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## Reliability of Codefendant Confessions and the Confrontation Clause: Lee v. Illinois

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# SUPREME COURT RAMIFICATIONS

## RELIABILITY OF CODEFENDANT CONFESSIONS AND THE CONFRONTATION CLAUSE: *LEE V. ILLINOIS*

The confrontation clause of the sixth amendment<sup>1</sup> guarantees a defendant in a criminal trial the right to confront and cross-examine any witness against him.<sup>2</sup> This right of confrontation helps

<sup>1</sup> U.S. CONST. amend. VI. The sixth amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." *Id.*

The right to confront one's accusatory witnesses dates back to the time of Christ. *See Acts of the Apostles* 25:15-16. When discussing St. Paul's trial before King Agrippa, St. Luke wrote:

[T]he chief priests and elders of the Jews presented their case against him, and asked for his conviction. But I told them that Romans are not accustomed to give any man up before the accused has met his accusers face to face and has been given a chance to defend himself against the charges.

*Id.*

<sup>2</sup> *See Kirby v. United States*, 174 U.S. 47 (1898). In *Kirby*, the Court held that the right of confrontation was "[o]ne of the fundamental guarantees of life and liberty," and "a right long deemed so essential for due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution . . ." *Id.* at 55-56. Since the *Kirby* decision, the Supreme Court has zealously protected the right of confrontation in criminal trials as an essential safeguard to a fair trial. *See Davis v. Alaska*, 415 U.S. 308, 316 (1974) (confrontation clause allows cross-examiner to delve into the witness' character); *Brookhart v. Janis*, 384 U.S. 1, 3-4 (1966) (right of confrontation, if not waived, violated when defendant is denied opportunity to cross-examine any witness against him); *Douglas v. Alabama*, 380 U.S. 415, 418 (1965) (primary right secured by confrontation clause is that of cross-examination); *Pointer v. Texas*, 380 U.S. 400, 405 (1965) (confrontation is a fundamental requirement of a fair trial); *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959) (right of confrontation has "ancient roots"); *Alford v. United States*, 282 U.S. 687, 692 (1931) (confrontation is a "substantial right" to a fair trial); 5 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1395, at 123

ensure the reliability of testimony implicating a criminal defendant by requiring the declarant of such testimony to submit to cross-examination under oath before the trier of fact.<sup>3</sup> Though generally recognized in Anglo-American jurisprudence as essential to a fair trial, the right of confrontation had tenuous begin-

(3d ed. 1940). Dean Wigmore in discussing confrontation and cross-examination stated:

The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.

*Id.* (emphasis in original). See also 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE: COMMENTARY ON RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES ¶ 800[01], at 800-11 to -12 (1986) (discussion of the merits of cross-examination).

The right of confrontation under the sixth amendment has been held applicable to the states through the fourteenth amendment. *Pointer v. Texas*, 380 U.S. 400, 403-06. In its discussion of confrontation, the *Pointer* Court noted that "[t]he fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution." *Id.* at 404. The *Pointer* decision overruled a long-standing doctrine which called for individual states to apply their own constitutional requirements for confrontation. See *West v. Louisiana*, 194 U.S. 258, 262 (1904) (sixth amendment right of confrontation does not apply to states).

Prior to the decision in *Pointer*, in most instances, a state's interpretation of its own confrontation requirements led to results similar to those obtained under the sixth amendment. 5 J. WIGMORE, *supra*, § 1397, at 127 n.1 (a list of states and their constitutional provisions relating to confrontation).

<sup>3</sup> *Mattox v. United States*, 156 U.S. 237, 242-43 (1895). The Court in discussing the purpose of the confrontation clause noted:

The primary object of the constitutional provision in question was . . . [to allow] cross-examination of the witness . . . [during] which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

*Id.* See also *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (cross-examination tests veracity of witness' testimony); *Douglas v. Alabama*, 380 U.S. 415, 418-19 (1965) (tests sincerity and recollection); *Kirby v. United States*, 174 U.S. 47, 55-56 (1898) (gives defendant the ability to impeach his accuser's testimony); Stewart, *Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1, 22 (tests perception, memory and communication of a witness).

Confrontation and cross-examination of an adverse witness are recognized as two of the chief weapons an advocate has to obtain the truth. 5 J. WIGMORE, *supra* note 2, § 1368, at 33-49. As suggested by Dean Wigmore, cross-examination is "the greatest legal engine ever invented for the discovery of truth." *Id.* § 1367, at 29. Cross-examination ensures accuracy and completeness, and will very often expose fraud or honest error on the part of the witness. See E. CLEARY, MCCORMICK ON EVIDENCE § 31, at 68 (3d ed. 1984). See also Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 186 (1948) (possibility of exposing falsehood is a strong motivator for sincerity).

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nings,<sup>4</sup> and even today is not absolute.<sup>5</sup> At times this right must “bow to accommodate other legitimate interests in the criminal trial process.”<sup>6</sup> One such legitimate interest is that of the prosecutor to establish evidence admissible under the hearsay evidence rule.<sup>7</sup>

Somewhat analogous to the confrontation clause,<sup>8</sup> the hearsay

<sup>4</sup> See Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 99-101 (1972). During the treason trial of Sir Walter Raleigh, the accused demanded the right to confront the witnesses against him. *Id.* at 100. This demand was rejected and Sir Walter Raleigh was subsequently executed for treason. *Id.* at 100-01. Cf. W. BEST, A TREATISE ON THE PRINCIPLE OF EVIDENCE AND THE PRACTICE AS TO PROOFS IN COURTS OF COMMON LAW § 102, at 120-21 (1849) (beginning of the hearsay doctrine may extend as far back as the time of King Edward II). Dean Wigmore maintained “[t]here never was at common law any recognized right to an indispensable thing called confrontation as distinguished from cross-examination. There was a right to cross-examination as indispensable, and that right was involved in and secured by confrontation; it was the same right under different names.” 5 J. WIGMORE, *supra* note 2, § 1397, at 128-29 (emphasis in original). See generally *California v. Green*, 399 U.S. 149, 174-80 (1970) (Harlan, J., concurring) (history of the confrontation clause makes it difficult to determine the actual intent of the Framers); Baker, *The Right to Confrontation, the Hearsay Rules, and Due Process - A Proposal for Determining When Hearsay May Be Used in Criminal Trials*, 6 CONN. L. REV. 529, 532-34 (1974) (discussion of the historical background surrounding right of confrontation).

<sup>5</sup> See, e.g., *Cruz v. New York*, 107 S. Ct. 1714, 1721 (1987) (harmless error overcomes violation of the confrontation clause); *Lee v. Illinois*, 106 S. Ct. 2056, 2066 (1986) (admission which is judged a harmless error when assessed in view of the entire case does not violate the confrontation clause); *United States v. Inadi*, 106 S. Ct. 1121, 1127-28 (1986) (lack of cross-examination not necessarily fatal to the admissibility of evidence under the confrontation clause). See also *infra* notes 79-81 and accompanying text (discussion of the harmless error rule).

<sup>6</sup> *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). The fact that the confrontation clause does not always guarantee a criminal defendant the right to confront the witnesses against him has been recognized by the Supreme Court. See, e.g., *Mattox v. United States*, 156 U.S. 237, 243 (1895) (the right of confrontation “must occasionally give way to considerations of public policy and the necessities of the case”).

<sup>7</sup> See 4 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 489, at 1149 (Federal Rules of Evidence “attempt to strike a balance between the recognized needs of the accused and the problems of the prosecution”); cf. Natali, Green, Dutton and Chambers: *Three Cases in Search of a Theory*, 7 RUT.-CAM. L.J. 43, 73 (1975) (“no rule will perfectly resolve all possible problems”). Despite the commentaries to the contrary, the Supreme Court has expressed the opinion that the decisions reached over the years have not done injustice to either the confrontation clause nor to the hearsay exceptions which have developed. *Ohio v. Roberts*, 448 U.S. 56, 66 n.9 (1980).

<sup>8</sup> See *Dutton v. Evans*, 400 U.S. 74, 86 (1970) (“Confrontation Clause and the evidentiary hearsay rule stem from the same roots” but are not equivalent). See also *California v. Green*, 399 U.S. 149, 155-56 (1970) (hearsay rules and confrontation clause are designed to protect similar interests, but the Court has “more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception”); *Payne v. Janasz*, 711 F.2d 1305, 1314 (6th Cir.) (evidence may be hearsay without violating the right of confrontation), *cert. denied*, 464 U.S. 1019 (1983); See also Comment, *Confrontation and the Hearsay Rule*, 75 YALE L.J. 1434, 1437 (1966) (“no hearsay rule closely approximates the advantages of confrontation”).

evidence rule seeks to keep out of evidence statements made out of court by persons not subject to cross-examination.<sup>9</sup> At times however, exceptions to the hearsay rule<sup>10</sup> will conflict with the

<sup>9</sup> See FED. R. EVID. 801(c). "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *Id.* Over the years, hearsay and the hearsay evidence rule have been defined in a number of ways. See, e.g., *Clement v. Packer*, 125 U.S. 309, 321 (1888) (hearsay evidence is "inadmissible to establish any specific fact which in its nature is capable of being proved by the testimony of a person who speaks from his own knowledge"); 5 J. WIGMORE, *supra* note 2, § 1362, at 3 (the hearsay rule is "a rule rejecting assertions, offered testimonially, which have not been in some way subjected to the test of Cross-examination") (emphasis in original). See also E. CLEARY, *supra* note 3, § 244, at 724-26 (brief discussion regarding the history of the hearsay evidence rule).

Weinstein maintains that three conditions have developed which minimize the chance of unreliable evidence: oath, personal presence at trial and cross-examination. 4 J. WEINSTEIN & M. BERGER, *supra* note 2, ¶ 800[01], at 800-10 to -12. There are also four primary reasons why hearsay evidence is considered unreliable: ambiguity, lack of candor or insincerity, failure of memory, and misperception. 4 D. LOUISELL & C. MUELLER, *supra* note 7, § 413, at 69-70. See generally Morgan, *supra* note 3 (thorough analysis of reasons for excluding hearsay).

<sup>10</sup> See FED. R. EVID. 803 & 804. The Federal Rules of Evidence enumerate almost thirty exceptions to the hearsay evidence rule, however the number of "actual working" exceptions is no more than twelve. E. CLEARY, *supra* note 3, § 253, at 753. Dean Wigmore developed a list of fourteen exceptions which included: dying declarations, statements of facts against interest, statements of a voter, and declarations of mental condition. 5 J. WIGMORE, *supra* note 2, § 1420, at 202-03. According to Dean Wigmore, such evidence has a "circumstantial probability of trustworthiness", hence the reason for its admissibility and the departure from the traditional hearsay rule. *Id.* § 1422, at 204-05. The state of flux underlying the hearsay evidence rule has caused some commentators to refer to the rule and its varied list of exceptions as "resembl[ing] an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists." Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 921 (1937).

Over time, courts have ruled that admission of evidence which falls into certain recognized hearsay exceptions is admissible without violating rights guaranteed by the confrontation clause. See, e.g., *Mancusi v. Stubbs*, 408 U.S. 204, 216 (1972) (prior cross-examined testimony); *Delaney v. United States*, 263 U.S. 586, 590 (1924) (statements of deceased conspirator may be attested to by a co-conspirator as evidence against a third conspirator); *Mattox v. United States*, 156 U.S. 237, 243-44 (1895) (dying declarations). See also *Lenza v. Wyrick*, 665 F.2d 804, 810 (8th Cir. 1981) (declarations of state of mind of declarant); *United States v. Nick*, 604 F.2d 1199, 1203-04 (9th Cir. 1979) (excited utterances); *United States v. Lee*, 589 F.2d 980, 986-89 (9th Cir.) (affidavit made after diligent search stating that record of requested information did not exist), *cert. denied*, 444 U.S. 969 (1979); *United States v. Medico*, 557 F.2d 309, 314 n.4 (2d Cir.) (hearsay exceptions listed in Federal Rules of Evidence satisfy rights guaranteed under the confrontation clause), *cert. denied*, 434 U.S. 986 (1977); *United States v. Carlson*, 547 F.2d 1346, 1356 (8th Cir. 1976) (application of virtually all hearsay exceptions will not violate defendant's sixth amendment rights), *cert. denied*, 431 U.S. 914 (1977); *United States v. Lipscomb*, 435 F.2d 795, 802 (5th Cir. 1970) (entries in regular course of business), *cert. denied*, 401 U.S. 980 (1971); *Reed v. Beto*, 343 F.2d 723, 724-25 (5th Cir. 1965) (public records of previous convictions), *aff'd*, 385 U.S. 554 (1967); Comment, *Hearsay, the Confrontation Guarantee and Related Problems*, 30 LA. L. REV. 651, 668 (1970) (business and public records).

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confrontation clause in that they seek to admit evidence which a literal interpretation of the confrontation clause would otherwise bar.<sup>11</sup> This is exemplified when the inculpatory confession of a non-testifying codefendant is sought to be admitted as evidence of a defendant's guilt.<sup>12</sup> The Supreme Court has held this type of confession to be presumptively unreliable unless the prosecutor can show that the declarant of the inculpatory confession is unavailable and the statement contains adequate indicia of reliability.<sup>13</sup> However, in *Lee v. Illinois*,<sup>14</sup> the Supreme Court failed to properly apply the reliability portion of this test and concluded that the confrontation clause of the sixth amendment was violated when an uncross-examined confession was relied upon by a state trial court judge as substantive evidence against the declarant's codefendant.<sup>15</sup> The Court rejected the State's argument that the codefendant's statement constituted a declaration against penal interest<sup>16</sup> and thus was sufficiently reliable to be admitted without

<sup>11</sup> See *Bourjaily v. United States*, 107 S. Ct. 2775, 2782 (1987) (literal interpretation of the confrontation clause rejected as "unintended and too extreme") (quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980)); *California v. Green*, 399 U.S. 149, 161-64 (1970) (discussion of previous cases in which the question of the hearsay evidence and the confrontation clause arose); Lilly, *Notes on the Confrontation Clause and Ohio v. Roberts*, 36 U. FLA. L. REV. 207, 207 (1984) ("an intractable problem in criminal trials"). The interplay between the expansive list of hearsay exceptions and the confrontation clause has not been constrained by a strict rule of law, and is continually changing. See *Ohio v. Roberts*, 448 U.S. 56, 64-65 (1980); *California v. Green*, 399 U.S. 149, 162 (1970). See also Read, *The New Confrontation-Hearsay Dilemma*, 45 S. CAL. L. REV. 1, 47 (1972). Commentators have recognized the competing interests between the confrontation clause and evidence falling within a recognized hearsay exception, and have offered numerous theories to reconcile the inherent differences between the two. See, e.g., Baker, *supra* note 4, at 556 (a showing of unavailability and reliability before evidence is admissible); Graham, *The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness*, 56 TEX. L. REV. 151, 205 (1978) (production of declarants only if hearsay was accusatory); Seidelson, *Hearsay Exceptions and the Sixth Amendment*, 40 GEO. WASH. L. REV. 76, 91-92 (1971) (all hearsay should be excluded except that which has a high degree of trustworthiness, and a "total absence" of motive to falsify); cf. Westen, *The Future of Confrontation*, 77 MICH. L. REV. 1185, 1187-88 (1979) (no tenable middle ground has been found).

<sup>12</sup> See, e.g., *Bourjaily v. United States*, 107 S. Ct. 2775 (1987); *Lee v. Illinois*, 106 S. Ct. 2056 (1986); *Ohio v. Roberts*, 448 U.S. 56 (1980); *Bruton v. United States*, 391 U.S. 123 (1968); Comment, *The Confrontation Clause and the Hearsay Rule: A Problematic Relationship in Need of a Practical Analysis*, 14 FLA. ST. U.L. REV. 949 (1987).

<sup>13</sup> *Ohio v. Roberts*, 448 U.S. 56, 66 (1979). See *infra* notes 40-46 and accompanying text (application of the *Roberts* test).

<sup>14</sup> 106 S. Ct. 2056 (1986).

<sup>15</sup> *Id.* at 2065-66.

<sup>16</sup> See *infra* notes 54-56 and accompanying text (analysis of declarations against penal interest).

cross-examination.<sup>17</sup>

In *Lee*, the petitioner, Millie Lee, confessed to her and her boyfriend Thomas' involvement in the killing of her aunt and her aunt's friend, Ms. Harris.<sup>18</sup> Lee contended that she acted in self-defense in killing her aunt, but implicated Thomas in the murder of Ms. Harris.<sup>19</sup> Thomas, after a confrontation with Lee and upon being informed that inculpatory statements were made by Lee in the presence of the police, made his own confession.<sup>20</sup> Both confessions were similar in many respects, although Thomas' confession asserted the two murders were premeditated by both him and Lee.<sup>21</sup>

<sup>17</sup> *Lee*, 106 S. Ct. at 2064 n.5. The Court stated: "We reject respondent's categorization of the hearsay involved in this case as a simple 'declaration against penal interest.' That concept defines too large a class for meaningful Confrontation Clause analysis." *Id.*

<sup>18</sup> *Id.* According to Lee, she was present with Thomas in the apartment which she shared with her aunt. *Id.* at 2058. Her aunt arrived at the apartment accompanied by Odessa Harris, and soon thereafter Harris and Lee had "two or three words not really an argument" in the kitchen. *Id.* When Odessa left the kitchen to return to the bedroom, Odessa passed Thomas and gave him "dirty looks." *Id.* Odessa turned her back on Thomas, at which point Thomas stabbed her in the back with a twenty-four inch long knife. *Id.* After Odessa was stabbed, Thomas entered the kitchen "with the knife in his hand with blood on it." *Id.* at 2059. Lee then went into the bedroom where her aunt was, and upon entering the bedroom, her aunt rose up from the bed with a knife in her hand and threatened her. *Id.* Lee then recounted that she returned to the kitchen, obtained a butcher's knife, returned to the bedroom and repeatedly stabbed her aunt to death. *Id.*

<sup>19</sup> *Id.* at 2058-59. Lee also presented an argument in the alternative, which maintained she acted as "the result of a sudden and intense passion resulting from serious provocation." *Id.* at 2060. The trial court judge rejected this argument and noted that no evidence had been presented to show that the murder of Lee's aunt resulted from a sudden and intense passion. *Id.* at 2061.

<sup>20</sup> *Id.* at 2058. When Lee and Thomas met together in the police station, Lee pleaded with Thomas to share "the rap" with her. *Id.* In response to his girlfriend's pleading, Thomas made his own confession. *Id.* See *infra* note 21 and accompanying text.

<sup>21</sup> *Lee*, 106 S. Ct. at 2059. The confession of Thomas was similar to the statement given by Lee in that both confessions described the argument which had occurred between the two codefendants, the confrontation with Odessa in the kitchen, and the commission of both murders. *Id.* The confessions diverged regarding the question of premeditation. *Id.* The pertinent portions of Thomas' confession were quoted by the Court as follows:

This is when I asked [Lee] 'did she still want to go through with it?' . . . We had talked about doing something to Aunt Beedie, but we had not figure out just what we would do. We had never before discussed doing anything to Odessa just Aunt Beedie, because we were tired of Aunt Beedie getting drunk, and coming home and 'going off' on [Lee] . . . After asking [Lee], 'did she still want to do it?' [Lee] first gave me a funny look, as though she was not going to do it, she stared into space for awhile, then she looked at me and said, 'yes'.

We decided that if we did som[e]thing to Aunt Beedie, we had to do something with Odessa . . . We had plained [sic] that [Lee] was supposed to get Odessa to stand, with her back toward the front room, looking into the kitchen, while I would

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In a joint bench trial during which neither defendant testified,<sup>22</sup> the trial court found the petitioner Millie Lee guilty of both murders. The court relied upon Thomas' confession as substantive evidence in reaching its decision.<sup>23</sup> The Appellate Court of Illinois, Fifth District, affirmed the conviction without opinion,<sup>24</sup> and the Illinois Supreme Court subsequently denied leave to appeal.<sup>25</sup>

The United States Supreme Court granted certiorari,<sup>26</sup> and in a five to four decision, reversed judgment and remanded the case.<sup>27</sup> The majority<sup>28</sup> found insufficient "indicia of reliability" to overcome the presumption of unreliability usually associated with such uncross-examined evidence.<sup>29</sup> Similarly, the majority noted that Thomas' confession was not deemed reliable simply because it "interlocked"<sup>30</sup> with certain aspects of the petitioner's account of the murders.<sup>31</sup> Moreover, the majority refused to consider Thomas'

grab her from the back, using the big knife . . . .  
*Id.* at 2059.

<sup>22</sup> *Id.* at 2060. Before the trial, both defendant's withdrew their motion for separate trials. *Id.* The defendants only testified with regard to their respective motions to suppress their individual confessions, which were denied by the trial court judge. *Id.*

<sup>23</sup> *Id.* at 2061. Lee was sentenced to a term of 40 years of imprisonment for the murder of Ms. Harris, and life imprisonment for the murder of her aunt. *Id.* The trial court judge explained that he rejected the assertions contained in Lee's confession and relied on the confession of Thomas and his version of the facts. *Id.*

<sup>24</sup> *People v. Lee*, 129 Ill. App. 3d 1167, 491 N.E.2d 1391 (Ill. App. Ct. 1984).

<sup>25</sup> *Lee v. Illinois*, 106 S. Ct. at 2061.

<sup>26</sup> *Lee v. Illinois*, 105 S. Ct. 3524 (1985).

<sup>27</sup> *Lee v. Illinois*, 106 S. Ct. at 2065-66. The matter was remanded to the Illinois Appellate Court for a determination concerning whether the admission of the uncross-examined confession of the codefendant resulted in a "harmless error." *Id.* See *infra* notes 79-81 and accompanying text (discussion of harmless error rule).

<sup>28</sup> *Lee*, 106 S. Ct. at 2056. Justice Brennan wrote the majority opinion, in which Justices White, Marshall, Stevens and O'Connor joined. *Id.*

<sup>29</sup> *Id.* at 2065.

<sup>30</sup> *Id.* at 2064-65. See *infra* notes 70-72 and accompanying text (discussion of "interlocking confessions").

<sup>31</sup> *Lee*, 106 S. Ct. at 2064. The *Lee* Court based its findings of insufficient indicia of reliability on several factors. *Id.* at 2064-65. First, the codefendant's inculpatory confession was elicited only after he was confronted with Lee's statement implicating him in both murders. *Id.* at 2064. Second, the record indicated a possibility that Thomas' confession may have been a distortion of the facts, and an act of retaliation against Lee. *Id.* The majority noted that the codefendant considered the possibility of becoming Lee's adversary. *Id.* The most important factors focused upon by the majority were the few discrepancies between the two confessions concerning the petitioner's involvement, facilitation, and certain factual circumstances relevant to premeditation. *Id.* at 2065. The Court concluded that these differences were not "irrelevant or trivial," and therefore maintained it should

statement to be reliable despite it being a declaration against his penal interest.<sup>33</sup>

Justice Blackmun writing for the dissent<sup>33</sup> argued that the codefendant's inculpatory confession was sufficiently reliable to warrant its admission as substantive evidence of the petitioner's guilt.<sup>34</sup> The dissent noted that not only was Thomas' statement thoroughly adverse to his penal interest, but it was also extensively corroborated by independent evidence.<sup>35</sup> Furthermore, Justice Blackmun noted that Thomas' statements were also corroborated in certain relevant respects by Lee's confession.<sup>36</sup>

It is suggested that the *Lee* Court, in reaching its decision, incorrectly focused on the theoretical underpinnings of the confrontation clause and ignored the practical effect of its application to the facts present in *Lee*. It is further submitted that the codefendant's statement in *Lee* constituted a declaration against interest and as such was sufficiently reliable so as not to have violated the defendant's right of confrontation.

## I. RELIABILITY AND CODEFENDANT CONFESSIONS

Historically, the reliability of a codefendant's inculpatory confession was ensured by requiring the declarant to undergo cross-examination.<sup>37</sup> Over the years, however, courts have gradually

not deviate from the well-founded rule that a codefendant's confession inculcating the accused is inherently unreliable, and that convictions supported by such evidence violate the constitutional right of confrontation. *Id. Accord* *Bruton v. United States*, 391 U.S. 123, 126 (1968).

<sup>33</sup> *Lee*, 106 S. Ct. at 2064 n.5. *See infra* notes 54-56 (discussion of declarations against penal interest).

<sup>34</sup> *Lee*, 106 S. Ct. 2066. Justice Blackmun wrote the dissenting opinion, joined by Chief Justice Burger and Justices Powell and Rehnquist. *Id.*

<sup>35</sup> *Id.* at 2068 (Blackmun, J., dissenting). Justice Blackmun maintained that statements against interest, as a recognized hearsay exception, must be judged in terms of reliability. *Id. See also infra* notes 54-56 (discussion of declarations against penal interest).

<sup>36</sup> *Lee*, 106 S. Ct. at 2069 (Blackmun, J., dissenting).

<sup>37</sup> *Id.* at 2069-70 (Blackmun, J., dissenting). Both confessions agree not only as to the manner in which the murders were committed, but also as to the defendant's activities subsequent to the death of the two women. *Id.* at 2070 n.7 (Blackmun, J., dissenting).

<sup>38</sup> *See supra* notes 2-4 and accompanying text (historical background surrounding cross-examination). Cf. Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378, 1390 (1972) ("Absent sufficient inherent assurances of reliability, the only permissible guarantor of the hearsay declaration's evidentiary value is the defendant's cross-examination of the declarant.").

Some forms of evidence have been deemed reliable even though the declarant was not

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shifted from a guarantee of cross-examination to a guarantee against the admission of unreliable hearsay.<sup>38</sup> As a result of this gradual shift, courts have attempted to redefine the parameters of reliability regarding inculpatory codefendant confessions.<sup>39</sup> The test currently employed is the "indicia of reliability" test formulated in *Ohio v. Roberts*.<sup>40</sup>

The Court in *Roberts* held that a codefendant's confession implicating his accomplice was presumptively unreliable, but held that this presumption could be rebutted.<sup>41</sup> In order to rebut this pre-

cross-examined. *See, e.g.*, *California v. Green*, 399 U.S. 149, 165 (1970) (preliminary hearing testimony of an unavailable witness); *Pointer v. Texas*, 380 U.S. 400, 407 (1965) (dying declarations and prior testimony); *Mattox v. United States*, 156 U.S. 237, 243-44 (1895) (dying declarations); *Reynolds v. United States*, 98 U.S. 145, 158-59 (1878) (former testimony admissible where witness is kept away from trial by the adverse party). *Cf. supra* note 10 and accompanying text (discussion of exceptions to the hearsay rule).

<sup>38</sup> *See generally* 4 J. WEINSTEIN & M. BERGER, *supra* note 2, ¶ 800[04], at 800-19 to -35 (discussion of the various interpretations given to the confrontation clause).

During the 1960's, the Supreme Court regarded a defendant's right of confrontation as a guarantee against the admission of uncross-examined testimony. *See Bruton v. United States*, 391 U.S. 123 (1968) (defendant's right of confrontation denied when codefendant who was a declarant of an inculpatory statement refused to testify); *Barber v. Page*, 390 U.S. 719 (1968) (defendant's right of confrontation violated when state failed to make a good faith effort to produce witness); *Douglas v. Alabama*, 380 U.S. 415 (1965) (prosecutor's reading to the jury of the confession of previously convicted co-felon violated defendant's right of confrontation).

In the 1970's, however, the Court relaxed its strict interpretation of the confrontation clause requiring that a declarant be produced at trial, and began to allow the admission of all evidence determined to be reliable. *See Parker v. Randolph*, 442 U.S. 62 (1979) (interlocking confessions admissible); *Dutton v. Evans*, 400 U.S. 74 (1970) (co-conspirator statements admissible against defendant); *California v. Green*, 399 U.S. 149 (1970) (declarant's statement given at preliminary hearing admissible when declarant is available and testifying at trial).

<sup>39</sup> *See generally* *Ohio v. Roberts*, 448 U.S. 56 (1980) (indicia of reliability test); *Parker v. Randolph*, 442 U.S. 62 (1979) (interlocking confessions test); Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 958-61 (1974) (proposal for a method of determining the reliability of hearsay by minimizing the four "testimonial infirmities," namely ambiguity, insincerity, erroneous memory and faulty perception). Some commentators, though, have expressed the opinion that courts have been unsuccessful in their attempts to strike a balance between the rights granted under the confrontation clause and the exceptions to the hearsay rule. *See, e.g.*, Read, *supra* note 11, at 48.

<sup>40</sup> 448 U.S. 56 (1980).

<sup>41</sup> *Id.* at 73. During a preliminary hearing in *Roberts*, a witness made adverse statements against the petitioner's interest. *Id.* at 58. When this witness failed to appear at trial, despite the issuance of several subpoenas, a transcript of her testimony was introduced into evidence. *Id.* at 59. The defendant was convicted and thereafter appealed claiming the admission of the witness' statement violated his rights under the sixth amendment. *Id.* The court of appeals reversed, holding that the prosecution failed to make a good faith effort to secure the testimony of the witness. *Id.* at 60. The Supreme Court of Ohio affirmed the decision on other grounds holding that the mere opportunity to cross-examine during a

sumption, the Court in *Roberts* noted that the prosecution must first show that the declarant is "unavailable,"<sup>42</sup> and then prove that the confession bears "adequate 'indicia of reliability'."<sup>43</sup> The "indicia of reliability" are shown if the confession falls within a "firmly rooted hearsay exception"<sup>44</sup> or contains "particularized

preliminary hearing did not satisfy the defendant's right of confrontation. *Id.* at 60-62. The United States Supreme Court granted certiorari at 441 U.S. 904 (1979).

<sup>42</sup> *Roberts*, 448 U.S. at 66. The prosecution is held to a "good faith" standard to show that a witness is unavailable. *Id.* at 74 (quoting *Barber v. Page*, 390 U.S. 719, 724-25 (1968)). See *California v. Green*, 399 U.S. 149, 189 n.22 (1970) (prosecution must make a reasonable attempt to produce a witness); *Dres v. Campoy*, 784 F.2d 996, 998-1001 (9th Cir. 1986) (same). This standard is not very demanding, and at times does not have to be met where it would be inconvenient for the prosecution to produce the declarant, or where cross-examination by the accused would be of little benefit in showing that the statement was unreliable. *Roberts*, 448 U.S. at 65 n.7. See also *United States v. Inadi*, 106 S. Ct. 1121, 1126 (1986) (no showing of unavailability required for admission of statements from a non-testifying co-conspirator). Cf. 5 J. WIGMORE, *supra* note 2, §§ 1401-1418, at 146-201 (various types of unavailability are described, and their ramifications on the hearsay rule discussed). See generally Kirkpatrick, *Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement*, 70 MINN. L. REV. 665 (1986) (in-depth discussion of unavailability); Note, *Confrontation and the Unavailable Witness: Searching for a Standard*, 18 VAL. U.L. REV. 193, 197-208 (1983) (historical development of unavailability).

The Federal Rules of Evidence recognize the following as acceptable reasons for a declarant's unavailability as a witness: (1) declaration of a valid privilege, (2) persistent refusal to testify, (3) lack of memory, (4) death or physical or mental impairment, and (5) absence from the hearing despite reasonable effort to procure declarant's attendance. FED. R. EVID. 804(a). Justice Brennan maintained that while physical unavailability would not cast doubt on the reliability of a declarant's earlier testimony, fear of self-incrimination at trial, or feigned or actual memory loss might tend to do so. *California v. Green*, 399 U.S. 149, 202 (1970) (Brennan, J., dissenting).

Justice Harlan has suggested that only in situations where the evidence in question consists of official statements, learned treatises, trade reports, business or laboratory analysis should it be permissible for the prosecution to make no attempt to produce the declarant. *Dutton v. Evans*, 400 U.S. 74, 95-96 (1970) (Harlan, J., concurring).

Courts have held a defendant's right to confrontation was not violated when the declarant of an inculpatory statement invoked his privilege against self-incrimination under the fifth amendment. See, e.g., *United States v. De Luna*, 763 F.2d 897, 910 (8th Cir.), *cert. denied*, 106 S. Ct. 382 (1985); *United States v. Rodriguez*, 706 F.2d 31, 40 (2d Cir. 1983). Cf. *United States v. Vandetti*, 623 F.2d 1144, 1148 (6th Cir. 1980) (defendant's sixth amendment rights violated when prosecutor called codefendant knowing he would not testify).

<sup>43</sup> *Roberts*, 448 U.S. at 65-66 (quoting *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972)).

<sup>44</sup> *Id.* at 66. The Court noted that "certain [firmly rooted] hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'" *Id.* (citation and footnote omitted). The Court cited four previously recognized exceptions which it considered firmly rooted: dying declarations, cross-examined prior-trial testimony, properly administered business records and public records. *Id.* at 66 n.8.

One commentator has suggested that application of the *Roberts* decision would result in the denial of a defendant's constitutional right of confrontation. See Seidelson, *The Confrontation Clause, the Right Against Self-Incrimination and the Supreme Court: A Critique and Some*

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guarantees of trustworthiness.”<sup>48</sup> Although the Supreme Court in

*Modest Proposals*, 20 DUQ. L. REV. 429, 433-36 (1982). Professor Seidelson asserted “the sixth amendment right of confrontation should be interpreted to exclude extrajudicial accusatory declarations, even where such declarations ‘fall within a firmly rooted hearsay exception’ or possess ‘particularized guarantees of trustworthiness.’ ” *Id.* at 460-61 (emphasis in original). Professor Seidelson maintained that such an interpretation would ensure that the basic purpose behind the confrontation clause is preserved. *Id.* at 461.

It has not been determined whether an exception is “firmly rooted” simply because of its age, or by its acceptance by a number of jurisdictions. See Lilly *supra* note 11, at 228. Commentators have maintained that the constitutionality of a hearsay exception should rest upon the likelihood of reliability rather than longevity. See, e.g., Comment, *Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest*, 66 CALIF. L. REV. 1189, 1214-17 (1978). See also *State v. Wyss*, 124 Wis. 2d 681, 709-10, 370 N.W.2d 745, 759 (1985).

The failure of the Supreme Court to define the term “firmly rooted” hearsay exception has resulted in numerous attempts by lower courts to develop a workable standard. See, e.g., *United States v. Keplinger*, 776 F.2d 678, 695 n.7 (7th Cir. 1985) (business records are firmly rooted hearsay), *cert. denied*, 106 S. Ct. 2919 (1986); *Barker v. Morris*, 761 F.2d 1396, 1399 (9th Cir. 1985) (videotaped testimony not within a firmly rooted hearsay exception), *cert. denied*, 106 S. Ct. 814 (1986); *Williams v. Melton*, 733 F.2d 1492, 1495 (11th Cir.) (*res gestae* exception to hearsay rule not a violation of defendant’s confrontation clause rights), *cert. denied*, 469 U.S. 1073 (1984); *United States v. Harenberg*, 732 F.2d 1507, 1515 (10th Cir. 1984) (grand jury testimony not a firmly rooted hearsay exception); *Olson v. Green*, 668 F.2d 421, 427-28 (8th Cir.) (custodial statements implicating a third party do not fall within a firmly rooted hearsay exception), *cert. denied*, 456 U.S. 1009 (1982); *United States v. Peacock*, 654 F.2d 339, 349 (5th Cir. 1981) (declaration against interest is firmly rooted hearsay exception), *cert. denied*, 464 U.S. 965 (1983); *Brown v. Tard*, 552 F. Supp. 1341, 1351 (D.N.J. 1982) (contemporaneous statements are firmly rooted hearsay exceptions). See also 4 J. WEINSTEIN & M. BERGER, *supra* note 2, ¶ 800[04], at 800-35 (hearsay exceptions listed in Federal Rules of Evidence are firmly rooted hearsay exceptions).

<sup>48</sup> *Roberts*, 448 U.S. at 66. Some commentators have maintained that a statement containing “particularized guarantees of trustworthiness” is one which on a previous occasion was subjected to some form of cross-examination by the accused. See Note, *Federal Rule of Evidence 801(d)(2)(E) and the Confrontation Clause: Closing the Window of Admissibility for Coconspirator Hearsay*, 53 FORDHAM L. REV. 1291, 1308 (1985) (most Supreme Court cases which have admitted hearsay involved previously cross-examined testimony of an unavailable witness); Comment, *supra* note 44, at 1197 (confrontation clause not violated if witness was previously cross-examined and shown to be unavailable). *But see* *California v. Green*, 399 U.S. 149, 196-98 (1970) (Brennan, J., dissenting) (due to their less formal structure, a defendant’s right to confrontation is rarely satisfied at preliminary hearings); *United States v. Iron Shell*, 633 F.2d 77, 84-85 (8th Cir. 1980) (statements made by patient to physician admissible without having physician undergo cross-examination), *cert. denied*, 450 U.S. 1001 (1981); *United States v. West*, 574 F.2d 1131, 1137-38 (4th Cir. 1978) (prior recorded grand jury testimony admissible despite absence of cross-examination); *Davenport*, *supra* note 37, at 1390 (absent cross-examination, only reliable statements should be admissible).

Courts have been provided with few guidelines to determine when a sufficient form of cross-examination has taken place. See, e.g., *Mancusi v. Stubbs*, 408 U.S. 204, 214-16 (1972) (cross-examination of declarant at preliminary hearing is sufficient); *Green*, 399 U.S. at 168-70 (prior cross-examined testimony admissible after declarant claimed memory loss); *United States v. Johnson*, 735 F.2d 1200, 1203 (9th Cir. 1984) (adequate opportunity to cross-examine during a deposition); *Glenn v. Dallman*, 635 F.2d 1183, 1187 (6th Cir. 1980) (testimony given at preliminary hearing admissible even though petitioner did not take

*Roberts* provided this test for determining when hearsay is admissible, the Court's failure to clarify the components of the test have left lower courts to their own devices in determining the admissibility of such evidence.<sup>46</sup> The case of *Lee v. Illinois* is the most recent example in which the deficiencies of the *Roberts* test are illustrated.<sup>47</sup>

## II. MISAPPLICATION OF THE *ROBERTS* TEST

### A. Unavailability

Application of the *Roberts* test to the facts in *Lee* first required that the Court find the declarant to be unavailable.<sup>48</sup> The Court in *Lee*, however, never reached this issue when it held that Thomas' confession was unreliable and thus inadmissible.<sup>49</sup> Notwithstanding, an analysis of the facts reveals that although Thomas was present in the courtroom throughout Lee's trial,<sup>50</sup> he was nevertheless unavailable for purposes of the *Roberts* test.<sup>51</sup> The unavailability requirement has never been strictly enforced, and all that is required of a prosecutor is good faith in obtaining the witness' testimony.<sup>52</sup> If Thomas had been called to testify, he

opportunity to fully cross-examine declarant), *cert. denied*, 454 U.S. 843 (1981); Buelow v. Dickey, 622 F. Supp. 761, 765-66 (E.D. Wis. 1985) (statement given at investigative hearing presided over by state circuit court judge which corroborated a statement given to police earlier contained particularized guarantees of trustworthiness).

<sup>46</sup> See Lilly, *supra* note 11, at 228 (leaves room for case-by-case development). Among some factors considered by the courts are adequate opportunity to observe, spontaneity of speech, likelihood of sufficient recollection and motive to falsify. *Id.*

<sup>47</sup> See Comment, *supra* note 12, at 951-67 (analysis of court's struggle with the *Roberts* test). See also Bourjaily v. United States, 107 S. Ct. 2775, 2782-83 (1987).

<sup>48</sup> See *supra* note 42 and accompanying text (discussion of unavailability). But see Westen, *supra* note 11, at 1188-90 ("availability" necessitates ability to give incriminating evidence in the form of live testimony in open court, under oath and subject to cross-examination).

<sup>49</sup> *Lee*, 106 S. Ct. at 2061. ("[w]e need not address the question of Thomas' availability").

<sup>50</sup> *Id.* at 2067 (Blackmun, J., dissenting). Physical presence of a witness in a courtroom does not make his testimony available. See E. CLEARY, *supra* note 3, § 253, at 754.

<sup>51</sup> *Lee*, 106 S. Ct. at 2067 (Blackmun, J., dissenting). It has been noted that unavailability relates not to the availability of the witness but to the availability of his testimony. E. CLEARY, *supra* note 3, § 253 at 754. See also California v. Green, 399 U.S. 149, 168 (1969).

<sup>52</sup> See Barber v. Page, 390 U.S. 719, 724-25 (1968); Kirkpatrick, *supra* note 42, at 670-77. Some courts have maintained that actual invocation of the fifth amendment privilege is a mere formality when determining the availability of a witness. See United States v. Thomas, 571 F.2d 285, 288 (5th Cir. 1978). Although FED. R. EVID. 804(a)(1) requires the court to rule upon the validity of the witness' claim of privilege, such a requirement need

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would have invoked his fifth amendment right against self-incrimination.<sup>53</sup>

### B. *Reliability*

Although the first element of *Roberts* had been satisfied, the *Lee* Court erred in holding Thomas' confession to be unreliable, despite it being a declaration against the declarant's penal interest. The declaration against penal interest exception<sup>54</sup> to the hearsay evidence rule is founded upon the assumption that people will not make damaging statements against themselves unless the statements are in fact true.<sup>55</sup> Many courts and commentators, in con-

not be met where it is a mere formality. *See, e.g., United States v. Young Bros., Inc.*, 728 F.2d 682, 690-91 (5th Cir.), *cert. denied*, 469 U.S. 881 (1984). Moreover, courts and commentators have argued that the unavailability requirement can be done away with. *See, e.g., United States v. Inadi*, 106 S. Ct. 1121, 1128 (1986) (showing of unavailability in case involving co-conspirator statements would be burdensome to the prosecutor); E. CLEARY, *supra* note 3, § 253, at 753-58; Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 HARV. L. REV. 1, 6-8 (1944) (unavailability requirement is inconsistent when viewed in light of other exceptions to the hearsay rule, such as spontaneous utterances and dying declarations).

<sup>53</sup> *Lee*, 106 S. Ct. at 2067 (Blackmun, J., dissenting). Justice Rehnquist, in his concurrence in *New Mexico v. Earnest*, 106 S. Ct. 2734 (1986), maintained that failure to cross-examine a declarant "is not necessarily fatal to the admissibility of evidence under the Confrontation Clause" in view of *Ohio v. Roberts*. *Earnest*, 106 S. Ct. at 2735 (Rehnquist, J., concurring).

<sup>54</sup> *See* FED. R. EVID. 804(b)(3). A statement is against the declarant's interest if the statement when made is "so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless [he believed] it to be true." *Id.* In order for a statement to qualify as a declaration against penal interest, the declarant must have made a statement which was against his interest, such that a reasonable person would not have made the statement unless true, and the declarant must be unavailable at the time of trial. 4 J. WEINSTEIN & M. BERGER, *supra* note 2, ¶ 804(b)(3)[02], at 804-128 to -138; E. CLEARY, *supra* note 3, § 276, at 819.

Courts had traditionally drawn a distinction between penal and pecuniary or proprietary interests. Ponsoldt & Steering, *Accomplice Accusations in the Criminal Process: The Application of Sixth Amendment Test for Reliability of Hearsay Evidence to Probable Cause Determinations*, 16 RUTGERS L.J. 869, 883-84 (1985). This distinction was ultimately rejected by the courts since a declarant's penal interest is as important, if not more so, than his pecuniary or proprietary interest. *See* Jefferson, *supra* note 52, at 39. *See generally* E. CLEARY, *supra* note 3, § 278, at 822-24 (discussion of the development of the declaration against penal interest exception).

<sup>55</sup> *See* 5 J. WIGMORE, *supra* note 2, § 1457, at 262-63 ("The basis of the Exception is the principle of experience that a statement asserting a fact distinctly against one's interest is entirely unlikely to be deliberately false or heedlessly incorrect, and is thus sufficiently sanctioned, though oath and cross-examination are wanting."); Morgan, *The Rationale of Vicarious Admissions*, 42 HARV. L. REV. 461, 480-81 (1929) (sufficient guarantee of trustworthiness found in declarations against penal interest); Comment, *supra* note 44, at 1209-10 (com-

sidering the admissibility of declarations against penal interest, view such statements with much skepticism and consider them inherently unreliable.<sup>56</sup>

Courts look with disfavor on declarations against penal interest when such statements appear to shift the blame onto another,<sup>57</sup> seem to curry favor from the police,<sup>58</sup> or are tainted by police coercion.<sup>59</sup> On its face, the confession of Thomas does appear to

mon sense dictates people generally do not concede untrue facts against their interest). Some commentators, however, have argued that such an assumption is based upon a misperception of human nature. *See, e.g.*, 4 J. WEINSTEIN & M. BERGER, *supra* note 2, ¶ 804(b)(3)[01], at 804-123 ("Persons will lie despite the consequences to themselves to exculpate those they love or fear, to inculpate those they hate or fear, or because they are congenital liars."). Others have contended the real reason behind the reluctance to allow the admission of declarations against penal interest is the "fear of opening a door to a flood of witnesses testifying falsely to confessions that were never made or testifying truthfully to confessions that were false." *See, e.g.*, E. CLEARY, *supra* note 3, § 278, at 823.

<sup>56</sup> *See, e.g.*, *United States v. Oliver*, 626 F.2d 254, 261 (2d Cir. 1980) (statement which implicates accomplice even though against declarant's penal interest is unreliable and must be subjected to cross-examination); *United States v. Alvarez*, 584 F.2d 694, 701 (5th Cir. 1978) (the admissibility of inculpatory declarations against penal interest requires proof of trustworthiness); *United States v. H & M, Inc.*, 562 F. Supp. 651, 668 (M.D. Pa. 1983) (statement against interest not "firmly rooted," therefore "particularized guarantees of trustworthiness" test must be used); 4 J. WEINSTEIN & M. BERGER, *supra* note 2, ¶ 804(b)(3)[03], at 804-150 to -157 (declaration against penal interest if not shown to be reliable will violate the Confrontation Clause). *But see* *Donnelly v. United States*, 228 U.S. 243, 278 (1913) (Holmes, J., dissenting) ("no other statement is so much against interest as a confession of murder"); *United States v. Harrell*, 788 F.2d 1524, 1526 (11th Cir. 1986) (declarant's tape recorded conversation implicating codefendant deemed admissible as statement against interest); *United States v. Winley*, 638 F.2d 560, 562 (2d Cir. 1981) (plea of guilty surrounded with "safeguards of trustworthiness"), *cert. denied*, 455 U.S. 959 (1982); *United States v. Love*, 592 F.2d 1022, 1025-26 (8th Cir. 1979) (confessions against interest are reliable even where third party is implicated). Declarations against interest have been found to be reliable and therefore admissible as evidence if: the declarant is unavailable, the statement is against the declarant's penal interest, and there are corroborating circumstances indicating the trustworthiness of the statement. *United States v. Alvarez*, 584 F.2d 694, 699-701 (5th Cir. 1978).

<sup>57</sup> *See* *Bruton v. United States*, 391 U.S. 123, 136 (1968) (there is a "recognized motivation to shift blame onto others"); 4 D. LOUISELL & C. MUELLER, *supra* note 7, § 489, at 1176 ("disserving interest is outweighed by the apparent overall self-serving purpose").

<sup>58</sup> *See* FED. R. EVID. 804 advisory committee note ("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 [a declaration] against [penal] interest"). *See also* *United States v. Johnson*, 802 F.2d 1459, 1465 (D.C. Cir. 1986) (common knowledge that accomplice can curry favor with police by implicating others in the offense); Note, *Inculpatory Statements Against Penal Interest and the Confrontation Clause*, 83 COLUM. L. REV. 159, 163-64 (1983) (confession coerced by the police should be viewed as unreliable).

<sup>59</sup> *See* *Dutton v. Evans*, 400 U.S. 74, 98 (1970) (Harlan, J., concurring). Another reason, equally valid, though rarely alleged and proven is intimidation of the declarant by the defendant or his cohorts. *See, e.g.*, *United States v. Carlson*, 547 F.2d 1346, 1359 (8th Cir.

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shift the blame onto his codefendant.<sup>60</sup> The majority correctly noted that Thomas could have confessed in order to shift the blame onto the petitioner for initially implicating him in the murder of Ms. Harris.<sup>61</sup> But irrespective of his motive, Thomas' confession failed to accomplish that end.<sup>62</sup> Thomas freely admitted to stabbing Odessa Harris, and attributed to the petitioner only actions which she had already admitted to in her own confession.<sup>63</sup> Thomas, through his confession, at no time attempted to, nor succeeded in, minimizing his own guilt at the expense of the petitioner.<sup>64</sup> Therefore, the majority's assertion that Thomas' confession could have been motivated by a desire to shift the blame onto Lee, rendering it unreliable, was without merit.<sup>65</sup> In addition, Thomas' confession did not appear to stem from any attempt to curry the favor of police as his statement was thoroughly adverse to his penal interest.<sup>66</sup> There was no evidence that Thomas' con-

1976), *cert. denied*, 431 U.S. 914 (1977).

<sup>60</sup> See *Lee*, 106 S. Ct. 2068-69 (1986) (Blackmun, J., dissenting).

<sup>61</sup> *Id.* at 2064-65. Among the possible reasons behind Thomas' confession could have been the desire to shift the blame onto Lee or to curry the favor of the police. *Id.* See *supra* notes 56-58. Some courts have ruled that absent these reasons, a declarant's incriminating statement which also inculcates a codefendant is admissible. See, e.g., *United States v. Garis*, 616 F.2d 626, 632 (2d Cir.) (declarant's statement admissible where there were no threats, suggested promises, or fostered hopes of leniency), *cert. denied*, 447 U.S. 926 (1980).

<sup>62</sup> *Lee*, 106 S. Ct. at 2068-69 (Blackmun, J., dissenting). Reliability was present in Thomas' confession by virtue of the fact that his confession did not diminish his own guilt. *Id.* (Blackmun, J., dissenting).

<sup>63</sup> See *supra* notes 18 and 21 (the confessions of Lee and Thomas).

<sup>64</sup> *Lee*, 106 S. Ct. at 2069 (Blackmun, J., dissenting). Thomas' confession was contrary to the usual way in which a declarant would attempt to shift the blame onto his codefendant. See *United States v. Monaco*, 735 F.2d 1173, 1177 (9th Cir. 1984) (declarant minimized his responsibility more than he incriminated himself); *United States v. Coachman*, 727 F.2d 1293, 1297 (D.C. Cir. 1984) (codefendant's "attempt to trivialize his own involvement in the nefarious scheme by shifting responsibility to his cohorts"); *United States v. Lilley*, 581 F.2d 182, 187 (8th Cir. 1978) (statements were made to "shift suspicion away from . . . [codefendant] and to soften the impact of his admission").

The majority contended that Thomas was considering becoming a witness for the prosecution prior to trial in support of its argument that Thomas' confession was given to shift the blame to the petitioner. *Lee*, 106 S. Ct. at 2064. Although this may be true, it is irrelevant, since the motivation underlying a confession is determined at the time given not a time subsequent to the original confession. See *Dutton v. Evans*, 400 U.S. 74, 89 (1970) (spontaneous statement against declarant's penal interest contained indicia of reliability).

<sup>65</sup> *Lee*, 106 S. Ct. at 2069 (Blackmun, J., dissenting). See *infra* notes 79-81 (discussion of harmless error rule).

<sup>66</sup> *Lee*, 106 S. Ct. at 2069 (Blackmun, J., dissenting). See *supra* note 58 (discussion of confessions motivated by desire to curry favor).

fession was conditioned upon a deal with the authorities.<sup>67</sup> Finally, Thomas' confession was neither coerced nor obtained through police impropriety.<sup>68</sup> The majority in *Lee* never raised the issue of police coercion and spoke only in broad generalities regarding the problems associated with a statement obtained through such means.<sup>69</sup>

The reliability of Thomas' inculpatory confession was further strengthened by the fact that it was extensively corroborated by the petitioner's own statement and physical evidence associated with the commission of the crime.<sup>70</sup> Thomas' confession "inter-

<sup>67</sup> *Lee*, 106 S. Ct. at 2069 (Blackmun, J., dissenting). Although the majority noted there may have been a motive to curry favor from the police, no evidence was offered to support such a contention. *Id.* at 2064. Compare *United States v. Sarmiento-Perez*, 633 F.2d 1092, 1102 (5th Cir. 1981) (declarant allowed to plead guilty to only one of the five counts on which he was initially indicted), *cert. denied*, 459 U.S. 834 (1982) and *United States v. Love*, 592 F.2d 1022, 1026 (8th Cir. 1979) (appeared to declarant that "her best chance of being released promptly was to make a statement implicating someone else") with *Lee*, 106 S. Ct. at 2069 (Blackmun, J., dissenting) (declarant's statement did not minimize his own guilt).

<sup>68</sup> *Lee*, 106 S. Ct. at 2071 (Blackmun, J., dissenting) (testimony was presented which showed that declarant was not coerced or threatened by the police).

Justice Harlan has contended as a matter of due process, the confession of any accomplice made during police interrogations should not be admitted against a codefendant. *Dutton v. Evans*, 400 U.S. 74, 98 (1970) (Harlan, J., concurring). See also *Davenport*, *supra* note 37, at 1395-96 (police questioning could amount to duress); cf. Comment, *supra* note 44, at 1210 (police custody fosters self-serving statements).

<sup>69</sup> *Lee*, 106 S. Ct. at 2062. Absent any evidence tending to show unconstitutional police conduct, the reliability of Thomas' confession should not be held inadmissible simply because it was gained during police questioning. *Id.* at 2070-71 (Blackmun, J., dissenting) (declarant notified of his fifth amendment rights). But see *United States v. Robinson*, 635 F.2d 363 (5th Cir.) (declarant's statement, given after *Miranda* warning, and after police made no promise of leniency nor indicated that it would help to implicate others, found admissible), *cert. denied*, 452 U.S. 916 (1981). But cf. Fine, *Declarations Against Penal Interest in New York: Carte Blanche?*, 21 SYRACUSE L. REV. 1095, 1111-12 (1970) (confession in response to receipt of repeated *Miranda* warnings deemed unreliable since declarant may be attempting to curry favor).

<sup>70</sup> *United States ex rel. Cantanzaro v. Mancusi*, 404 F.2d 296 (2d Cir. 1968), *cert. denied*, 397 U.S. 942 (1970). The Court in *Mancusi* first developed the "interlocking confession" doctrine. Lung, *Parker v. Randolph: The Right of Confrontation and the Interlocking Confession Doctrine*, 32 HASTINGS L.J. 305, 317-18 (1980).

The interlocking confession doctrine was further extended in *Parker*, where in a plurality opinion, the Court held that admission of an interlocking confession did not violate the defendant's right of confrontation provided that limiting instructions were presented to the jury. 442 U.S. 62, 75 (1979). This view was subsequently rejected by the Court in *Cruz v. New York*, 107 S. Ct. 1714 (1987), in which it was held that despite limiting instructions, admission of an inculpatory confession of a nontestifying codefendant resulted in a violation of the confrontation clause. *Id.* at 1720. The Court noted, however, that this constitutional violation might in some instances result in a harmless error. *Id.*

To this date there has been no consensus of opinion among the courts as to how closely two statements must agree before they can be considered "interlocking." See, e.g., *United*

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locked”<sup>71</sup> with the petitioner’s statement in every salient respect.<sup>72</sup> This extensive corroboration effectively made the motive behind Thomas’ inculpatory statement irrelevant regardless of the possibility of it being given to shift blame onto the petitioner, to curry the favor of the police, or whether it was tainted by police coercion.<sup>73</sup> Although the confessions diverged with respect to the question of premeditation,<sup>74</sup> it should be noted that premeditation is not an element of the crime of murder in Illinois,<sup>75</sup> nor was the

States v. Paternina-Vergara, 749 F.2d 993, 999 (2d Cir. 1984) (confessions interlock despite discrepancies as to whether defendant knew he was transporting narcotics), *cert. denied*, 469 U.S. 1217 (1985); Tamilio v. Fogg, 713 F.2d 18, 20 (2d Cir. 1983) (confessions interlock if they are “substantially the same and consistent on the major elements of the crime involved”), *cert. denied*, 464 U.S. 1041 (1984); Montes v. Jenkins, 626 F.2d 584, 589 (7th Cir. 1980) (confessions must be in “substance identical” in order to interlock); United States *ex rel.* Stanbridge v. Zelker, 514 F.2d 45, 49-50 (2d Cir.) (confessions interlock despite discrepancies as to whether codefendant knew his accomplice was armed), *cert. denied*, 423 U.S. 872 (1975); United States *ex rel.* Ortiz v. Fritz, 476 F.2d 37, 39 (2d Cir.) (confessions interlock despite being dissimilar as to time crime was committed, but essentially similar regarding motive and plot), *cert. denied*, 414 U.S. 1075 (1973); United States *ex rel.* Johnson v. Lane, 639 F. Supp. 260, 268 (N.D. Ill. 1986) (confessions “substantially identical” as to time, manner, plot and execution of crime interlock, despite discrepancies as to physical particulars of the crime); Note, *The Second Circuit’s Exceptions to Bruton v. United States: The Need for a Reexamination*, 29 SYRACUSE L. REV. 793, 804 (1978) (confessions interlock when “the confession of the nontestifying codefendant can add nothing to what is already in evidence”).

<sup>71</sup> *Lee*, 106 S. Ct. at 2069 (Blackmun, J., dissenting). Both confessions detail the same crimes, the same manner of attack, the same efforts to conceal the crimes, and the same motives. *Id.* at 2069-70 (Blackmun, J., dissenting). Most importantly, the individual confessions of each defendant attributed to the other actions to which that party confessed. *Id.* at 2069 (Blackmun, J., dissenting).

<sup>72</sup> *Id.* at 2070 n.8 (Blackmun, J., dissenting). As noted by Justice Blackmun, the fact that confessions interlock does not dictate that the confessions are automatically admissible. *Id.* (Blackmun, J., dissenting). However, the interlocking nature of the statements should not be deemed irrelevant in determining whether the statements contain sufficient reliability to be admitted without violating the confrontation clause. *Id.* (Blackmun, J., dissenting). See *Cruz v. New York*, 107 S. Ct. 1714, 1720 (1987) (interlocking confessions pertain to reliability).

<sup>73</sup> *Lee*, 106 S. Ct. at 2069 n.6 (Blackmun, J., dissenting). *Cf.* *United States v. Alvarez*, 584 F.2d 694, 701 (5th Cir. 1978) (corroboration has been held to be “necessary to a logical interrelation” between a declaration against penal interest, and a defendant’s right of confrontation).

<sup>74</sup> *Lee*, 106 S. Ct. at 2065. The majority maintained that the question of premeditation was an issue in dispute during the trial of *Lee*. *Id.* *But see infra* notes 75-76 and accompanying text.

<sup>75</sup> ILL. ANN. STAT. ch. 38, §§ 9-1 to -3 (Smith-Hurd 1979 & Supp. 1986). The confession of the petitioner, *supra* note 18, does not describe self-defense or the crime of voluntary manslaughter as is defined by Illinois law. ILL. ANN. STAT. ch. 38 § 9-1 (Smith-Hurd 1979 & Supp. 1986).

petitioner charged with the crime of conspiracy.<sup>76</sup>

It is therefore submitted that sufficient evidence existed to rebut the perceived unreliability surrounding Thomas' inculpatory confession. The "interlocking confessions," combined with Thomas' declaration against penal interest and the physical evidence present at the scene of the crime bestowed upon Thomas' confession sufficient "indicia of reliability" to satisfy the second prong of the test enunciated in *Roberts*.<sup>77</sup> This indicia of reliability combined with the showing of unavailability dictated that declarant's confession should have been admitted as evidence of the petitioner's guilt despite the absence of Thomas' cross-examination.<sup>78</sup>

### C. Harmless Error

It has been demonstrated that the motive behind Thomas' inculpatory confession was irrelevant due to the pre-existing incriminating confession of the petitioner.<sup>79</sup> Since Lee had already confessed to essentially the same crimes to which she was ultimately inculcated by Thomas, admission of his statement, even in violation of her sixth amendment rights, resulted in nothing more than a harmless error.<sup>80</sup> In considering whether the admission of Thomas' statement resulted in a harmless error, the Court should have determined whether the evidence against Lee would have been "significantly less persuasive" absent Thomas' confession.<sup>81</sup>

<sup>76</sup> ILL. ANN. STAT. ch. 38, § 8.2 (Smith-Hurd 1979 & Supp. 1986).

<sup>77</sup> See *supra* notes 43-45 and accompanying text (analysis of indicia of reliability portion of *Roberts* test).

<sup>78</sup> *Lee*, 106 S. Ct. 2071 (Blackmun, J., dissenting). The indicia of reliability included: the confession of Thomas which was adverse to his penal interest, the corroboration supplied by Lee's confession, the corroboration supplied by the physical evidence present at the scene of the crime, and the voluntary nature of Thomas' confession. *Id.* (Blackmun, J., dissenting).

<sup>79</sup> See *supra* notes 18, 21 and 70-72 and accompanying text (analysis of corroboration supplied by the confessions of both codefendants).

<sup>80</sup> See Lung, *supra* note 70, at 315-17 (brief discussion of "harmless error" rule); Note, *supra* note 45, at 1318-21 (same). Cf. *Lutwak v. United States*, 344 U.S. 604, 619 (1953) (criminal defendant is entitled to a "fair trial not a perfect one").

<sup>81</sup> See *Schneble v. Florida*, 405 U.S. 427, 432 (1972). See also *Olson v. Green*, 668 F.2d 421, 430 (8th Cir.) (accomplice's statement against penal interest ruled not to contain "indicia of reliability" but admissible under the harmless error rule, *cert. denied*, 456 U.S. 1009 (1982). In determining whether a harmless error is present, the Court must determine the "probable impact" on the trier of fact when the evidence in question was admitted. *Harrington v. California*, 395 U.S. 250, 254 (1969).

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### CONCLUSION

Over the years, the Court has successfully balanced a criminal defendant's constitutional right of confrontation against the admissibility of reliable hearsay evidence. The *Lee* majority, by concentrating on the theoretical niceties of the confrontation clause, and failing to consider the practical realities of the evidence presented, has effectively struck a fatal blow against the long list of hearsay exceptions which have painstakingly developed since the Framers took pen in hand. Under the proper circumstances, a declaration against penal interest can be as reliable, if not more so, than a dying declaration, or former testimony. Reliability of evidence is the ultimate test of admissibility, not limiting categories, since easy labels do not always supply ready answers. When all the evidence is weighed, the admissibility of Thomas' confession should be judged, solely by its reliability. The evidence presented during the trial showed that Thomas' confession, despite being a declaration against penal interest, was reliable and trustworthy, and therefore should have been admissible without transgression of the confrontation clause.

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