77}\) 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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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\textsuperscript{78} granted the prosecution's certiorari petition and, in a single sentence, remanded to the New Mexico Supreme Court\textsuperscript{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.\textsuperscript{80} Justice Rehnquist wrote a concurring opinion, joined by Chief Justice Burger, Justice Powell, and Justice O'Connor.\textsuperscript{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."\textsuperscript{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-

\textsuperscript{78} 77 U.S. 648 (1986) (per curiam).
\textsuperscript{79} Id.
\textsuperscript{80} New Mexico v. Earnest, 477 U.S. 648 (1986).
\textsuperscript{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.
\textsuperscript{82} Earnest, 477 at 649-50 (Rehnquist, J., concurring).
cluded that the prosecution has overcome the presumption of unreliability described in Lee. 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. A few of these decisions have involved statements of codefendants.

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. 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.
One would have thought, therefore, that, at least after the 1970 *Dutton* decision, 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. 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. In any event, rarely before *Cruz v. New York* in 1987 did prosecutors advance such an argument. Even so, the *Cruz* Court did not reach...
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the issue. 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. In Cruz, the state trial judge, applying New York law, had limited use of the codefendant's statement to the co-defendant alone. The Cruz majority, through Justice Scalia, without pausing to acknowledge the argument, reversed on Bruton grounds. 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.

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.

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

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.


Cruz, 481 U.S. at 194.

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*, al- luded to a situation where a state court has prohibited use of a co- defendant's statement as evidence against a defendant even though such use would not violate the Confrontation Clause. He sug- 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, but he did not resolve the question.

Courts below. See 41 Grim. 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 re- spondent 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 no- tice 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 discre- tion 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 appel- lee'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 prose- cution 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 de- clarant but not against his or her codefendant. Presumably, because of the prosecu- tion'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 reli- able as to defendant Cruz, and that the declarant was available to the prosecution, Peti- tioner 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.”  

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. 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*. 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.

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. 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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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.* 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." He added that he read the majority opinion to permit New York courts on remand to consider "the admissibility of that confession against Cruz." 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. 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.***

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107 481 U.S. at 198 (White, J., dissenting).
108 481 U.S. at 199 (White, J., dissenting).
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.  

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. 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.

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 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 758, 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. 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—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.

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

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 co-defendant'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 co-defendant'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. However, courts do not always accept the greater-lesser analysis in other areas; therefore, we choose not to rely upon it. Instead, we look to the terms of Bruton itself.

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

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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.\textsuperscript{119} The codefendant, in effect, will become a
witness against the defendant. Where the codefendant has not testi-
fied, 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 per-
mit 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.\textsuperscript{120} Once it appears that, under\textit{Dutton} and\textit{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\textit{Dutton}
through\textit{Lee}.

A defendant may be in an awkward position where a codefend-
ant’s statement is deemed inadmissible hearsay in the defendant’s
case, and, nevertheless, the defendant’s jury has heard the code-
fendant’s hearsay accusations. At least in cases where the prosecu-
tion 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 de-
clarants—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 confronta-
tion. The problem is a tactical one, much like that faced by a de-
fendant in\textit{Nelson v. O’Neil}.\textsuperscript{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-

\textsuperscript{119} For a discussion of the claim that limiting instructions will be ineffective in code-
fendant confession cases, see Haddad, supra note 6, at 40-42, which asserted that empiri-
cal 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 dis-
obeyed as is the codefendant instruction condemned in\textit{Bruton}.

\textsuperscript{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.

tion. 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, 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. 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, 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.

Justice Brennan, the author of Bruton, also recognized this problem when he later dissented in Nelson v. O’Neil. In O’Neil the confessing codefendant took the stand and underwent cross-examination by the defendant. 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-

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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.
The dissenters, through Justice Brennan, argued that, as in Bruton, the jury was likely to disregard the limiting instruction. It was likely to use against the defendant a statement of the codefendant which domestic law had deemed inadmissible hearsay against the defendant. 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.

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.

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.

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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. 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. 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.

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. 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. 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.

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 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 may have been correct when it interpreted the sixth amendment as attaching only upon the initiation of formal adversary judicial proceedings. Once the Kirby Court so narrowly construed the right established in Wade, because the great majority of lineups and show-ups 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. The fact that the Court found no sixth amendment

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).


violation in Kirby 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.

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.

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. 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

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.\textsuperscript{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 \textit{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 \textit{Bruton}.\textsuperscript{150}

\begin{footnotesize}
\textsuperscript{149} The authors believe that often prosecutors will convince courts of the reliability of third-party inculpatory declarations against interest. \textit{See supra} note 83.

\textsuperscript{150} We refer to redaction or other means of complying with Bruton. \textit{See supra} note 87.
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