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Admitting Confessions of Codefendants: Has *Lee v. Illinois* Created an Additional Hearsay Exception?

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I. INTRODUCTION

The Confrontation Clause of the Sixth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."[1] The United States Supreme Court has held that this right includes the right of the accused to cross-examine witnesses testifying against him.[2] A difficult situation arises, however, when one codefendant[3] makes a pretrial confession, inculpating not only himself but also another defendant, after the other defendant has also made a confession that interlocks[4] with the codefendant's confession. The difficulty arises when the prosecution attempts to admit the codefendant's confession after the codefendant asserts his Fifth Amendment right against self-incrimination at the joint trial of the codefendant[5] and defendant.[6]

The United States Supreme Court has utilized a two-tier analysis for determining whether the codefendant's confession is admissible in its entirety at the joint trial. First, a trial court should determine whether the codefendant's confession is substantively admissible against the defendant without violating the Confrontation Clause, which requires

1. U.S. CONST. amend. VI.

2. Pointer v. Texas, 380 U.S. 400, 404 (1965).

3. The term "codefendant" refers to the individual whose out-of-court confession inculpates himself and another defendant and is admitted in their joint trial.

4. The term "interlock" indicates that the codefendant and defendant's confessions contain some, or all, of the same facts.

5. Although a codefendant's confession constitutes hearsay, it is exempted from the hearsay rules and is admissible against the *codefendant* as an admission of a party-opponent under FED. R. EVID. 801(d)(2).

6. If the codefendant testifies as a witness at trial and is subject to full cross-examination, admission of his out-of court confession does not violate the Confrontation Clause. California v. Green, 399 U.S. 149, 164 (1970).

the confession both to qualify as a hearsay[7] exception with respect to the defendant and comply with the requirements of the Confrontation Clause.[8] Many courts have erroneously presumed, however, that as long as the confessions do not offend the Confrontation Clause, then the courts need not address the hearsay issue separately. This erroneous presumption stems from the misinterpretation by the trial courts of the Supreme Court's decisions regarding interlocking confessions, *Lee v. Illinois*[9] and *Cruz v. New York.*[10] Second, if a court determines that substantive use of the codefendant's confession against the defendant is not constitutionally permitted, the court then must comply with the requirements mandated by the United States Supreme Court in *Bruton v. United States.*[11]

II. SUBSTANTIVE ADMISSIBILITY OF A CODEFENDANT'S CONFESSION

A. *The Hearsay Requirement*

The hearsay exception that often permits the admission of the confession of a codefendant against the defendant is the exception for statements made by the declarant which were against his interest at the time he made them. This exception is codified in Federal Rule of Evidence 804(b)(3) and in many state evidence codes.[12] The utilization of this exception in the context of confessions made by a codefendant while in the custody of police poses several unsettling issues affecting admissibility. The first issue that divides courts is whether a confession given by a codefendant while in custody was in fact "against interest," such that a reasonable person would not have made the statement unless he believed it to be true.[13] In *Lee v. Illinois*,[14] without specifically addressing the

7. Hearsay is an out of court statement offered in court to prove the truth of the matter asserted therein. FED. R. EV. 801(c).

8. U.S. CONST. amend. VI.

9. 476 U.S. 530 (1986).

10. 481 U.S. 186 (1987).

11. 391 U.S. 123 (1968).

12. FED. R. EVID. 804(b)(3) provides a hearsay exception for:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

FED. R. EVID. 804(b)(3).

13. Many state courts also recognize an exception for statements against interest, implemented by statute or common law. *See, e.g.*, CAL. EVIDENCE CODE § 1230 (West 1992); FLA. STAT. ch. 9.804 (1991); *see also* New York v. Brensic, 509 N.E.2d 1226 (N.Y. 1987).

14. 476 U.S. 530, 545 (1986).

requirements for this hearsay exception, the United States Supreme Court emphasized that "a codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another."[15] The Court recognized that a codefendant may overstate another defendant's involvement in retaliation for his having implicated the codefendant in his confession.[16] The Court noted that "once partners in crime recognize that the 'jig is up,' they . . . immediately become antagonists, rather than accomplices."[17]

The Advisory Committee's note to Rule 804(b)(3) adopts a similar approach, stating that the determination of whether or not a statement was in fact against the declarant's interest must be determined from the circumstances of each case.[18] The note suggests that a "statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest."[19] Both federal and state courts follow the aforementioned guidelines when determining whether a declarant's statement was sufficiently against his interest. These courts scrutinize the circumstances surrounding the making of the statement, the content of the statement, and possible motivations behind making the statement, while recognizing the possibility of a desire to curry favor.[20] Some courts seem to require *obvious* evidence of a motivation to falsify,

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15. *Id.* at 545.

16. *Id.* at 544.

17. *Id.* at 544-45.

18. FED. R. EVID. 804 advisory committee's note.

19. *Id.*

20. *See, e.g.*, United States v. Magana-Olvera, 917 F.2d 401, 409 (9th Cir. 1990).

> Neither party disputes that Ricky's remarks tended to subject him to criminal liability. However, they hotly dispute . . . whether a reasonable person in Ricky's shoes would not have made the statements unless true . . . .
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> . . . .
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> Under the prevailing view then, Ricky's statements were not sufficiently against his interest because: (1) they were made under custody; (2) they were made in an attempt to curry favor from the federal authorities; (3) the government encouraged his cooperation by suggesting that it could cut his prison time in half if he cooperated; and (4) the statements trivialized Ricky's role in the drug conspiracy by pointing to Magana as the "kingpin."

Id. at 407, 409; United States v. Boyce, 849 F.2d 833, 837 (3d Cir. 1988) ("While we are unwilling to hold that any declaration against interest made in custody is inherently unreliable, an examination of the 'totality of circumstances' in this case does not support the conclusion that McMahon's statement is trustworthy."); People v. Frierson, 808 P.2d 1197, 1205 (Cal. 1991) (en banc), *cert. denied*, 112 S. Ct. 944 (1992) ("In determining whether a statement is truly against interest . . . the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.").

while other courts employ less stringent standards for ascertaining whether the declarant may have falsified his statement.[21]

The second issue that courts and commentators debate concerns whether collateral inculpatory statements contained within the codefendant's confession are admissible against the defendant, or whether only noncollateral inculpatory statements are admissible against him.[22] McCormick summarizes three approaches for determining the admissibility of a declaration containing both statements against interest and collateral statements.[23] Commentators and federal and state judges disagree as to which of these three approaches best adjusts the admissibility of the statement to the trustworthiness of its parts. Thus, courts have adopted all of these approaches.

The first approach is to admit the entire declaration under the reasoning that because part of the statement is disserving, then by a contagion of truthfulness, the entire statement will be trustworthy.[24] The second approach "compare[s] the strength of the self-serving interest

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21. *Compare* United States v. Gabay, 923 F.2d 1536, 1540-41 (11th Cir. 1991) (requiring an obvious motive to falsify) *and* United States v. Garcia, 897 F.2d 1413, 1421 (7th Cir. 1990) (finding the record lacked evidence of motivating factors because the declarant made statements voluntarily and not as part of a plea arrangement) *with* United States v. Monaco, 735 F.2d 1173, 1176-77 (9th Cir. 1984) (noting that courts consistently hold that certain circumstances surrounding statements made while in police custody render such statements unreliable) *and* United States v. Johnson, 802 F.2d 1459, 1465 (D.C. Cir. 1986) (recognizing it is common for arrestees to try to curry favor with law enforcement officials).

22. In a *collateral* inculpatory declaration, the inculpatory material is not found in the portion of the statement directly against the declarant's interest, but appears instead in another portion of the statement. In contrast, in a *noncollateral* inculpatory statement, the facts inculpating the defendant are found in the portion of the statement directly against the declarant's interest. Comment, *Federal Rules of Evidence 804(b)(3) and Inculpating Statements Against Penal Interest*, 61 CAL. L. REV. 1189, 1197 n.7 (1978).

An *inculpatory* statement is one which implicates both the declarant and the defendant in criminal activity and which is admitted against the defendant. In contrast, an *exculpatory* statement is a declaration against the declarant's interest which indicates that the defendant is not responsible for the crime charged. *Id.*

23. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE, § 279 (Edward W. Cleary ed., 2d ed. 1972).

24. *Id.* at 677. *See, e.g.*, United States v. Casamento, 887 F.2d 1141, 1171 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990) ("In admitting a statement as against the penal interest of the declarant, the district court need not excise those portions which refer to others. . . . Admitting the entire statement even though it contains a reference to others is particularly appropriate when that reference is closely connected to the reference to the declarant."); United States v. Lieberman, 637 F.2d 95, 103 (2d Cir. 1980) ("Even if [the statement] were wholly neutral, however, it could constitute a statement against interest within the meaning of Rule 804(b)(3) since it was part and parcel of a larger conversation in which clearly self-incriminating statements were made . . . ."); *see also* New Mexico v. Earnest, 744 P.2d 539, 540 (N.M. 1987); North Carolina v. Wilson, 367 S.E.2d 589, 598-99 (N.C. 1988) ("Rather, we adopt the view . . . that such collateral statements are admissible even though they are themselves neutral as to the declarant's interest if they are integral to a larger statement which is against the declarant's interest.").

and the disserving interest in making the statement as a whole."[25] When a disserving interest predominates, courts admit the entire statement; courts exclude the entire statement if the self-serving interest predominates.[26] The third approach "admit[s] the disserving parts of the declaration, and exclude[s] the self-serving parts."[27]

Under the third approach, however, some courts will allow the admission of the self-serving parts if there are reasonable assurances of trustworthiness based both on the totality of the circumstances surrounding the making of the statement, and on whether the declarant had a motive to lie.[28] Although McCormick views the third approach as "the most realistic method of adjusting admissibility to trustworthiness,"[29] Wigmore prefers the first alternative because the declarant made the statement while he was in the "trustworthy condition of mind which permitted him to state what was against his interest."[30] Additionally, some courts require corroborating evidence before permitting the introduction of inculpatory statements under this rule.[31]

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25. McCORMICK, *supra* note 23, at 677.

26. McCORMICK, *supra* note 23, at 677 (footnote omitted); *see, e.g.*, Washington v. Rice, 844 P.2d 416, 424 (Wash. 1993) (en banc) ("The overall circumstances surrounding McNeil's letter do not suggest the statements were self-serving. The statement made to Detective Shaw during police interrogation deserves greater scrutiny, because it was precisely the context in which one co-defendant might attempt to shift blame onto another. McNeil's statement, however, did not 'assign a minor role' to himself and 'a major role' to Rice. . . . Therefore, McNeil's statements are admissible under the Rules of Evidence.").

27. McCORMICK, *supra* note 23, at 677 (footnote omitted). *See, e.g.*, Stephens, Inc. v. Geldermann, Inc., 962 F.2d 808, 812 (8th Cir. 1992) ("Any portion of a statement not against interest must be edited out or the whole statement is inadmissible.") (citing United States v. Lilley, 581 F.2d 182, 188 (8th Cir. 1978)); United States v. Porter, 881 F.2d 878, 883 (10th Cir.), *cert. denied*, 493 U.S. 944 (1989) ("Thus, to the extent that a statement not against the declarant's interest is severable from other statements satisfying 804(b)(3) . . . such statement should be excluded.") (citation omitted); United States v. Lilley, 581 F.2d 182, 188 (8th Cir. 1978).

> The restriction advocated by McCormick excluding portions of statements which are not against the declarant's interest is in keeping with the reasoning behind the 804(b)(3) exception to the hearsay rule. Rule 804(b)(3) is based on the guaranty of trustworthiness which accompanies a statement against interest. To the extent that a statement is not against the declarant's interest, the guaranty of trustworthiness does not exist and that portion of the statement should be excluded.

Id.; *see also* New York v. Brensic, 509 N.E.2d 1226, 1229 (N.Y. 1987) ("[I]t should admit only the portion of that statement which is opposed to the declarant's interest since the guarantee of reliability contained in declarations against penal interest exists only to the extent the statement is disserving to the declarant."); People v. Leach, 541 P.2d 296, 311 (Cal. 1975), *cert. denied*, 424 U.S. 926 (1976) (en banc) ("[W]e construe the exception to the hearsay rule . . . to be inapplicable to evidence of any statement or portion of a statement not itself specifically disserving to the interests of the declarant.") (footnote omitted).

28. *See, e.g.*, New Hampshire v. Kiewert, 605 A.2d 1031, 1036 (N.H. 1992).

29. McCORMICK, *supra* note 23, at 677.

30. 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1465, at 341 (Chadbourn rev. 1974).

31. *See, e.g.*, United States v. Boyce, 849 F.2d 833, 836 (3d Cir. 1988); United States v.

Moreover, courts may permit the admission of the codefendant's confession under a residual hearsay exception if the applicable rules of evidence provide such an exception.[32] For example, the Federal Rules of Evidence provide an exception to the hearsay rules for "[a] statement not specifically covered by any of the [other] exceptions but having equivalent circumstantial guarantees of trustworthiness."[33]

B. *The Confrontation Clause Requirements*

If the confession is admissible against the defendant under a hearsay exception, the court must determine whether admitting the confession violates the Confrontation Clause as construed in *Ohio v. Roberts*[34] and its progeny. With respect to a statement admitted under a hearsay exception, when the declarant was not present for cross-examination at trial, the Court in *Roberts* required the fulfillment of a two-prong test.[35] First, in general, the declarant must have been unavailable.[36] Second, his statement must bear adequate "indicia of reliability."[37] Courts could infer reliability, without more, where the evidence fell under a "firmly rooted" hearsay exception.[38] In cases where the evidence did not fall within a "firmly rooted" exception, the evidence had to be excluded absent a showing of "particularized guarantees of trustworthiness."[39]

The Supreme Court limited the impact of the requirements it announced in *Roberts* in its decisions in several subsequent cases. With respect to the first prong of the *Roberts* test, in *United States v. Inadi*,[40] the Supreme Court rejected the proposition that *Ohio* established a rule that out-of-court statements were not admissible without a showing of unavailability.[41] The Court clarified the scope of the *Roberts* test, in *White v. Illinois*,[42] by interpreting *Roberts* as standing for "the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding."[43] In view of *Inadi*

Harrell, 788 F.2d 1524, 1526 (11th Cir. 1986); United States v. Oliver, 626 F.2d 254, 260 (2d Cir. 1980).

32. FED. R. EVID. 801(d)(1); California v. Green, 399 U.S. 149, 164 (1970).
33. FED. R. EVID. 803(24).
34. 448 U.S. 56 (1980).
35. *Id.* at 66.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. 475 U.S. 387 (1986).
41. *Id.* at 400.
42. 112 S. Ct. 736, 741 (1992).
43. *Id.* at 741.

and *White*, the *Roberts* test does not require a declarant to be unavailable in order for a co-conspirator's statement to be admitted,[44] or in order for the evidence to be admitted under the exceptions for "spontaneous declarations and statements made for medical treatment."[45] Although the Court has not specifically held that unavailability is not required in order for courts to admit evidence under Federal Rule of Evidence 804(b)(3) without violating the Confrontation Clause, the reasoning utilized by the Court in the aforementioned cases could easily suggest such a conclusion. The Court's assertion that unavailability was not required in the previous cases rested on several factors: (1) the evidentiary value of such statements;[46] (2) their reliability;[47] and, (3) the fact "that establishing a generally applicable unavailability rule would have few practical benefits while imposing pointless litigation costs.[48]

The Court's decisions concerning which hearsay exceptions qualify as "firmly rooted" exceptions also weakened the impact of *Roberts* as the Court qualified an exception on the basis of its long-standing tradition, rather than on an assessment of its reliability.[49] The Court strengthened the proposition that an exception should qualify as "firmly rooted" based on its reliability, because "[a]dmission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements."[50]

The Supreme Court has not decided whether the 804(b)(3) exception for declarations against penal interest is a "firmly rooted" exception

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44. *Inadi*, 475 U.S. at 394.

45. *White*, 112 S. Ct. at 743.

46. *Id.*

47. *Id.* at 742. The *White* Court noted that "a statement that qualifies for admission under a 'firmly rooted' hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability." *Id.* at 743. The very fact that these statements provide substantial guarantees of their trustworthiness has led the Court "to conclude that 'firmly rooted' exceptions carry sufficient indicia of reliability to satisfy the reliability requirement posed by the Confrontation Clause." *Id.* at 742 n.8. The effect, the Court relied on the second-prong of the *Ohio* test to declare that the first-prong of the test is unnecessary.

48. *Id.* at 742.

49. *See, e.g.*, Bourjaily v. United States, 483 U.S. 171, 183 (1987) (holding that the co-conspirator exception to the hearsay rule is "firmly rooted" because the Court had established it over a century and a half ago and since reaffirmed). The *Bourjaily* Court ignored the fact that the coconspirator hearsay exception is commonly supported on the basis of agency and the adversarial system, rather than on reliability.

50. Idaho v. Wright, 497 U.S. 805, 817 (1990); *see also* Lee v. Illinois, 476 U.S. 530, 552 (1985) (Blackmun, J., dissenting) ("[S]tatements squarely within established hearsay exceptions possess 'the imprimatur of judicial and legislative experience' . . . and that fact must weigh heavily in our assessment of their reliability for constitutional purposes.") (citation omitted).

and thus presumptively reliable for confrontation clause purposes.[51] Several federal courts of appeal have expressly reserved the question without deciding it.[52] Although four of the justices in *Lee v. Illinois* did issue an opinion finding that 804(b)(3) was "firmly rooted,"[53] the majority rejected the categorization of the hearsay involved in that case as a "declaration against penal interest."[54] Instead the majority decided the case as if it involved "a confession by an accomplice which incriminates a criminal defendant."[55] Thus, because the codefendant's confession did not fall within a "firmly rooted" exception, the Court instead examined whether sufficient independent "indicia of reliability" existed to overcome the presumption of unreliability. Specifically, the Court addressed the question of whether the interlocking character of the defendant and codefendant's confessions may provide the requisite reliability.[56]

In *Lee*, the codefendant and the defendant both confessed to police regarding their respective roles in two murders after being brought into custody for questioning.[57] Although the confessions overlapped greatly in their factual recitations, they diverged most significantly with respect to factual circumstances relevant to determining whether the murders had been premeditated.[58] In rejecting the defendant's assertions that she had acted either in self-defense or under intense or sudden passion, the trial judge expressly relied on the codefendant's confession and version of the killings.[59]

The Court reiterated the *Roberts* requirements necessary to satisfy the Confrontation Clause with respect to the admission of a codefendant's confession: "even if certain hearsay evidence does not fall within 'a firmly rooted hearsay exception' and is thus presumptively unreliable . . . it may nonetheless meet Confrontation Clause reliability standards if

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51. United States v. Layton, 855 F.2d 1388, 1405 n.5 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989).

52. *See, e.g., id.*; United States v. Monaco, 735 F.2d 1173, 1176 (9th Cir. 1984).

53. 476 U.S. at 551-52 (Blackmun, J., dissenting).

54. *Id.* at 544 n.5.

55. *Id.*

56. *Id.*

57. *Id.* at 532.

58. Most significantly, Thomas stated that he and Lee had previously discussed killing Aunt Beedie, and referred to conversations immediately prior to the murders that suggested a premeditated plan to kill. . . .

> . . . .
>
> Lee's statement, by contrast, suggested that it was Thomas who had been provoked by Aunt Beedie's behavior and Thomas who had snapped the night of the murders. Her statement made no mention of an alleged decision by herself and Thomas to "go through with it," nor, of course, did it indicate that the two had formulated a plan . . . .

Id. at 538.

59. *Id.* at 538.

it is supported by a 'showing of particularized guarantees of trustworthiness.' "[60] The Court, however, also emphasized that "the [Confrontation] Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason [underlying the existence of the Confrontation Clause].' "[61]

In applying this standard to determine whether the facts in *Lee* satisfied the Confrontation Clause, the Court found that the circumstances surrounding the codefendant's confession did not rebut the presumption that the codefendant's statement was unreliable regarding the defendant's participation in the murders.[62] The Court found that a codefendant's confession was not necessarily rendered reliable simply because some of the facts it contained "interlocked" with the facts of the defendant's confession.[63] Therefore, "[i]f those portions of the codefendant's purportedly 'interlocking' statement which bear to any significant degree on the defendant's participation in the crime are not thoroughly substantiated by the defendant's own confession, the admission of the statement" would violate the Confrontation Clause.[64] The Court's language supports the conclusion that if the defendant's and codefendant's confessions are identical in all material respects, the interlocking nature of the confessions may provide the required reliability.

The Supreme Court, in *Cruz v. New York*,[65] subsequently clarified what role the "interlocking" nature of a codefendant's and defendant's confessions is to play in determining the constitutional admissibility of the codefendant's confession. The Court stated that the interlocking nature of the codefendant's confession pertains to its reliability, not its "harmfulness."[66] Therefore, its reliability may be relevant in determining whether the confession should be admitted as evidence against the

60. *Id.* at 543 (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980)).

61. *Id.* (quoting Ohio v. Roberts, 448 U.S. 56, 65 (1980)).

62. When [the codefendant] was taken in for questioning and read his rights he refused to talk to the police. The confession was elicited only after [the codefendant] was told that [the defendant] had already implicated him and only after he was implored by [the defendant] to share 'the rap' with her. The unsworn statement was given in response to the questions of police, who, having already interrogated [the defendant], no doubt knew what they were looking for, and the statement was not tested in any manner by contemporaneous cross-examination by counsel . . . . It is worth noting that the record indicates that [the codefendant] not only had a theoretical motive to distort the facts to [the defendant's] detriment, but that he also was actively considering the possibility of becoming her adversary: prior to trial, [the codefendant] contemplated becoming a witness for the State against [the defendant].

Id. at 544.

63. *Id.* at 545.

64. *Id.*

65. 481 U.S. 186 (1987).

66. *Id.* at 192.

defendant.[67] Assuming the confession cannot be admitted, the interlocking nature is not relevant to determining whether the "jury is likely to obey the instruction to disregard it, or [whether] the jury's failure to obey is likely to be inconsequential."[68] Thus, the Court affirmed the *Lee* holding that courts could consider the defendant's interlocking confession in assessing whether the codefendant's statements are supported by sufficient 'indicia of reliability' to be substantively admissible as evidence against him without violating the Confrontation Clause.[69]

C. *Misapplication of* Lee v. Illinois

It is important to note that *Lee* and *Cruz* do not support the notion that as long as a statement bears independent "indicia of reliability" sufficient to satisfy the Confrontation Clause requirements, then the statement is admissible as substantive evidence against the defendant even if it does not meet the requirements of a hearsay exception. Many courts have interpreted *Lee* in such a manner. These courts either completely refrain from addressing whether the confession would be admissible under a hearsay exception, instead focusing solely on the Confrontation Clause requirements,[70] or note that a hearsay problem exists, but conclude that the confession is either admissible or inadmissible based on the Confrontation Clause requirements set out in *Lee*.[71] This type of analysis is entirely incorrect.[72]

In determining what precedential impact the Court intended for its *Lee* decision, it is important to note that the *Lee* Court stated that the question presented to them was " 'whether that substantive use of the [codefendant's] hearsay confession denied [defendant's] rights guaranteed . . . under the Confrontation Clause . . . .' "[73] The Court specifically noted that the admissibility of the evidence as a matter of state law was not at issue in the case.[74] In addition, the Supreme Court has held in prior cases that although the "hearsay rules and the Confrontation Clause

67. *Id.* at 192-93.

68. *Id.*

69. *Id.* at 193.

70. *See, e.g.*, Illinois v. Sevier, 598 N.E.2d 968, 974-76 (Ill. App. Ct. 1992); Illinois v. Parks, 523 N.E.2d 130 (Ill. App. Ct. 1988); New Mexico v. Gallegos, 781 P.2d 783 (N.M. Ct. App. 1989).

71. 476 U.S. 530 (1986); *see, e.g.*, U.S. v. Vernor, 902 F.2d 1182, 1186-88 (5th Cir.), *cert. denied*, 498 U.S. 92 (1990); Whack v. Maryland, 615 A.2d 1226, 1233-34 (Md. Ct. Spec. App. 1992), *cert. denied*, 622 A.2d 1196 (Md. 1993); Illinois v. MacFarland, 592 N.E.2d 471, 479-81 (Ill. App. Ct. 1992); Illinois v. Lincoln, 510 N.E.2d 1026, 1029-31 (Ill. App. Ct.), *appeal denied*, 515 N.E.2d 120 (Ill. 1987).

72. *See infra* notes 73-77 and accompanying text.

73. 476 U.S. at 539 (quoting Respondent's Brief at 11).

74. *Id.*

are generally designed to protect similar values."[75] and "stem from the same roots,"[76] the Supreme Court has been careful "not to equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements."[77] A codefendant's confession, therefore, must fulfill the requirements of both the hearsay rules and the Confrontation Clause before a court may substantively admit it against the defendant that it inculpates.[78]

A literal reading of the Court's interpretation of *Lee* in *Cruz* may be misleading because the Court stated in *Cruz* that the interlocking nature of the codefendant and defendant's confessions may be relevant to "whether the confession should (despite the lack of opportunity for cross-examination) be admitted as evidence against the defendant."[79] The Court merely referred to whether substantive use of the codefendant's confession against the defendant is constitutionally permissible. In other words, the Court is trying to determine whether the interlocking nature of the two confessions provides adequate indicia of reliability to fulfill the requirements of *Roberts*. The Court used the phrase "admitted as evidence" to emphasize that the interlocking nature of the confessions is relevant to whether the confession is substantively admissible against the defendant without violating the Confrontation Clause, as opposed to being relevant where the court determines that the confession is constitutionally inadmissible against the defendant because the requirements of *Roberts* have not been fulfilled.

The Illinois Appellate Court decision in *Illinois v. Moore* illustrates the correct relationship between the hearsay rules and the Confrontation Clause.[80] The *Moore* court declared that "*Lee* recognized that even if the confession meets the 'Lee test' for admissibility under the sixth amendment analysis, State hearsay rules could act independently of the confrontation clause to preclude admission of codefendants' reliable confessions."[81] The court further found that "the fact that a confession is interlocking under *Lee* does not render the confession admissible under Illinois evidentiary analysis."[82] Other courts also have correctly addressed the hearsay requirements and Confrontation Clause requirements individually.[83]

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75. California v. Green, 399 U.S. 149, 155 (1970).
76. Dutton v. Evans, 400 U.S. 74, 86 (1970).
77. Idaho v. Wright, 497 U.S. 805, 814-15 (1990).
78. *See*, Cruz v. New York, 481 U.S. 186, 193-94 (1987).
79. *Id.* at 193.
80. 593 N.E.2d 771 (Ill. App. Ct. 1992).
81. *Id.* at 778 (citation omitted).
82. *Id.* at 778-79.
83. *See, e.g.*, New Hampshire v. Cook, 610 A.2d 800 (N.H. 1992); Illinois v. Moman, 558 N.E.2d 1231 (Ill.App. 1 Dist. 1990); Washington v. Rice, 844 P.2d 416 (Wash. 1993).

The confusion that courts confront probably stemmed from the requirements of the residual hearsay exception under the Federal Rules of Evidence 803(24). Rule 803(24) requires that the evidence have circumstantial guarantees of trustworthiness equivalent to the other hearsay exceptions. These requirements are similar to the particularized guarantees of trustworthiness mandated by the *Lee* decision. It is crucial for the courts to determine whether a hearsay exception has been met, however, because some states do not provide a residual hearsay exception.[84] Additionally, the residual hearsay exception for the Federal Rules of Evidence requires affording separate notice to the adverse party.[85]

III. THE *BRUTON* PROBLEM

If the codefendant's confession is constitutionally inadmissible against the defendant because the requirements of *Roberts* have not been fulfilled, then current law clearly dictates that the Supreme Court's ruling in *Bruton v. United States*[86] is applicable. Prior to *Bruton*, the general rule was that admission of one codefendant's pretrial confession implicating another defendant, where two or more defendants were being tried jointly, would violate the Confrontation Clause unless the confessing defendant waived his Fifth Amendment right not to testify, thus permitting cross-examination.[87] "Ordinarily, [however,] a witness is considered to be a witness 'against' a defendant for purposes of the Confrontation Clause only if his testimony is part of the body of evidence that the jury may consider in assessing [the defendant's] guilt."[88] Therefore, a witness whose testimony is introduced into evidence with the limiting instruction that it be used only to assess the guilt of the codefendant would not be considered as a witness "against" the defendant, and the Confrontation Clause protection would not be invoked.[89] This rule assumes that jurors actually follow a court's limiting jury instructions.[90] The Court recognized a narrow exception to this in *Bruton*, where it held that the defendant's constitutional right to confront witnesses against him is violated if the facially incriminating confession

84. Florida and Illinois do not provide residual hearsay exceptions.

85. FED. R. EVID. 803(24) provides, in pertinent part, "a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant."

86. 391 U.S. 123 (1968).

87. Cruz v. New York, 481 U.S. 186, 189-90 (1987).

88. *Id.* at 190.

89. *Id.*

90. *See, e.g.*, Francis v. Franklin, 471 U.S. 307, 324-25 n.9 (1985).

of a nontestifying codefendant is introduced at their joint jury[91] trial, even if the jury is instructed to consider the confession only against the codefendant.[92] The Supreme Court justified the exception by emphasizing the substantial risk that juries may not follow the limiting instructions under these circumstances, the devastating effect that the incriminations may have on the defendant, and the fact that the credibility of the incriminations are inevitably suspect.[93]

With respect to interlocking confessions, if the interlocking nature of the confessions does not provide adequate "indicia of reliability" to meet the Confrontation Clause requirements set out in *Lee*, then application of the *Bruton* doctrine precludes admission of the confession at their joint trial. This is true even if the jury is instructed not to consider it against the defendant, and even if the court admits the defendant's own interlocking confession against him.[94] In *Parker v. Randolph*,[95] the Supreme Court had considered, but was unable to authoritatively resolve, the question of whether *Bruton* applies where the defendant's own interlocking confession is introduced against him.[96] The *Cruz* court answered that question in the affirmative.[97] In *Parker* "each of the

91. Because of *Bruton's* emphasis on the limitations of the jury system, several federal courts of appeal have held that *Bruton* was inapplicable to bench trials. *See, e.g.*, Rogers v. McMackin, 884 F.2d 252, 255-257 (6th Cir. 1989), *cert. denied*, 493 U.S. 1061 (1990); United States *ex rel.* Faulisi v. Pinkney, 611 F.2d 176, 178 (7th Cir. 1979); United States v. Castro, 413 F.2d 891, 894-95 & n.7 (1st Cir. 1969), *cert. denied*, 397 U.S. 950 (1970). *Rogers*, decided subsequent to *Lee*, rejected the notion that *Lee* made *Bruton* applicable to bench trials, explaining that the question in *Lee* "was not whether *admission* of the co-defendant's confession [at the joint trial] was constitutional error, but 'whether [substantive use] by the judge upon the codefendant's confession' " against the defendant constituted constitutional error. 884 F.2d at 257 (citations omitted). Thus, whereas the Court in *Bruton* solely considered whether a court may admit evidence which is not constitutionally admissible against the defendant at the joint trial with a limiting instruction, the Court in *Lee* only addressed the issue of whether the evidence possesses sufficient "guarantees of trustworthiness" to be constitutionally admissible against the defendant. *Id.* at 257.

92. Bruton v. United States, 391 U.S. 123, 125-26 (1968).

93. [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed.

Id. at 135-36 (citations omitted).

94. Cruz v. New York, 481 U.S. 186, 193 (1987).

95. 442 U.S. 62 (1979).

96. *Id.* at 72-73; *Cruz*, 481 U.S. at 188.

97. *Cruz*, 481 U.S. at 193-94.

jointly tried defendants had himself confessed, his own confession was introduced against him, and his confession recited essentially the same facts as those of his nontestifying codefendants."[98] The *Parker* plurality interpreted *Bruton* as holding "that the Confrontation Clause is violated only when introduction of a codefendant's confession is 'devastating' to the defendant's case."[99] They further held that when the defendant has confessed, " '[his] case has already been devastated,' " so the codefendant's case will rarely " 'be of the 'devastating' character referred to in *Bruton*.' "[100] Therefore, "the plurality would have held *Bruton* inapplicable to cases involving interlocking confessions."[101] The four remaining justices in *Parker* disagreed, "subscribing to the view expressed by Justice Blackmun that introduction of the defendant's own interlocking confession might, in some cases, render the violation of the Confrontation Clause harmless, but could not cause introduction of the nontestifying codefendant's confession not to constitute a violation."[102]

The *Cruz* Court adopted the approach espoused by Blackmun, thereby affirming the notion that *Bruton* is applicable to interlocking confessions.[103] The Court first noted that although "devastating" practical effect was one of the factors that *Bruton* considered in assessing whether the Confrontation Clause might require an exception from the general rule that jury instructions are sufficient to exclude improper testimony, it did not suggest that the existence of such an effect should be assessed on a case-by-case basis.[104] Instead, the Court interpreted that factor as one of the justifications for excepting from the general rule the entire category of codefendant confessions that implicate the defendants.[105] The Court held that there is no reason to exclude as generally not "devastating" codefendant confessions that "interlock" with the defendant's own confession.[106]

The court went even further by explaining that it is the very "interlocking" nature of the codefendant's confession that makes it devastating to the defendant because ordinarily the defendant attempts to avoid his confession on the basis that it was not accurately reported or that it was not really true when made.[107] Therefore, the codefendant's statement will be extremely damaging if it confirms, in all essential respects,

98. *Id.* at 190-91; *Parker*, 442 U.S. at 66-68.
99. *Cruz*, 481 U.S. at 191.
100. *Id.* (quoting *Parker*, 442 U.S. at 73, 75 n.7).
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 191-92.
107. *Id.* at 192.

the defendant's alleged confession. Thus, the *Cruz* Court repudiated the interlocking confessions exception to *Bruton*.[108]

The Supreme Court subsequently held in *Richardson v. Marsh*[109] that in order to avoid the *Bruton* result of prohibiting admission of a codefendant's confession, trial courts must either grant a severance before trial or redact[110] the codefendant's written statements that are published to the jury to eliminate any reference to the defendant's existence.[111] The Supreme Court has yet to express an opinion concerning whether a confession is adequately redacted if the defendant's name is replaced with a symbol or neutral pronoun.[112] A court does not encounter a *Bruton* problem by admitting a redacted confession while providing a limiting instruction to the jury,[113] even if the confession becomes incriminating when linked with evidence introduced later at trial. In *Richardson*, the Court concluded that the instructions were insufficient to protect the other defendants only if the confession was incriminating on its face.[114] Many circuit courts of appeals rely on this requirement that the confession must be incriminating on its face before mandating its exclusion in order to admit confessions which do utilize neutral pronouns, where additional evidence and inference are necessary before a confession can implicate the defendant.[115]

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108. Fernandez v. Leonardo, 931 F.2d 214, 216 (2d Cir.), *cert. denied*, 112 S. Ct. 236 (1991) (citation omitted).

109. 481 U.S. 200 (1987).

110. Oral statements admitted at trial through testimony must also be redacted in order to avoid the *Bruton* problem. Illinois v. Lincoln, 510 N.E.2d 1026, 1029 (Ill. App. Ct.), *appeal denied*, 515 N.E.2d 120 (Ill. 1987).

111. *Richardson*, 481 U.S. at 211. In *Richardson*, "the confession [was] redacted to eliminate not only the defendant's name, but any reference to his or her existence." *Id.* (footnote omitted).

112. *Id.* at 211 n.5.

113. *Id.* at 211. The Court reasoned that "[w]here the necessity of such linkage is involved, [the] generalization that the jury will not likely obey the instruction" is less valid than where the confession is incriminating on its face. *Id.* at 208. The Court stated that the overwhelming probability that jurors will be unable to obey the instructions is the foundation of the ruling in *Bruton* that limiting instructions were not an adequate substitute for the defendant's constitutional right of cross-examination. Thus limiting instructions are an adequate substitute when used with a redacted confession. *Id.* at 208.

114. *Id.*

115. *See, e.g.*, United States v. Chrismon, 965 F.2d 1465, 1472-73 (7th Cir. 1992) (admission of statement including references to "we" or "they" did not directly implicate the defendant did not violate *Bruton*); United States v. Donahue, 948 F.2d 438, 444 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 1600 (1992) ("two or three references to 'everyone' and 'they' . . ." did not violate *Bruton*); United States v. Strickland, 935 F.2d 822, 826 (7th Cir.), *cert. denied*, 112 S. Ct. 324 (1991) ("the replacement of defendants' names with references such as 'another person,' combined with an instruction to consider the confession against only the declarant, satisfies *Bruton*"); United States v. Briscoe, 896 F.2d 1476, 1502 (7th Cir.), *cert. denied* 498 U.S. 863 (1990) (admission of a confession including a reference to a collective ("we") and thus only incriminating to a member of the group when linked with other evidence does not violate *Bruton*).

IV. CONCLUSION

Before admitting a codefendant's confession as substantive evidence against a defendant that it inculpates, it is crucial for a court to interpret *Lee v. Illinois* as requiring both that the confession qualify as a hearsay exception under the applicable hearsay rules and that it satisfy the reliability requirements of the Confrontation Clause. Although the hearsay rules and the Confrontation Clause serve similar purposes, their requirements may not be the same in the context of admitting a codefendant's confession into evidence. In order to satisfy the intent of the Congress of the United States as well as state legislatures in promulgating their respective evidence codes, a court must not rely solely on the Constitutional requirements mandated in the Confrontation Clause.

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