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"So I Says to "The Guy,' I Says...": The Constitutionality of Neutral Pronoun Redaction in Multidefendant Criminal Trials

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"SO I SAYS TO 'THE GUY,' I SAYS...": THE CONSTITUTIONALITY OF NEUTRAL PRONOUN REDACTION IN MULTIDEFENDANT CRIMINAL TRIALS

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INTRODUCTION

Human beings are naturally inquisitive and instinctively seek to complete that which is incomplete. When a word is removed from a sentence and replaced with a blank space, human nature seeks to complete the sentence and determine what belongs in the blank space. The difficulties of attempting to cover up parts of sentences in the hope that people will ignore their human nature and disregard what was removed are clear to anyone familiar with the Watergate scandal. During the presidency of Richard Nixon, conversations held in the Oval Office and over the phone among government officials, including President Nixon himself, were secretly recorded.[1] When the story about the break-in at the Watergate hotel was uncovered, the tapes became evidence linking the President and others to the orchestrated burglary and subsequent cover-up.[2] Some of the tapes were turned over to prosecutors and transcribed for use during the investigation.[3] Parts of the transcripts were altered, however. In place of the foul language that the President and others frequently used, the editors of the transcripts substituted the phrases "expletive removed" or "expletive deleted."[4] Yet, for anyone reading the transcripts, not only was it obvious that something had been removed, it did not take a great

1. Lawrence Meyer, *President Taped Talks, Phone Calls: Principal Offices Secretly Bugged Since Spring 1971*, WASH. POST, July 17, 1973, at A1.

2. *See* United States v. Nixon, 418 U.S. 683, 713 (1974).

3. Many of the transcripts of the conversations are available to the public. Transcripts of President Nixon's conversations are available through the Nixon Archives' website: http://nixon.archives.gov/ find/tapes/finding_aids.html (last visited Sept. 12, 2006).

4. *See, e.g.*, Transcript of a Recording of a Meeting Between the President and Henry Petersen in the Oval Office on April 19, 1973, from 10:12 to 11:07 a.m., at 5, *available at* http://nixon.archives.gov/find/tapes/watergate/wspf/902-002_902-003.pdf (submitted for in camera review in the Watergate litigation) ("This -but frankly, I really didn't know this myself until this case came out. I said, 'What in the (expletive removed) is Hunt doing?'"); *see also* Hugh Rawson, *The Words of Watergate: An Anniversary Look Back at the Biggest Presidential Scandal Ever, Through the Changes It Wrought in the Language*, AM. HERITAGE, Oct. 1997, *available at* http://www.americanheritage.com/articles/magazine/ah/1997/6/1997_6_24.shtml (discussing the words and phrases that came to be associated with the Watergate scandal, including a discussion of the phrase "expletive deleted").

deal of effort to determine which words "expletive deleted" may have replaced.[5]

The problems with removing offensive references and finding suitable replacements are not unique to the Watergate recordings. As multiple-defendant criminal trials become more common, especially in drug conspiracy, terrorism, and RICO prosecutions, prosecutors and judges face similar difficulties trying to ensure that defendants receive fair trials.[6] Such problems arise where one defendant in a joint trial confesses to his crime, and in the confession, he implicates his codefendant in some way. Although such a statement is admissible against the confessor, provided it was lawfully obtained and voluntary, it is inadmissible hearsay with regard to his codefendant if the confessor does not testify.[7] If the confession is introduced at their joint trial, the jury will hear the statements that implicate the nonconfessing defendant as well as the confessing defendant. If the confessing defendant does not testify, the nonconfessing defendant has no opportunity to cross-examine the confessor on his statement, thus denying him the right "to be confronted with the witnesses against him."[8] When the jury thus hears evidence that is inadmissible against the codefendant, there is a danger that the jurors will improperly consider this

5. Indeed, one website even offers a prize for the most creative guesses as to which words or phrases were removed from the transcripts. *See* The Watergate [EXPLETIVE DELETED] Contest, http://www.superseventies. com/expledel.html (last visited Sept. 12, 2006).

6. Conspiracy trials have become more common due to the significant advantages offered to prosecutors under the law, including exceptions to the general prohibition on hearsay. *See* FED. R. EVID. 801(d)(2)(E). In many circumstances, coconspirators are tried jointly. Joint trials are relatively common in the prosecution of white-collar crime, as well, and these prosecutions present similar difficulties. *See* Paul Marcus, *Re-evaluating Large Multiple-Defendant Criminal Prosecutions*, 11 WM. & MARY BILL RTS. J. 67 (2002) (discussing prosecutions of group criminal activity, such as those under RICO, and the difficulties that arise when jointly prosecuting white-collar criminals).

7. Such a statement would be an out-of-court statement offered for the truth of the matter asserted. It would therefore be generally inadmissible as evidence. *See* FED. R. EVID. 801, 802. It would, however, be admissible against the nonconfessing defendant if the confessing codefendant was a coconspirator and made the statement in furtherance of the conspiracy. *See* FED. R. EVID. 801(d)(2)(E).

8. *See* U.S. CONST. amend. VI.

inadmissible evidence when determining the nonconfessing defendant's guilt. This danger is called the "*Bruton* problem."[9]

There are various ways to avoid the danger that the jury will consider inadmissible evidence like the confession when determining the guilt or innocence of the nonconfessing defendant. The most obvious is to sever the trials and try each defendant separately.[10] The problem can also be avoided altogether by simply choosing not to use the confession. Courts have rejected this "sever or never" approach, however, and have chosen to permit the introduction of confessions in joint trials provided the references to nonconfessing defendants are redacted.[11] As a guard against the dangers that a jury will improperly consider the confession as evidence against the nonconfessing defendants, judges issue limiting instructions, which juries are presumed to follow.[12]

The Supreme Court has held that a limiting instruction alone is not constitutionally sufficient to protect the rights of the nonconfessing defendant in a *Bruton* situation.[13] The Court held that if the references to the codefendant are fully redacted, however, the introduction of the confession along with a limiting instruction is not a violation of the defendant's rights under the Confrontation Clause.[14] On the question of just how much redaction

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9. This label comes from *Bruton v. United States*, 391 U.S. 123 (1968), the landmark case concerning the use of confessions in multiple-defendant prosecutions.

10. *See* Marcus, *supra* note 6, at 93 ("The obvious answer, of course, is to sever on this basis. After all, if the parties are tried separately, the *Bruton* problem instantly disappears, as only the defendant's own statement will be heard by her jury."). One trial in which a court ordered severance based on a *Bruton* problem was the trial of Timothy McVeigh for the Oklahoma City bombing. Both McVeigh and his partner, Terry Nichols, made statements to the FBI that incriminated the other, and they were tried separately after the judge upheld their *Bruton* objection. *See* Christopher B. Mueller, *Tales Out of School—Spillover Confessions and Against-Interest Statements Naming Others*, 55 U. MIAMI L. REV. 929, 956 (2001).

11. See discussion of *Richardson v. Marsh*, 481 U.S. 200 (1987), *infra* Part III.A, which found complete redaction of all references to the defendant to be acceptable protection, and *Gray v. Maryland*, 523 U.S. 185 (1998), *infra* Part III.C, which prohibited the use of symbol redaction.

12. *See, e.g.*, Opper v. United States, 348 U.S. 84, 95 (1954) ("Our theory of trial relies upon the ability of a jury to follow instructions.").

13. *See infra* notes 88-99 and accompanying text; *see also* Jackson v. Denno, 378 U.S. 368, 388-89 (1964) (rejecting the presumption that a limiting instruction was sufficient to prevent a jury from considering the improper confession of the defendant as evidence against him).

14. *See infra* Part III.A.

is required or what method of redaction is permissible, however, the Court has been less than clear.[15] These questions have tormented state and federal courts for years, and the Supreme Court has offered little guidance on the issue.

One method of redaction that some courts have employed in an attempt to comply with the Court's jurisprudence in this area is neutral pronoun redaction.[16] This method of redaction involves substituting neutral pronouns or phrases for the nonconfessing defendant's name. For example, a confession that stated, "Jane, Bob, and I robbed the bank" might be redacted to read, "The others and I robbed the bank." The Supreme Court has not directly addressed the issue of neutral pronoun redaction, though the Court has found similar redaction methods to be unconstitutional.[17] This Note will examine the issue of neutral pronoun redaction and argue that it is an acceptable form of compliance with the Court's Sixth Amendment jurisprudence. In Part I, this Note will discuss the Court's Confrontation Clause jurisprudence prior to *Bruton v. United States*. Part II will examine the *Bruton* holding and lower courts' attempts to comply with it. Part III will discuss the Court's attempt to limit *Bruton* in *Richardson* and its expansion of the *Bruton* principle in *Gray*. This Part will also discuss the confusion these decisions caused among the lower courts. Part IV of this Note will examine the question of neutral pronoun redaction, arguing that it is different from symbol redaction and less likely to prejudice a nonconfessing defendant. A limiting instruction, therefore, would be sufficient to protect a defendant's rights if his codefendant's confession were redacted using the neutral pronoun method. Finally, in an attempt to create uniformity and achieve the finality the Supreme Court has yet to achieve in this area, this Note will suggest a two-pronged test for determining the admissibility of redacted confessions. Under this test, the admissibility of a redacted confession depends on both the likelihood that jurors will

15. *See* Marcus, *supra* note 6, at 94 (describing redaction as "[n]ot exactly ... [a] simple and neat solution").

16. *See, e.g.*, United States v. Coleman, 349 F.3d 1077, 1085-86 (8th Cir. 2003) (permitting the substitution of the word "someone" for the nonconfessing defendant's name).

17. *See, e.g.*, Gray v. Maryland, 523 U.S. 185 (1998) (holding that use of the word "deleted" and blank spaces in a confession to replace the names of the other defendants violated a nonconfessing defendant's Sixth Amendment rights).

speculate as to the identity of the redaction and the strength of the inferential connection between the redaction and the identity of the defendant.

I. *DELLI PAOLI* AND THE QUESTION OF CONFESSIONS PRIOR TO *BRUTON*

A. Delli Paoli

The Court first dealt with the issue of codefendant confessions in *Delli Paoli v. United States*.[18] Orlando Delli Paoli and four other codefendants were convicted in the United States District Court for the Southern District of New York for conspiring to illegally transport alcohol and evade taxes.[19] At the end of the Government's case, the court admitted into evidence the written confession of one coconspirator, Whitley, which he had given in the presence of federal agents and his attorney.[20] The trial court admitted the confession "with an emphatic warning that it was to be considered solely in determining the guilt of Whitley and not in determining the guilt of any other defendant."[21] Delli Paoli was found guilty, and he appealed his conviction. The Second Circuit, in an opinion written by Judge Learned Hand, affirmed Delli Paoli's conviction.[22]

In an opinion written by Justice Burton, the Supreme Court affirmed the lower court's ruling, holding that the admission of the confession into evidence was not error based on the evidentiary

18. 352 U.S. 232 (1957).

19. *See id.* at 233.

20. *Id.* at 233-34. The Government initially offered the confession as evidence during its case-in-chief, but the court postponed a ruling on the admissibility of the confession until the close of the Government's case. *See id.*

21. *Id.* at 234. The trial court's admonition to use the confession only for this narrow purpose was based on a hearsay theory, rather than on constitutional grounds. As the court explained to the jury, the difference between considering a confession as evidence against the confessor and against another defendant is that, as against the confessor, it is "an admission against interest which a person ordinarily would not make," whereas against the codefendant, the statement "is nothing more than hearsay evidence." *Id.* at 240. The trial judge repeated the warnings to the jury several times during cross-examination and gave the jury a lengthy final warning during the jury charge. *See id.*

22. *See* Delli Paoli v. United States, 229 F.2d 319 (2d Cir. 1956).

rules concerning statements made during a conspiracy.[23] The Court noted that statements made by one conspirator in furtherance of the conspiracy are admissible into evidence against any and all other coconspirators, but any declarations made after the termination of the conspiracy "may be used only against the declarant and under appropriate instructions to the jury."[24] The Court recognized that requiring the jury to consider evidence as against only one person and not with regard to others placed a "heavy burden" on the jurors,[25] but it found that the burden was not so heavy as to make the task impossible.[26]

The Court, noting that the trial court had given multiple limiting instructions before giving the case to the jury,[27] defined the issue in *Delli Paoli* as "whether, under all the circumstances, the court's instructions to the jury provided petitioner with sufficient protection [with regard to] the admission of Whitley's confession."[28] The resolution of that issue, according to the Court, depended "on whether the instructions were sufficiently clear and whether it was reasonably possible for the jury to follow them."[29] Relying on the "long-standing" presumption that a clear limiting instruction could prevent other defendants from being prejudiced by the introduction of a postconspiracy declaration,[30] the Court determined that the trial court's limiting instructions were sufficiently clear.[31]

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23. *Delli Paoli*, 352 U.S. at 237. Before reaching the question of the confession's admissibility, the Court initially noted that, whether the confession was admissible, the other evidence against Delli Paoli was sufficient to sustain his conviction. *Id.* at 236-37.

24. *Id.* at 237.

25. *See id.* at 238.

26. *See id.* ("While these difficulties have been pointed out in several cases the rule has nonetheless been applied.") (citations omitted). Interestingly, and somewhat presciently, the Court noted that if all references to the nondeclarants were removed from the confession, there would be no plausible objection to the confession's admissibility. *Id.* at 237.

27. *See supra* note 21 and accompanying text.

28. *Delli Paoli*, 352 U.S. at 239. The Court specifically distinguished *Delli Paoli* from *Krulewitch v. United States*, 336 U.S. 440 (1949), on which Delli Paoli relied in claiming that the confession was inadmissible. *Krulewitch* held that the confession of a conspirator made after the conclusion of the conspiracy was not admissible at the trial of a coconspirator, but, as the *Delli Paoli* Court noted, the declarant in *Krulewitch* was not on trial. *See Delli Paoli*, 352 U.S. at 239.

29. *Delli Paoli*, 352 U.S. at 239.

30. *See id.* at 239 n.5.

31. *See id.* at 240-41.

Having resolved the question of the sufficiency of the instructions, the Court then considered whether the jury followed those instructions. The Court explained that, in light of the presumption that juries follow the instructions they are given,[32] and the facts of the case,[33] it was reasonable to presume the jury followed the instructions given by the trial judge.[34] Although the Court did recognize that there may be "practical limitations" to the general presumption that a jury follows its instructions, the particular facts suggested that those limitations were not present in this case,[35] and the Court therefore affirmed Delli Paoli's conviction.[36]

Justice Frankfurter wrote a dissenting opinion[37] in which he questioned the sufficiency of limiting instructions: "The fact of the matter is that too often such an admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors."[38] As Justice Frankfurter pointed out, it is not reasonable to expect jurors to understand and follow the limiting instructions given by the judge, as "[t]he admonition [frequently] becomes a futile collocation of words and fails of its purpose as a legal protection to

32. *See id.* at 242 ("It is a basic premise of our jury system that the court states the law to the jury and that the jury applies that law to the facts as the jury finds them .... 'Our theory of trial relies upon the ability of a jury to follow instructions.'" (quoting Opper v. United States, 348 U.S. 84, 95 (1954)). This presumption was necessary, according to the Court, in order to maintain the efficacy of the jury system. *Id.*

33. *See id.* at 241-42 (discussing the factors the Court considered, including the simplicity of the conspiracy, the emphasis on the separate interests of the defendants throughout the trial, the introduction of the confession at the end of the prosecution's case, the fact that the confession merely corroborated the other evidence against Delli Paoli, and the lack of evidence in the record to suggest the jury's confusion).

34. *See id.* at 241.

35. *See id.* at 243.

36. *Id.* The Court suggested that substantial deference should be paid to the trial judge's decision whether to try the codefendants separately or to try them jointly and admit the confession. *See id.* The Court held that the decision as to whether a jury instruction was insufficient should be a case-by-case determination based "on the circumstances of the particular case." *Id.*

37. This dissenting opinion would play a central role in the Court's subsequent decision to limit the policy of relying on jury instructions in this context. *See* Bruton v. United States, 391 U.S. 123, 129 (1968) ("Significantly, we supported that conclusion [in *Jackson v. Denno*, 378 U.S. 368 (1964)—that a limiting instruction was not sufficient to protect defendant's rights] in part by reliance upon the dissenting opinion of Mr. Justice Frankfurter for the four Justices who dissented in *Delli Paoli*.").

38. *Delli Paoli*, 352 U.S. at 247 (Frankfurter, J., dissenting).

defendants."[39] Frankfurter and his fellow dissenters advocated a "serious harm" standard, noting that "where a conspirator's statement is so damning to another against whom it is inadmissible, ... the difficulty of introducing it against the declarant without inevitable harm to a coconspirator ... is no justification for causing such harm."[40]

In addition to their concerns about the logic underlying the presumption that jurors follow instructions, the dissent also expressed concern about the spillover effects of introducing such a confession.[41] The dissenters suggested that the prosecutor who finds himself in such a situation should try the defendants separately,[42] and they rejected the majority's argument that admitting the confession was harmless error simply because of the strength of the other evidence against the defendant.[43] As the dissent argued, no matter how much evidence there may have been against the defendant, it was still reversible error to introduce such "powerfully improper evidence" as the confession.[44]

B. The Road to Bruton*:* Pointer, Douglas, *and* Jackson

What was striking about the *Delli Paoli* opinion was that it was decided without reference to the defendant's Confrontation Clause rights. Some scholars attribute the Court's failure to address the issue, at least in part, to the fact that the Court's Confrontation Clause jurisprudence was not yet very extensive.[45] Whatever the

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39. *Id.*

40. *Id.* at 247-48. The dissent pointed out that there could be a circumstance in which the confession "only glancingly ... affects a co-defendant"; in such a case, it might be appropriate to leave the decision whether to admit the confession to the discretion of the trial judge. *See id.* at 247.

41. *See id.* at 248 ("The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.").

42. *See id.*

43. *See id.*

44. *Id.*

45. *See, e.g.*, Judith L. Ritter, *The X Files: Joint Trials, Redacted Confessions, and Thirty Years of Sidestepping* Bruton, 42 VILL. L. REV. 855, 864 n.59 (1997) ("It is difficult to account for the lack of Confrontation Clause analysis in *Delli Paoli*. One possibility is that in 1957 ... the Supreme Court had not formally pronounced that the Sixth Amendment right of an accused to confront witnesses against him included the right to cross-examine those

reason, neither the majority nor the dissent saw *Delli Paoli* as a constitutional case,[46] and they instead focused on the question of whether juries could be relied upon to heed limiting instructions. As the Court's Confrontation Clause jurisprudence expanded in the years following *Delli Paoli*, the presumption supporting the decision in *Delli Paoli*—that juries followed instructions—was undermined. Three decisions, all of which would figure prominently in *Bruton*, were responsible for bringing to the fore consideration of the role of the Confrontation Clause in joint criminal trials.[47]

1. Pointer v. Texas

In *Pointer v. Texas*,[48] the Court considered whether the right to confront one's accusers, protected by the Sixth Amendment, included the right to cross-examine witnesses, and whether that right applied in state courts.[49] Pointer was charged with robbery and tried in a Texas state court.[50] The only witness against him, the victim of the robbery, was unavailable for trial.[51] In place of the victim's testimony, the prosecutor introduced, over Pointer's objections,[52] the testimony given by the witness at the pretrial hearing.[53]

The Supreme Court held that the Sixth Amendment right to confront witnesses necessarily included the right to cross-examine

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witnesses.").

46. David E. Seidelson, *The Confrontation Clause and the Supreme Court: Some Good News and Some Bad News*, 17 HOFSTRA L. REV. 51, 54 (1988).

47. See Ritter, *supra* note 45, at 862-68, for a discussion of the cases leading up to *Bruton*.

48. 380 U.S. 400 (1965).

49. *See id.* at 401.

50. *See id.* at 401-02 (describing Pointer's trial, conviction, and appeal).

51. *See id.* at 401.

52. *See id.* at 401-02 (recounting Pointer's objections). Pointer objected both before and during trial, arguing that the failure of the victim to testify denied him his right to confront the witnesses against him. *See id.* The judge allowed the reading of the testimony based on the fact that Pointer had the opportunity to cross-examine the witness at the preliminary hearing, when the testimony was given. *See id.* Pointer contested this ruling, arguing that, because he had not been given an attorney at the preliminary hearing, he was unable to cross-examine the victim at that time. *See id.* at 403.

53. *See id.* at 401.

them.[54] Cross-examination, in the Court's opinion, was an essential and fundamental requirement for the kind of fair trial guaranteed by the Constitution.[55] The right to cross-examine witnesses was also a fundamental right,[56] according to the Court, which applied even in state courts.[57]

2. Douglas v. Alabama

The Court decided *Douglas v. Alabama*[58] on the same day as *Pointer*. Douglas was charged with assault with attempt to murder and tried in an Alabama state court.[59] At the trial, the prosecutor called as a witness Douglas's accomplice, Loyd, who had previously been tried and found guilty.[60] Because Loyd intended to appeal his conviction, his attorney advised him to remain silent and refuse to answer the prosecutor's questions.[61] In light of this difficulty, the judge permitted the prosecutor to treat Loyd as a hostile witness, and the prosecutor, purportedly "to refresh Loyd's recollection, ... read from [Loyd's confession], pausing after every few sentences to ask Loyd ... 'Did you make that statement?' Each time, Loyd ... refused to answer, but the [prosecutor] continued this form of

54. *See id.* at 404 ("It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him.").

55. *See id.* at 405. According to the Court, "probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case." *Id.* at 404.

56. *See id.* at 404 ("The 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."). The Court also held that the right to confront witnesses was a guarantee protected by the Due Process Clause: "Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law." *Id.* at 405.

57. *See id.* at 406. The Court had previously ruled that the Sixth Amendment was applicable in state courts. Malloy v. Hogan, 378 U.S. 1 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963).

58. 380 U.S. 415 (1965).

59. *See id.* at 416.

60. *Id.*

61. *Id.*

questioning until the entire document had been read."[62] Loyd's confession implicated Douglas in the crime.[63]

Justice Brennan, writing for the majority of the Court, held that the admission of Loyd's confession, in light of his refusal to testify, denied Douglas his right to cross-examine his accuser.[64] According to the Court, the confession was the only direct evidence of Douglas's involvement in the crime, and the introduction of the confession added significant credibility to the government's case.[65] The Court expressed concern that the manner in which the confession was introduced—through the prosecutor's leading questions[66]—combined with the refusal of Loyd to testify led jurors to believe that Loyd had indeed made the statements implicating Douglas and that those statements were true.[67] According to the Court, the admission of Loyd's confession therefore violated Douglas's right to confront his accusers.[68]

3. Jackson v. Denno

A third case that laid the foundation for the Court's rejection of *Delli Paoli* was *Jackson v. Denno*.[69] In *Jackson*, the defendant was arrested at the scene of a shooting. Jackson had been injured during the course of a firefight, and he was taken to a hospital, where he was given an injection of Demerol.[70] Immediately after the injection, Jackson was subjected to an interrogation by the Assistant District

62. *Id.* at 416-17.

63. *See id.* at 417 ("The statements from the document as read by the Solicitor recited in considerable detail the circumstances leading to and surrounding the alleged crime; of crucial importance, they named the petitioner as the person who fired the shotgun blast which wounded the victim.").

64. *See id.* at 419.

65. *See id.*

66. The Court explained: "Although the [prosecutor's] reading of Loyd's alleged statement, and Loyd's refusals to answer, were not technically testimony, the [prosecutor's] reading may well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement ...." *Id.*

67. *See id.*

68. *See id.*

69. 378 U.S. 368 (1964).

70. *Id.* at 371.

Attorney, during which Jackson confessed to the crime.[71] At trial Jackson questioned the voluntariness of his confession, and the jury was instructed to disregard the confession if it found that it was involuntarily given.[72] Jackson was ultimately found guilty, and he appealed his conviction on the grounds that the confession was improperly admitted as evidence.[73]

In overturning Jackson's conviction, the Court rejected the presumption that jurors could ignore the confession if they indeed found it involuntary.[74] Given the concern that a jury, having heard the confession, would be influenced by it regardless of its admissibility, the Court held that this case presented one circumstance in which it could not presume that jurors could follow instructions to ignore such evidence when determining guilt or innocence.[75] The rejection of this long-held presumption would prove to be an important precedent for the Court's decision in *Bruton*.

II. *BRUTON* AND THE CONFRONTATION CLAUSE CONFRONTED

A. Bruton v. United States

In 1968, *Bruton v. United States*[76] presented the Court with the chance to reexamine its *Delli Paoli* holding[77] in light of the recent developments in Confrontation Clause jurisprudence. Bruton and his codefendant, Evans, were charged with armed postal robbery.[78] Prior to the trial, Evans orally confessed to the postal inspector in charge of the investigation that both he and Bruton committed the

71. The Court noted that by this time, almost three hours after the shoot-out with the police, Jackson, who had been shot in the liver and lung, had lost almost 500 cc of blood. *See id.*

72. See *id.* at 375 n.5 for a copy of the jury instruction.

73. *See id.* at 375-76.

74. *See id.* at 381, 389 (discussing the lower courts' presumption that the jury could follow the instructions given to it).

75. *See id.* at 388-89. Professor Ritter finds it significant that the Court quoted Justice Frankfurter's dissenting opinion in *Delli Paoli* when discussing the issue of whether it could presume that juries would follow limiting instructions. *See* Ritter, *supra* note 45, at 868 n.90.

76. 391 U.S. 123 (1968).

77. *See id.* at 125.

78. *Id.* at 124.

robbery.[79] Both Bruton and Evans were convicted following a joint trial, and each appealed his conviction to the Eighth Circuit Court of Appeals.[80] Evans's conviction was overturned by the Circuit Court, which held that his conviction was improperly obtained under the rules set forth in *Miranda v. Arizona*[81] and thus could not be admitted as evidence against him.[82] Despite the constitutional problems with Evans's conviction, however, the Circuit Court held that the admission of Evans's confession was not error with regard to Bruton, as the trial court had given the jury a limiting instruction in order to prevent it from being prejudiced by the statements in the confession that implicated Bruton.[83] Bruton appealed the Circuit Court's decision to the Supreme Court.

In an opinion written by Justice Brennan, the Supreme Court overturned Bruton's conviction and held that the admission of Evans's confession violated Bruton's right to confront his accuser,[84] as there was a "substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining [Bruton's] guilt."[85] In deciding to overturn Bruton's conviction based on the improper admission of Evans's confession, the Court explicitly overruled its earlier decision in *Delli Paoli*.[86]

The Court's decision to overrule *Delli Paoli* was based largely on its earlier decisions in *Pointer*, *Douglas*, and *Jackson*.[87] According to the Court, "[t]he basic premise of *Delli Paoli* was that it is

79. *Id.*

80. *Id.*

81. 384 U.S. 436 (1966).

82. *See* Evans v. United States, 375 F.2d 355, 361 (8th Cir. 1966).

83. *See id.* at 362.

84. *See Bruton*, 391 U.S. at 126. The discussion of the Confrontation Clause in the context of codefendant confessions was novel, as this constitutional provision was not the basis for the Court's decision in *Delli Paoli*. *See supra* note 45 and accompanying text.

85. *See Bruton*, 391 U.S. at 126.

86. *See id.* at 125-26. It is interesting to note that the Solicitor General submitted a memo to the Court in which he urged that Bruton's conviction be reversed and remanded for a new trial in light of the fact that Evans's confession was deemed inadmissible and his conviction reversed, as upholding the conviction of Bruton under such circumstances "may ... place too great a strain upon the [*Delli Paoli*] rule—at least, where, as here the other evidence against [Bruton] is not strong." *See id.* at 125-26 (first alteration in original). This statement by the Solicitor General suggests that the Court could have overturned the conviction without overturning *Delli Paoli*, or even referring to it at all.

87. *See id.* at 126 ("But since *Delli Paoli* was decided this Court has effectively repudiated its basic premise.").

'reasonably possible for the jury to follow' sufficiently clear instructions to disregard the confessor's extrajudicial statement that his codefendant participated with him in committing the crime."[88] In *Jackson*, however, the Court had specifically rejected the presumption that a limiting instruction was sufficient to protect a codefendant's rights.[89] The Court held that it was more difficult for the jury to ignore a confession when introduced against a codefendant in a joint trial like Bruton's than when the statement is introduced against only the defendant himself.[90] As the Court suggested, in a joint trial where the confessor's admissible confession implicates his codefendant, "the jury is expected to perform the overwhelming task of considering it in determining the guilt or innocence of the declarant and then ignoring it in determining the guilt or innocence of any codefendants of the declarant."[91] According to the Court, if it is an "overwhelming task" to ignore an *admissible* confession, then where the confession is *inadmissible* against the confessor, as Evans's had been in *Bruton*, it is a near impossible task to ignore that confession as evidence against the codefendant.[92]

In repudiating the presumption that juries can ignore a codefendant's confession when considering the guilt or innocence of the non-confessing defendant, the Court rejected various arguments that a limiting instruction was sufficient in such a situation. The Court rejected the premise that jury instructions provide a way around the exclusionary rules of evidence in such a way as to promote rather than hinder the search for the truth,[93] noting that

88. *Id.* (citing Delli Paoli v. United States, 352 U.S. 232, 239 (1957)).

89. *See id.* at 129. See *supra* Part I.B.3 for a discussion of *Jackson*.

90. *See Bruton*, 391 U.S. at 130. In analogizing *Jackson* to *Bruton* and *Delli Paoli*, the Court referred to the decision written by California Supreme Court Chief Justice Traynor in *People v. Aranda*, in which he held that "[*Jackson*'s] logic extends to obviating the risks that the jury may rely on *any* inadmissible statements" and that if it was a denial of due process for a jury to rely on an improperly obtained confession, it was likewise a denial of due process to rely on the jury's ability to ignore a confession that implicates a codefendant. *See* People v. Aranda, 407 P.2d 265, 271-72 (Cal. 1965) (emphasis added).

91. *Bruton*, 391 U.S. at 131 (quoting *Aranda*, 407 P.2d at 271-72).

92. *See id.* at 133 n.9 ("When, however, the confession implicating both defendants is not admissible at all, there is no longer room for compromise. The risk of prejudicing the nonconfessing can no longer be justified by the need for introducing the confession against the one who made it." (quoting *Aranda*, 407 P.2d at 270)).

93. *See id.* at 132-33 ("In Judge Hand's view the limiting instruction, although not really capable of preventing the jury from considering the prejudicial evidence, does as a matter of

there are other ways to utilize the confession without infringing the codefendant's rights.[94] The majority likewise rejected the dissent's argument that the efficiency of joint trials justified admitting these confessions in such trials. The Court conceded that joint trials "do conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of a crime to trial,"[95] but held that these benefits paled in comparison to the costs of denying defendants their constitutional rights.[96] The Court also rejected the argument that the efficacy and survival of the jury system depended on the presumption that a jury instruction was sufficient to prevent the jury from considering inadmissible evidence.[97] The Court held that while there were many circumstances in which a jury could be depended on to ignore inadmissible evidence, in certain contexts, such as that in *Bruton*, in which the extrajudicial statements are so "powerfully incriminating,"[98] there is a greater risk that the jury will be unable to follow the instructions.[99]

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form provide a way around the exclusionary rules of evidence that is defensible because it 'probably furthers, rather than impedes, the search for truth.'" (quoting Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932))). Judge Hand was a harsh critic of the presumption that juries can ignore inadmissible evidence. *See, e.g.*, United States v. Delli Paoli, 229 F.2d 319, 321 (2d Cir. 1956) ("[I]t is indeed very hard to believe that a jury will, or for that matter can, in practice observe the admonition."); United States v. Gottfried, 165 F.2d 360, 367 (2d Cir. 1948) ("Nobody can indeed fail to doubt whether the caution is effective ...."); *Nash*, 54 F.2d at 1007 (finding that the limiting instruction is a "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else"). The Court cited these and other opinions in a footnote in *Bruton*. *See Bruton*, 391 U.S. at 132 n.8.

94. *Bruton*, 391 U.S. at 134 ("Where viable alternatives do exist, it is deceptive to rely on the pursuit of truth to defend a clearly harmful practice."). The Court discussed some of the alternatives employed by lower courts, such as deletion of the references to codefendants. *See id.* at 134 n.10.

95. *Id.* at 134.

96. *See id.* at 135 ("We secure greater speed, economy and convenience in the administration of the law at the price of fundamental constitutional liberty. That price is too high." (quoting People v. Fisher, 164 N.E. 336, 341 (1928)).

97. *See id.*

98. *Id.*

99. *See id.* ("[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is ... great ...."). The Court also pointed out that the credibility of an extrajudicial statement of an accomplice is inherently suspect given the propensity of an accomplice to try to shift the blame to other accomplices, and that such a statement is even less reliable when the defendant does not testify and the jury is not given the opportunity to evaluate the credibility of the witness. *See id.* at 136. The Court also referred to the 1966 amendment to the Federal Rules of Criminal Procedure, which was prompted by concerns

Having established that a limiting instruction was not sufficient to protect the right of a defendant to confront witnesses against him, the Court found that Bruton had a constitutional right to confront Evans and that the admission of Evans's confession violated that right.[100] The Court determined that the introduction of the confession "added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination,"[101] thus denying Bruton his Sixth Amendment right of confrontation.[102] The Court further held that the violation of Bruton's rights was even more egregious than the violation in *Douglas*,[103] because in *Bruton* Evans's statements were actually introduced into evidence, which, absent the opportunity to hear Evans cross-examined, created a significant risk the jury would believe all the statements were true and reliable—including those implicating Bruton.[104] Because the potential failure of the jury to ignore these "powerfully incriminating" statements "posed a substantial threat"[105] to Bruton's constitutional rights, "the practical and human limitations of the jury system [could not] be ignored,"[106] according to the Court.[107]

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about the prejudice suffered by defendants when the confession of a codefendant is introduced. *See id.* at 131 & n.6. According to the Advisory Committee on Rules, the prejudice suffered by the nondeclarant "cannot be dispelled by cross-examination if the co-defendant does not take the stand. Limiting instructions to the jury may not in fact erase the prejudice." *Id.* at 132.

100. *See id.* at 126 ("[A] major reason underlying the constitutional confrontation rule is to give a defendant charged with a crime an opportunity to cross-examine the witnesses against him." (quoting Pointer v. Texas, 380 U.S. 400, 406-07 (1965)).

101. *Id.* at 128.

102. *See id.*

103. *See id.* at 126-28 (analogizing *Douglas* and *Bruton*). See *supra* notes 58-68 and accompanying text for a discussion of *Douglas*.

104. *See Bruton*, 391 U.S. at 127.

105. *Id.* at 137.

106. *Id.* at 135.

107. The Court noted that it could not determine whether the jury did in fact ignore the confession but held that it did not matter, as the mere possibility the jury considered it posed a substantial threat to Bruton's rights. *See id.* at 136-37. In finding a reversible error, the Court refused to accept a limiting instruction as a "substitute for [Bruton's] constitutional right of cross-examination." *Id.* at 137.

Justice Stewart wrote a separate concurrence,[108] noting that he agreed with the Court's decision to overrule *Delli Paoli* but disagreed that *Jackson* alone compelled this decision.[109] Rather, Justice Stewart would have reached the same conclusion, even without *Jackson*, based on the Sixth Amendment:

> A basic premise of the Confrontation Clause, it seems to me, is that certain kinds of hearsay are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, *whatever* instructions the trial judge might give.[110]

Justice White, joined by Justice Harlan, dissented. Justice White's lengthy dissent agreed that the statement was inadmissible against Bruton because it was hearsay but determined its admission to be harmless error based on his presumption that juries follow instructions.[111] Justice White decried the Court's decision as "excessively rigid"[112] and expressed concern that the decision would require the exclusion of all confessions implicating codefendants, regardless of any limiting instructions.[113] This criticism of the Court's decision focused on both the legal reasoning employed by the Court and the practical ramifications of the Court's holding. Justice White criticized the Court's reliance on *Jackson*, distinguishing that case because it concerned a defendant's confession being introduced as evidence against himself rather than against a codefendant, as in *Bruton*.[114] This was a critical distinction for Justice White, who stated that when a trial court instructs a jury

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108. *See id.* (Stewart, J., concurring). Justice Black also wrote a concurring opinion, in which he referred to his opinion in *Delli Paoli*. *See id.* (Black, J., concurring).

109. *See id.* at 137-38 (Stewart, J., concurring).

110. *Id.* at 138 (citations omitted).

111. *See id.* at 138-39 (White, J., dissenting). According to Justice White:

> Responsible judgment would be impossible but for the ability of men to focus their attention wholly on reliable and credible evidence, and jurymen are no less capable of exercising this capacity than other men.... I have no doubt that serious-minded and responsible men are able to shut their minds to unreliable information when exercising their judgment ....

Id. at 142-43.

112. *Id.* at 139.

113. *See id.*

114. *See id.* at 139-40. See *supra* Part I.B.3 for a discussion of *Jackson*.

to disregard a coerced confession, it does so not because the confession is necessarily unreliable, but in order to protect the constitutional rights of the defendant who was coerced into confessing.[115] This goal may be difficult for juries to understand, hence the rules excluding such evidence.[116] In contrast, when a jury is told that it is not to consider a defendant's confession as evidence against *another* defendant, it is because such statements are unreliable, a concept which, according to Justice White, is reasonable to believe that a jury will understand.[117]

In addition to questioning the legal basis of the Court's decision, the dissent criticized the majority's holding for its practical ramifications and its lack of explanation as to how to employ the announced standard.[118] The dissenting Justices suggested that the new approach to dealing with confessions would place an unnecessary burden on prosecutors and would seemingly defeat the efficiency rationale behind the joinder rules.[119] The dissent emphasized the concern that the majority had dismissed as unpersuasive: "[J]oint trials are more economical and minimize the burden on witnesses, prosecutors, and courts."[120] Justice White expressed concern that adhering to the majority's holding and requiring separate trials would result in inconsistent rulings with regard to similar defendants, delays in bringing defendants before a court, and "jockeying for position with regard to who should be the first to be tried."[121]

In discussing the burdens the majority's holding would place on prosecutors, Justice White provided a preview of the question that the court would have to answer in *Richardson*: whether the use of

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115. *See Bruton*, 391 U.S. at 140 (White, J., dissenting).

116. *See id.* at 141.

117. *See id.* at 141-42. The dissent characterized codefendant confessions as hearsay, "subject to all the dangers of inaccuracy which characterize hearsay generally," and the confessor as "no more than an eyewitness, the accuracy of whose testimony about the defendant's conduct is open to more doubt than would be the defendant's own account of his actions." *Id.* at 141. Justice White further explained that courts generally rely on juries to disregard most types of hearsay, and it is therefore difficult to believe that a jury will have difficulty ignoring hearsay that is of such questionable reliability as the statement of a codefendant. *See id.* at 142.

118. *See id.* at 143.

119. *See id.* at 144.

120. *Id.* at 143.

121. *See id.*

a confession would be permissible under the majority's holding if all references to the codefendant were deleted.[122] Justice White expressed concern that even if deletion was sufficient to avoid any constitutional concerns, the Court had provided no guidance as to the amount of deletion required[123] or how to handle oral statements.[124] Despite these concerns, however, effective deletion was, according to Justice White, perhaps the only way to comport with the Court's holding and thus avoid the difficult decisions prosecutors would have to make in choosing between not using a confession and trying the defendants separately.[125]

B. Bruton *Applied*

The *Bruton* decision was both hailed as a victory for the rights of criminal defendants and excoriated by those who thought the rule too burdensome. Though it was certainly a significant decision, the immediate legacy of *Bruton* had more to do with what it did not say than what it did say. Specifically, it did not directly address the issue of whether redaction was a permissible method of avoiding a *Bruton* problem, and redaction "quickly became a very effective way for prosecutors to skirt around *Bruton* and to admit non-testifying codefendant confessions in spite of *Bruton*'s 'powerfully incriminating' rule."[126] In determining whether redaction was a permissible method to prevent a confession from being "powerfully

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122. *See id.* ("I would suppose that it will be necessary to exclude all extrajudicial confessions unless all portions of them which implicate defendants other than the declarant are effectively deleted.").

123. Justice White explained that:

> Effective deletion will probably require not only omission of all direct and indirect inculpations of codefendants but also any statement that could be employed against those defendants once their identity is otherwise established. Of course, the deletion must not be such that it will distort the statements to the substantial prejudice of either the declarant or the government.

Id.

124. *See id.* at 144 ("Oral statements ... will present special problems, for there is a risk that the witness in testifying will inadvertently exceed permissible limits.").

125. *See id.* at 143-44.

126. Bryant M. Richardson, *Casting Light on the* Gray *Area: An Analysis of the Use of Neutral Pronouns in Non-Testifying Codefendant Redacted Confessions Under* Bruton, Richardson, *and* Gray, 55 U. MIAMI L. REV. 826, 835-36 (2001).

incriminating," two competing approaches emerged.[127] Some courts advocated using what came to be known as "contextual implication" analysis,[128] which required a trial court to examine the redacted confession in light of all the evidence introduced at trial in order to determine whether the confession implicated the codefendant.[129] Other courts interpreted the *Bruton* rule to require an examination of *only* the face of the confession itself;[130] thus, "as long as the face or four corners of the confession do not incriminate a jointly tried defendant, the court need look no further."[131] This relatively even split in the circuits persisted for almost twenty years until the Court finally got the chance to settle the debate between "contextual implication" and "facially incriminating" analysis in 1987.

III. REEXAMINING *BRUTON*: *RICHARDSON* AND *GRAY*

A. Limiting Bruton*:* Richardson v. Marsh

Richardson v. Marsh[132] gave the Court its chance to address the issue of whether prosecutors could comply with the dictates of *Bruton* by introducing a codefendant's confession in which all references to the defendant have been redacted. At issue in *Richardson* was the "contextual implication" or "evidentiary linkage" approach to applying *Bruton*.[133] The defendant, Clarissa Marsh, was one of three defendants charged with assault and

127. *See generally* James B. Haddad, *Post-*Bruton *Developments: A Reconsideration of the Confrontation Rationale, and a Proposal for a Due Process Evaluation of Limiting Instructions*, 18 AM. CRIM. L. REV. 1 (1980) (discussing courts' responses to *Bruton* and suggesting a due process approach to analyzing the admissibility of codefendant confessions).

128. *See* Ritter, *supra* note 45, at 872-76 (defining contextual implication analysis and discussing it by way of an illustrative hypothetical).

129. *See, e.g.*, English v. United States, 620 F.2d 150, 152 (7th Cir. 1980) (requiring an evaluation of the confession in the context of other evidence); Hodges v. Rose, 570 F.2d 643, 647 (6th Cir. 1978) (requiring that the evaluation of the inculpatory nature of a confession include other evidence); Serio v. United States, 401 F.2d 989, 989-90 (D.C. Cir. 1968) (interpreting *Bruton* as requiring contextual analysis).

130. *See, e.g.*, United States v. Satterfield, 743 F.2d 827, 849 (11th Cir. 1984) (holding that a statement violates *Bruton* only if it is inculpatory on its face); United States v. Wright, 742 F.2d 1215, 1223 (9th Cir. 1984) (rejecting contextual analysis); United States v. Belle, 593 F.2d 487, 495 (3d Cir. 1979) (rejecting contextual linkage analysis).

131. Ritter, *supra* note 45, at 874-75.

132. 481 U.S. 200 (1987).

133. *See id.* at 206.

murder.[134] Marsh and one other defendant, Benjamin Williams, were tried jointly in a Michigan state court.[135] At the trial, the prosecutor introduced into evidence a statement that Williams, who chose not to testify, had made to the police following his arrest.[136] The statement described a conversation that took place between Williams and a third defendant, Martin, in a car en route to the victims' residence.[137] During the conversation, Martin "said that he would have to kill the victims after the robbery."[138] Williams's confession, which "largely corroborated" the testimony of the victim as to the events that took place in the house,[139] was edited prior to its introduction into evidence such that "all reference to [Marsh]—indeed, ... all indication that *anyone* other than Martin and Williams participated in the crime," was omitted.[140] Upon the introduction of the confession, the judge warned the jury not to use the confession against Marsh.[141]

Marsh chose to testify in her defense and admitted that she was present both in the victims' house during the murders and in the car with Martin and Williams.[142] Marsh claimed that she did not know that the two men were armed and that, because she was in the back seat of the car, she did not hear the conversation that Williams detailed in his confession.[143]

During his closing statement, the prosecutor reminded the jury of the judge's instruction not to use the confession against Marsh,[144] but he also alerted the jury to the correlation between Marsh's

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134. *See id.* at 202.

135. The third defendant, Kareem Martin, was still a fugitive by the time the case came to trial. *See id.*

136. *See id.* at 203-04.

137. *See id.* at 204.

138. *Id.*

139. *See id.* at 203-04.

140. *Id.* For the full text of the redacted confession, see *id.* at 203 n.1.

141. *See id.* at 204.

142. *See id.* Marsh testified that she owed Martin money, and that she took him to the victims' residence, where she had previously been employed, in order to ask for a loan. Martin picked up Williams on the way to the house, during which time the conversation regarding the plan to rob and kill the inhabitants took place. Once inside the house, Martin pulled a gun, and he and Williams took the victims into the basement and shot them. *See id.* Despite the fact that she opened the door to allow Williams to enter the house, Marsh claimed that "she did not feel free to leave and was too scared to flee." *Id.*

143. *See id.*

144. *See id* at 205.

testimony, in which she said she had been in the car during the conversation between Martin and Williams but had heard nothing, and Williams's description of the conversation.[145] Before sending the jury to deliberate, the judge again warned the jury not to use Williams's confession against Marsh.[146] Marsh was convicted of felony murder and assault, and her conviction was upheld by the Michigan Court of Appeals.[147]

Marsh filed a habeas corpus petition in federal court, claiming that the introduction of Williams's confession at the trial violated her rights under the Sixth Amendment as defined in *Bruton*.[148] The Sixth Circuit overturned Marsh's conviction, holding that when applying *Bruton*, a court must "assess the confession's 'inculpatory value' by examining not only the face of the confession, but also all of the evidence introduced at trial."[149] As the Sixth Circuit pointed out, the only direct evidence of Marsh's intent to commit the robbery and murders was the link between her statements and the confession of Williams;[150] thus, the introduction of the confession was "powerfully incriminating to Marsh with respect to the critical element of intent."[151] The Sixth Circuit held that, given "[t]he paucity of other evidence of intent and the prosecution's use of the Williams confession against Marsh,"[152] there was a "substantial risk that the jury would consider Williams' statement in their deliberations regarding Marsh's guilt."[153] The Sixth Circuit found the violation of *Bruton* to be reversible error and remanded the case for reconsideration of the habeas petition.[154]

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145. *See id.* The prosecutor, after reminding the jury that Marsh had testified she was in the back seat of the car, said: "Why did she say she couldn't hear any conversation? She said, 'I know they were having conversation but I couldn't hear it because of the radio.' Because if she admits that she heard the conversation and she admits to the plan, she's guilty of at least armed robbery." *Id.* at 205 n.2.

146. *See id.* at 205.

147. *See id.*

148. *See id.*

149. *Id.* at 205-06 (citing Marsh v. Richardson, 781 F.2d 1201, 1212 (6th Cir. 1986)).

150. *See Marsh*, 781 F.2d at 1212.

151. *Id.* at 1213.

152. *Id.*

153. *Id.*

154. *See id.* at 1214. The Sixth Circuit was especially concerned by the prosecutor's actions during the trial: "Especially pertinent in this case is ... that the prosecution in closing argument pointed out the impermissible linkage to the jury ...." *Id.* at 1212.

The case reached the Supreme Court, where Justice Scalia, writing for the six-Justice majority, characterized the *Bruton* holding as a "narrow exception" to the general principle that juries can follow instructions to use evidence only for a limited purpose and not for any other purpose.[155] The majority interpreted the *Bruton* holding to apply only in cases where the confession of a nontestifying codefendant "facially incriminates" another defendant.[156] The Court limited *Bruton* in this way because it viewed facially-incriminating confessions as posing unique problems that contextually implicating confessions do not.[157] The Court distinguished the facts of *Richardson*, noting that Williams's confession was redacted in such a way that it was only incriminating "when linked with evidence introduced later at trial."[158] According to the Court, where a confession is not incriminating on its face, as in *Richardson*, "the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place."[159] The majority found this presumption that juries follow the instructions given to them to be a "pragmatic [rule] ... rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process."[160]

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155. *See* Richardson v. Marsh, 481 U.S. 200, 206-07 (1987). The Court noted that there are numerous circumstances in which a jury is instructed to ignore evidence. Some of these circumstances include the use of an illegally obtained confession as impeachment evidence only and the use of evidence of prior criminal convictions only for the purposes of sentencing enhancement. *See id.* In such circumstances, according to the Court, the presumption that jurors will follow instructions to use this evidence only for a limited purpose will be sufficient. *See id.* The Court thus held that the *Bruton* rationale—that juries cannot follow limiting instructions when a codefendant's confession is "facially incriminating"—applied only in limited circumstances, and the Court refused to extend it beyond those cases where it "validly applies." *See id.* at 211.

156. *See id.* at 208.

157. *See id.* ("Specific testimony that 'the defendant helped me commit the crime' is more vivid than inferential incrimination, and hence more difficult to thrust out of mind."). On the other hand, when a confession does not name or facially incriminate a defendant, a limiting instruction is adequate to protect the defendant's rights. *See id.* at 211.

158. *Id.* at 208.

159. *Id.* The majority chastised the dissent for focusing on whether the confession itself was incriminating, as, according to the majority, the issue was not "whether the confession incriminated [Marsh], but ... whether the trial court could properly assume the jury did not use it against her." *Id.* at 208 n.3.

160. *Id.* at 211.

The concern with practicality also figured into the Court's rejecting of contextual implication analysis: Besides being an improper extension of *Bruton*, contextual implication analysis would also be difficult to apply, in the Court's view. According to the majority, it would be nearly impossible to predict whether a confession would be admissible at trial under the contextual implication standard regardless of whether the confession was redacted.[161] The Court likewise questioned the logic and potential consequences of forcing the judge to assess the confession's admissibility at the end of the government's case,[162] and it rejected pretrial assessment as a potential solution to these difficulties.[163]

The Court, echoing the dissent in *Bruton*, also stressed the benefits and efficiency of holding joint trials and rejected the notion that severance was an acceptable solution.[164] The Court explained that joint trials accounted for "almost one-third of federal criminal trials in the [previous] five years,"[165] and that confessions in multi-defendant trials, such as those involving large-scale drug conspiracies, were "commonplace."[166] As the Court suggested:

> It would impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and

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161. *See id.* at 209 ("If extended to confessions incriminating by connection, not only is that [redaction] not possible, but it is not even possible to predict the admissibility of a confession in advance of trial.").

162. *See id.* ("The 'contextual implication' doctrine ... would presumably require the trial judge to assess at the end of each trial whether, in light of all of the evidence, a nontestifying codefendant's confession has been so 'powerfully incriminating' that a new, separate trial is required for the defendant. This obviously lends itself to manipulation by the defense – and even without manipulation will result in numerous mistrials and appeals.").

163. *See id.* ("[I]t would be time consuming and obviously far from foolproof' to hold "a pretrial hearing at which prosecution and defense would reveal the evidence they plan to introduce, enabling the court to assess compliance with *Bruton ex ante* rather than *ex post*.").

164. *See id.* ("[Assuring compliance with *Bruton* by trying the defendants separately] is not as facile or as just a remedy as might seem.").

165. *Id.*

166. *Id.* As the Court explained, "indeed the probability of confession increases with the number of participants, since each has reduced assurance that he will be protected by his own silence." *Id.* at 209-10.

> randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand.[167]

The Court also stressed the concern that holding separate trials whenever there is a confession that incriminates more than just the confessor would result in inconsistent verdicts.[168] The Court likewise rejected the alternative to severance: simply omitting the confession altogether. The Court found the cost to prosecutors of forgoing the use of confessions to be too high.[169]

Justice Stevens wrote a lengthy dissenting opinion, in which he was joined by Justices Brennan and Marshall. In his dissent, Justice Stevens criticized the Court's distinction between facially incriminating confessions and those that implicate a codefendant only in light of other evidence, suggesting that the application of this distinction would lead to absurd results.[170] As Justice Stevens wrote, "[t]he difference between the facts of *Bruton* and the facts of this case does not eliminate their common, substantial, and constitutionally unacceptable risk that the jury, when resolving a critical issue against [Marsh], may have relied on impermissible evidence."[171] Justice Stevens advocated extending the "powerfully incriminating" rule explicated in *Bruton* to situations in which a confession, when read in light of the other evidence, leads the jury "down 'the path of inference'" as to the involvement of a nonconfessing codefendant.[172] Under this standard, according to Justice Stevens, the decision to admit Williams's redacted confession was error. As the dissent pointed out, without linking the

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167. *Id.* at 210.

168. *See id.*

169. *See id.* ("That price also is too high, since confessions 'are more than merely "desirable"; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.'" (quoting Moran v. Burbine, 475 U.S. 412, 426 (1986))).

170. Justice Stevens noted that in some circumstances it might be the case that an indirect reference, one which only becomes inculpatory as other evidence is introduced, might be *more* damaging than a direct reference to the codefendant in a confession. Requiring the exclusion of only the latter confession, as the majority's holding would do, was an "illogical result [that] demeans the values protected by the Confrontation Clause." *Id.* at 212 (Stevens, J., dissenting).

171. *Id.* at 216-17.

172. *Id.* at 213. Justice Stevens pointed out the majority's "tacit" recognition that the jury would sometimes be led to speculate, which he contended was a violation of the Confrontation Clause no different than that in *Bruton*. *See id.* at 213-14.

victim's testimony to the confession, there was little to no evidence to demonstrate that Marsh either had the intent to rob and kill the victims or knew the others involved had such an intent.[173] For this reason, the dissent found it too difficult to believe that the jury ignored this inferential connection in deciding Marsh's guilt merely because the judge had instructed it to do so.[174]

The dissenters also disagreed with the majority's contention that extending the *Bruton* rule to cases like *Richardson* would create too heavy a burden on prosecutors, noting that "[o]n the scales of justice, ... considerations of fairness normally outweigh administrative concerns."[175] The dissenters also questioned the data presented by the majority, noting that although one-third of all federal prosecutions in the preceding five years had been joint trials, there was no indication in the statistics as to how many times a confession was offered.[176] The dissent likewise questioned the majority's concerns about the repetition of evidence and the burden on witnesses of testifying multiple times, noting that such "speculation also floats unattached to any anchor of reality."[177] According to the dissenters, it would be possible for judges in situations like that in *Richardson* to simply postpone the admission of the confession until the close of the prosecution's case, at which time it would be possible to determine whether the admission of the confession would be consistent with *Bruton*.[178]

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173. *See id.* at 214-16 (discussing the evidence that concerns Marsh's intent and what she may have heard). According to the dissent, "[i]t is unrealistic to believe that the jury would assume that respondent did not accompany the two men in the car but had just magically appeared at the front door of the apartment at the same time that Martin did." *Id.* at 216 n.3.

174. *Id.* at 214.

175. *Id.* at 217.

176. See *id.* at 218-19 for a discussion of the statistics employed by the majority and why they are misleading.

177. *Id.* at 219 n.7.

178. *See id.* at 220. The dissenters rejected the majority's concerns that such a procedure would allow defense attorneys to manipulate its evidence to make it appear that the confession is "powerfully incriminating," noting that a strategy designed to "enhance the prejudicial impact of a codefendant's confession" is extremely risky. *See id.* The dissent also took a rhetorical swipe at the majority based on its belief that trial judges would not be capable of managing the attorneys to prevent such problems and manipulation. According to the dissent, trial judges are often more than competent in managing trials and supervising attorneys "in order to avoid the problems that seem insurmountable to appellate judges who are sometimes distracted by illogical distinctions and irrelevant statistics." *Id.*

B. The Difficulties of Applying Richardson

Much like *Bruton*, *Richardson*'s failure to fully address the issues related to the admissibility of confessions led to confusion among the lower courts. In deciding *Richardson*, the Court expressly declined to answer the question of whether any form of redaction short of completely eliminating any mention of the codefendant would be permissible under the *Bruton* rule. In a footnote to its opinion, the Court specifically stated that "[w]e express no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or a neutral pronoun."[179] Given the Court's failure to decide what methods of redaction were permissible, some federal and state courts elected to permit the use of symbols[180] or pronouns[181] as substitutes for the names of codefendants.[182] Other courts rejected anything short of complete redaction.[183] In determining whether the various redaction methods comported with *Bruton*'s "powerfully incriminating" standard, appellate courts were divided between two modes of analysis: the "degree of inference test"[184] and the "invitation to speculate test."[185]

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179. *Id. at* 211 n.5 (majority opinion).

180. *See, e.g.*, Robinson v. Rose, 823 F.2d 553, 1987 WL 38091 at *3 (6th Cir. 1987) (unpublished table decision) (permitting the use of the word "blank" as a method of redaction); Commonwealth v. Lee, 662 A.2d 645, 651-52 (Pa. 1995) (permitting the use of "X" in place of codefendant's name).

181. *See, e.g.*, United States v. Williams, 936 F.2d 698, 700 (2d Cir. 1991) ("another guy"); United States v. Vogt, 910 F.2d 1184, 1192 (4th Cir. 1990) ("client"); United States v. Garcia, 836 F.2d 385, 389-90 (8th Cir. 1987) ("someone").

182. Professor Ritter contends that the acceptance of such methods was founded on an inappropriate reading of the decision in *Richardson*. *See* Ritter, *supra* note 45, at 887 (describing the "inappropriate broadening of *Richardson*"). Professor Ritter's article, which was published shortly before *Gray* was decided, provides an in-depth analysis of the state of *Bruton* immediately before *Gray*.

183. *See, e.g.*, State v. Littlejohn, 459 S.E.2d 629, 632 (N.C. 1995) ("[B]efore a confession of a nontestifying defendant is admitted into evidence, all portions of the confession which implicate a codefendant must be deleted.").

184. *See* Ritter, *supra* note 45, at 899 (defining the "degree of inference test": "[W]hen a co-defendant's confession is redacted by substituting a pronoun or symbol for a jointly tried defendant's name, a reviewing court must evaluate the likelihood that the disguised reference will be unmasked by the jury").

185. *See id.* at 899-900 (explaining that under the "invitation to speculate test," confessions are prohibited "when the form of the redaction invites the jury to speculate about the identity of anonymously mentioned accomplices ... [and that] [t]ypically, an 'invitation to speculate' exists when the jury's attention is called to the fact that names, known to the

In light of the competing views and the confusion among the lower courts, the Court was once again required to reevaluate the *Bruton* line of cases.

C. Answering the Unanswered Questions: Gray v. Maryland

Gray v. Maryland[186] presented the Court with the opportunity to determine the scope of the *Richardson* ruling and to answer the question it had specifically left open in *Richardson*: whether symbol or neutral pronoun redaction was an acceptable method of compliance with the *Bruton-Richardson* line of cases.[187] In *Gray*, three men—Gray, Bell, and Vanlandingham—were charged with beating Stacey Williams to death.[188] Gray and Bell were tried jointly, and at the trial, the prosecutor attempted to introduce Bell's confession into evidence against him.[189] The judge permitted the admission of the confession, but ordered that it be redacted.[190] When the confession was read into evidence, the detective who read it in court substituted the words "deleted" or "deletion" for the names of Gray and Vanlandingham.[191] When the written form of the confession was introduced, the names of Gray and Vanlandingham had been replaced with blank spaces separated by commas.[192] Bell did not testify. In addition to the confession, the prosecutor also introduced witnesses who identified the three men as participants in the

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prosecution, have been deleted" (footnote omitted)).

186. 523 U.S. 185 (1998).

187. *See supra* note 179 and accompanying text.

188. *See Gray*, 523 U.S. at 188.

189. Vanlandingham died before the grand jury was able to indict him. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 189. Thus, a portion of the written confession, which was printed in an appendix to the majority opinion, read as follows:

(Q) Who was in the group that beat Stacey
(A) Me, , and a few other guys
(Q) Do you have the other guys names
(A) , and me, I don't remember who was out there
...
(Q) Do you have a black jacket with Park Heights written on the back
(A) Yeh
(Q) Who else has these jacket [sic].
(A) ,

Id. at 199.

beating,[193] as well as the testimony of the police detective, who testified that once Bell had confessed, he was able to arrest Gray.[194] Before giving the case to the jury, the judge issued a limiting instruction warning the jury that Bell's confession was to be considered evidence only with regard to him and not with regard to Gray.[195] Both Gray and Bell were convicted. Gray's conviction was upheld by the highest court in Maryland,[196] and Gray appealed to the United States Supreme Court.

Justice Breyer announced the Court's decision on behalf of the other four justices in the majority. The Court vacated Gray's conviction, holding that the introduction of the confession violated Gray's rights under the Confrontation Clause as defined in *Bruton*.[197] According to the Court, the confession in *Gray*, despite its redaction, was no different in its incriminating nature than that in *Bruton*.[198] As the Court explained, blank spaces, symbols, or substituted words like "deleted" were not sufficient to prevent the jurors from linking the obvious omissions in the statement to the other defendant in the trial.[199] According to the Court, an obvious deletion would "call the jurors' attention specially to the removed name,"[200] and all a juror would have to do is look to the defense table to identify whose name had been redacted.[201] As Justice Breyer pointed out, an obvious redaction would "encourag[e] the

193. *See id.* at 189.

194. *See id.* at 188-89 ("Immediately after the police detective read the redacted confession to the jury, the prosecutor asked, 'after he gave you that information, you subsequently were able to arrest Mr. Kevin Gray; is that correct?' The officer responded, 'That's correct.'").

195. *See id.* at 189.

196. *See* State v. Gray, 687 A.2d 660, 669 (Md. 1997). The intermediate court in Maryland had initially vacated Gray's conviction, holding that the introduction of the confession violated *Bruton*. *See* Gray v. State, 667 A.2d 983, 992 (Md. Ct. Spec. App. 1995).

197. *See Gray*, 523 U.S. at 197.

198. As the majority explained, obvious redactions are just as "directly accusatory" as the unredacted statements in *Bruton*. *See id.* at 194. As such, the confession "closely resemble[d] *Bruton*'s unredacted statements." *Id.* at 192.

199. *See id.* at 192-93.

200. *Id.* at 193.

201. *See id.* Justice Breyer also explained that such a redaction might hurt the prosecutor's argument for the reliability of the confession, as "[a] more sophisticated juror, wondering if the blank space refers to someone else, might also wonder how, if it did, the prosecutor could argue the confession is reliable, for the prosecutor, after all, has been arguing that Jones, not someone else, helped Smith commit the crime." *Id.*

jury to speculate about the reference,"[202] which in turn might "overemphasize the importance of the confession's accusation—once the jurors work out the reference."[203] It was because of the danger of speculation that the Court found the confession in *Gray*, as well as the entire practice of symbol redaction, to be prohibited under *Bruton*.[204]

The Court, in finding symbol redaction insufficient to protect the rights of a defendant, distinguished the confession in *Gray* from that in *Richardson*: Bell's confession, despite the redactions, still referred to the existence of Gray,[205] whereas the confession in *Richardson* had been purged of all indicia of the existence of any other person. The Court concluded that *Richardson* did not place all inferentially incriminating statements outside the scope of *Bruton*'s protections.[206] Rather, "the *kind* of, not the simple *fact* of, inference" was what mattered.[207] In *Richardson*, the confession made only indirect references to the codefendant and became incriminating only when linked to other evidence at trial, while in *Gray* the confession was redacted in such a way as to "obviously refer directly

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202. *Id.* This concern about speculation was consistent with the test for implication that had been termed the "invitation to speculate test." *See* Ritter, *supra* note 45, at 908 ("The 'invitation to speculate' test calls for an assessment of whether the method of redaction is likely to convey to the jury that the names of known accomplices have been intentionally covered up.").

203. *Gray*, 523 U.S. at 193. Judge Hand expressed a similar concern about the danger of obvious deletions overemphasizing the connection between the missing name and the other defendant in his opinion in *Delli Paoli*: "[T]here could not have been the slightest doubt as to whose names had been blacked out; and, even if there had been, the blacking out itself would have not only laid the doubt, but underscored the answer." United States v. Delli Paoli, 229 F.2d 319, 321 (2d Cir. 1956).

204. *See Gray*, 523 U.S. at 195. As the Court explained, "we believe that, considered as a class, redactions that replace a proper name with an obvious blank, the word 'delete,' a symbol, or similarly notify the jury that a name has been deleted are similar enough to *Bruton*'s unredacted confessions as to warrant the same legal results." *Id.* The Court found the admission of Bell's confession to be a particularly egregious error owing to the fact that the prosecutor's question following the reading of the confession "eliminated all doubt" as to the identity of the name that had been removed. *See id.* at 194.

205. *See id.* at 192.

206. *See id.* at 195-96. Indeed, the Court found that such a broad reading of *Richardson* would be inconsistent with its precedent, which assumed that *Bruton* prohibited the introduction of confessions that used truncated first names, nicknames, or physical descriptions in place of names despite the fact that *some* inference was needed to connect these substitutions with the defendant. *See id.* (citing Harrington v. California, 395 U.S. 250, 253 (1969)).

207. *Id.* at 196.

to someone, often obviously the defendant, and ... involve[d] inferences that a jury ordinarily could make immediately."[208] Although the indirect inference in *Richardson* did not implicate *Bruton*'s Sixth Amendment protections, the direct inference in *Gray* did.[209] The Court suggested that more could have been done to protect Gray, such as removing all references to the codefendants, as had been done in *Richardson*.[210] But more was not done, and because it was likely that the jury ignored its limiting instruction and connected the blank spaces to Gray, the confession had been impermissibly admitted, according to the Court, in light of *Bruton*.[211]

Justice Scalia wrote a dissenting opinion in which he echoed his opinion in *Richardson* that *Bruton* was a "narrow exception" to the general proposition that juries will heed limiting instructions.[212] Justice Scalia questioned how the Court could accept that *Richardson* permitted confessions that were only inferentially incriminating and still prohibit the confession in *Gray*, which the Court admitted required inference to connect the defendant to the confession.[213] Reiterating his opinion in *Richardson*, Justice Scalia suggested that a confession is "facially incriminating" only when it incriminates a defendant "independent of other evidence introduced at trial."[214] As long as the confession did not specifically mention Gray, Justice Scalia contended, it could not be deemed "facially incriminating"; mere speculation as to the identity of "deleted" was not sufficient to prohibit the use of the confession.[215] The dissent rejected the majority's reliance on the "invitation to speculate"

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208. *Id.*

209. The Court suggested that the confession in *Gray* was "'*facially* incriminat[ing],'" the type of statement prohibited even by *Richardson*, because the blank was "prominent on [the confession's] face." *Id.* (quoting Richardson v. Marsh, 481 U.S. 200, 209 (1987)).

210. *See id.* at 196-97. The Court also suggested that the testifying witness could have said "Me and *a few other guys*" instead of "Me, deleted, deleted, and a few other guys." *Id.* at 196 (emphasis added). Disagreement over how to interpret this language has engendered a debate over whether redaction by neutral pronouns or phrases would comport with *Bruton*. *See infra* Part IV.B.

211. *See id.* at 190, 197.

212. *Id.* at 200-01 (Scalia, J., dissenting).

213. *See id.* at 200.

214. *Id.* at 201.

215. *Id.* at 201-02. The dissenters specifically rejected the majority's comparison of the use of the word "deleted" to the use of physical descriptions or nicknames. *See id.*

standard and suggested that the important inquiry was whether the incrimination was "powerful," not whether it caused the jury to speculate or whether it incriminated Gray.[216]

Justice Scalia also criticized the practical difficulties presented by the majority's suggestion that only total redaction would be acceptable.[217] In some cases, according to the dissent, total redaction will not be possible, as it would yield results that were "nonsensical"[218] or inconsistent with what was actually said in the confession.[219] Such a result is especially likely in conspiracy cases, where it is necessary to connect the confessing defendant to others.[220] According to the dissenters, redaction with notations where omissions had been made was a better alternative than the majority's "total redaction" standard: "The risk to the integrity of our system (not to mention the increase in its complexity) posed by the approval of such freelance editing seems to me infinitely greater than the risk posed by the entirely honest reproduction that the Court disapproves."[221]

D. Reaction to Gray

The Court's decision in *Gray*, while clearing up much of the uncertainty about the application of the *Bruton-Richardson* line of cases, was both criticized by scholars who thought the ruling either went too far in protecting the efficiency of the courts or did not go far enough to protect the rights of defendants in joint trials, and extolled by those who thought it achieved an adequate balance

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216. *See id.* at 202. The dissenters also suggested that the statement might not be as incriminating as the majority suggested, as "there were two names deleted, five or more participants in the crime, and only one other defendant on trial." *Id.*

217. *See id.* at 203.

218. *Id.*

219. *See id.* ("Introducing the statement with full disclosure of deletions is one thing; introducing as the complete statement what was in fact only a part is something else.").

220. According to Justice Scalia:

> If the question was "Who agreed to beat Stacey?", and the answer was "Me and Kevin," we might redact the answer to "Me and [deleted]," or perhaps to "Me and somebody else," but surely not to just "Me"—for that would no longer be a confession to the conspiracy charge, but rather the foundation for an insanity defense.

Id.

221. *Id.* at 203-04.

between the two. One commentator referred to the decision as a "partial victory for criminal defendants" and "a lucky card for prosecutors."[222] Another suggested that although the Court's failure to reject the "facially incriminating" rule set forth in *Richardson* ultimately put the policy interests in efficiency ahead of the rights of the accused, *Gray* was still more protective of defendants' rights than *Richardson*.[223] Yet another commentator predicted difficulties in applying the standard set forth in *Gray*, given the Court's failure to define which kinds of inferences are permissible.[224] Those who lauded the decision were pleased with the balance the Court achieved between protecting defendants' rights and preserving the efficiency of the courts.[225]

IV. WHAT TO DO WITH "THE GUY": NEUTRAL PRONOUN REDACTION AND THE *BRUTON* PROBLEM AFTER *GRAY*

A. The Problem of Neutral Pronoun Redaction: A Hypothetical

Following the *Gray* ruling, courts began using neutral pronoun redaction as a way to constitutionally utilize codefendant confes-

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222. *See* Jennifer S. Lue, Note, Gray v. Maryland: *The Revival of Confrontation or the Maintenance of Judicial Efficiency?*, 34 WAKE FOREST L. REV. 1205, 1224-25 (1999) (criticizing the Court for misapplying the "powerfully incriminating" standard and suggesting a "compelling inference" standard).

223. *See* Richard F. Dzubin, Casenote, *The Extension of the* Bruton *Rule at the Expense of Judicial Efficiency in* Gray v. Maryland, 33 U. RICH. L. REV. 227, 256 (1999). The author expressed concern that some confessions, although not incriminating on their face, might still incriminate the defendant in light of other evidence; such confessions would be admissible even under the reinterpreted version of the *Bruton* rule. *See id.* Despite these concerns, however, the author believes that the *Gray* decision will ultimately require more severed trials and better redaction, thus offering more protection to the rights of defendants than was recognized under *Richardson*. *See id.*

224. *See* Benjamin E. Rosenberg, *The Future of Codefendant Confessions*, 30 SETON HALL L. REV. 516, 549-50 (2000) (suggesting that although *Gray* did not go far enough in setting forth a clear rule, it did suggest that the Court might be considering a new approach to its Confrontation Clause jurisprudence).

225. *See, e.g.*, Gabrielle Benadi, *Supreme Court Review: All Aboard the* Bruton *Line*, 89 J. CRIM. L. & CRIMINOLOGY 837, 864-65 (1999) (commending the Court on setting an easy-to-apply bright-line rule which had "many advantages and virtually no apparent disadvantages" and which moderated between the desire to preserve joint trials and the need to protect defendants' rights).

sions.[226] This method of redaction is best illustrated through a hypothetical situation. Bob, Jane, John, and Mary are four accomplices in a bank robbery. All four are arrested and charged with the robbery. After arrest, Bob gives a statement to the police; assume that his statement is voluntarily given and that the police acted in compliance with the procedures defined by *Miranda*. In his statement, Bob states the following: "We all had guns and ski masks. Jane waited in the car while John, Mary, and I went into the bank. John took care of the cameras while Mary and I took the money from the safe and put it in a bag." At the joint trial of the four defendants, evidence is introduced that a witness saw Jane in the car and that John's fingerprints were on the video cameras in the bank. Bob refuses to testify, but both Jane and John testify that they were out to dinner together rather than at the scene of the crime. Mary does not testify.

Given the holding in *Bruton*, the introduction of Bob's confession as is would not be permissible, as it was given by a nontestifying codefendant and names other defendants explicitly. Likewise, if the statement were redacted to read "[deleted] waited in the car while X, , and I went into the bank," the confession would be inadmissible in light of *Gray*. If the same statement were redacted to read simply "I went into the bank," it would not be facially incriminating, and, like the confession in *Richardson*, would be admissible as long as it were accompanied by a limiting instruction. Much of the confession's meaning would be lost as a result of the redaction, however, a result that Justice Scalia might criticize as "nonsensical."[227]

The same statement redacted using neutral pronouns would read: "We all had guns and ski masks. Someone waited in the car while the others and I went into the bank. Somebody took care of the cameras while another person and I took the money from the safe and put it in a bag." All references to the other defendants have been replaced. Whether this type of redaction comports with the *Bruton-Richardson-Gray* line of cases is unclear given the Court's jurisprudence.

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226. This redaction method, though discussed in *Gray*, was not specifically prohibited by the Court. *See supra* note 210 and accompanying text.

227. *See supra* notes 217-21 and accompanying text.

B. Neutral Pronoun Redaction and the Inconsistent Application of Bruton

The neutral pronoun question arose because of the limited nature of the Court's decision in *Gray*. Although the Court specifically held that symbol redaction was per se unconstitutional, it did not address the issue of neutral pronoun redaction.[228] A brief passage in the *Gray* opinion, however, has been offered by those who claim the Court intended to permit neutral pronoun redaction. In *Gray*, the Court suggested that the testifying witness could have said, "Me and *a few other guys*" instead of "Me, deleted, deleted, and a few other guys."[229] Though this language was intended to demonstrate the feasibility of redacting *all* references to the other defendants, it has been interpreted—or rather misinterpreted—to mean that the Court substituted "a few other guys" for the names. This has engendered a debate over whether redaction by neutral pronouns or phrases would comport with *Bruton*.[230]

The lack of clarity as to what the Court meant by this passage resulted in a split in appellate and state courts over whether the use of neutral pronouns is acceptable. Some circuits have permitted the practice of neutral pronoun redaction. The Eighth Circuit, for example, permitted the use of "another individual" in the place of a codefendant's name despite the fact that the confession became incriminating in light of other evidence introduced at the trial.[231] Similarly, the Tenth Circuit found that a confession in which the

228. Jennifer Lue contends that the Court answered the neutral pronoun question in *Gray* and created a per se rule of exclusion. *See* Lue, *supra* note 222, at 1224. There is nothing in the opinion that explicitly supports this contention.

229. *See* Gray v. Maryland, 523 U.S. 185, 196 (1998) (emphasis added).

230. The dissent tacitly sanctioned such redaction, noting that replacing "'Me and Kevin'" with "'Me and somebody else'" might be sufficient to protect the defendant's rights. *See id.* at 203 (Scalia, J., dissenting).

231. *See* United States v. Logan, 210 F.3d 820, 823 (8th Cir. 2000) (holding the statement was not "powerfully incriminating" because "there was no indication whatever that there had been a redaction: Mr. Roan's statement was an oral one, and the detective simply testified that Mr. Roan said that 'another individual' had been in on the planning and commission of the offense"); *see also* United States v. Coleman, 349 F.3d 1077, 1085-86 (8th Cir. 2003) (permitting substitution of "someone" for defendant's name in codefendant's confession if accompanied by a jury instruction); United States v. Edwards, 159 F.3d 1117, 1125-26 (8th Cir. 1998) (holding that use of "we" and "they" to replace a confessing defendant's inculpatory references to her codefendants, accompanied by a limiting instruction, was consistent with the holding in *Gray*).

codefendant's nickname had been replaced with the phrase "another person" did not violate *Bruton* and *Gray*.[232] The Fourth Circuit has also approved the use of neutral pronouns or phrases, having found the use of the term "associates" as a substitute for a codefendant's name to be permissible.[233] The Ninth Circuit sanctioned the use of neutral pronouns, holding that the use of "we," "our," and "they" did not violate the defendants' rights under the Confrontation Clause.[234] Other redactions that have been approved in lower courts include the use of the phrases "another person"[235] and "more than one."[236] Some state courts, such as those in Pennsylvania, have also approved the use of neutral pronoun redaction and permitted the substitution of phrases like "the other guy" for the names of codefendants.[237]

Other courts have read *Gray* to establish a much more stringent standard: only fully redacted confessions are permissible.[238] These courts have rejected neutral pronoun redaction. The Seventh Circuit, for example, concluded that introducing a codefendant's confession with the word "another" in place of the defendant's name

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232. *See* United States v. Verduzco-Martinez, 186 F.3d 1208, 1213-14 (10th Cir. 1999) (holding that the redaction of the defendant's nickname and replacing it with a neutral pronoun phrase comports with *Bruton* and *Gray*, as the identity of the codefendant was not obvious from the confession itself). According to the circuit court:

> [W]here a defendant's name is replaced with a neutral pronoun or phrase there is no *Bruton* violation, providing that the incrimination of the defendant is only by reference to evidence other than the redacted statement and a limiting instruction is given to the jury. Where, however, it is obvious from consideration of the confession as a whole that the redacted term was a reference to the defendant, then admission of the confession violates *Bruton*, regardless of whether the redaction was accomplished by use of a neutral pronoun or otherwise.

Id. at 1214.

233. *See* United States v. Smith, 172 F.3d 865, at *7 (4th Cir. 1999) (unpublished table decision).

234. *See* United States v. Berrara-Medina, 139 F.App'x 786, 794-96 (9th Cir. 2005) (unpublished opinion) (holding that use of neutral pronouns did not obviously implicate the defendants and that confession was admissible despite other testimony that might have linked defendants to the confession).

235. *See* United States v. Akinoye, 174 F.3d 451, 456-57 (4th Cir. 1999).

236. *See* United States v. Barroso, 108 F. Supp. 2d 338, 346 (S.D.N.Y. 2000).

237. *See* Commonwealth v. Whitaker, 878 A.2d 914, 920 (Pa. Super. Ct. 2005).

238. *See, e.g.*, Richardson, *supra* note 126, at 858 ("*Richardson* was the only Supreme Court case that has approved of a specific form of redaction: redaction that omits all reference to the defendant's existence.").

was impermissible under *Gray*.[239] Similarly, the Fifth Circuit found that redaction substituting the word "someone" violated the defendant's rights under the Sixth Amendment.[240] The Third Circuit[241] and Sixth Circuit[242] have also rejected neutral pronoun redaction. Some state courts have adopted this per se rejection of neutral pronouns as well. Georgia, for example, has refused to permit confessions that use "someone" and "anybody" in place of a defendant's name.[243]

C. The Case for Neutral Pronoun Redaction

1. Neutral Pronouns Are Different, and Should Be Treated as Such

Some scholars have suggested that the solution to the neutral pronoun question is to prohibit the use of neutral pronoun redaction entirely.[244] The arguments in support of this position are based in part on the similarity between the type of redaction prohibited in *Gray* and the use of neutral pronouns.[245] Neutral pronouns such as "someone" and "the others," however, are different from symbols and blank spaces in constitutionally significant ways, as they

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239. *See* United States v. Eskeridge, 164 F.3d 1042, 1044 (7th Cir. 1998) (finding that use of "another" in redacted confession violated *Bruton* in light of *Gray*, but that the admission of the redacted confession was harmless error in light of the other evidence in the case).

240. *See* United States v. Vejar-Urias, 165 F.3d 337, 340 (5th Cir. 1999) (holding that use of "someone" in redaction violated defendant's rights because it divulged her identity even "without reference to other evidence" and because no limiting instruction was given to the jury).

241. *See* United States v. Richards, 241 F.3d 335, 341 (3d Cir. 2001) (finding violation of the Confrontation Clause when the confession was redacted to replace codefendants' names with "friend" and "inside man," as the references obviously referred to the codefendants).

242. *See* Stanford v. Parker, 266 F.3d 442, 457 (6th Cir. 2001) (holding that use of "other person" in redacted confession did not prevent the jury from inferring that the confession referred to the defendant).

243. *See* Davis v. State, 528 S.E.2d 800, 805-06 (Ga. 2000); *see also* Richardson, *supra* note 126, at 862 (noting that North Carolina and Georgia have adopted the approach that only confessions in which "all references to codefendants' existence are omitted" are admissible under *Bruton*).

244. *See, e.g.*, Richardson, *supra* note 126, at 866; Ritter, *supra* note 45, at 915 ("A per se rule prohibiting neutral pronoun ... redactions is necessary to protect adequately the confrontation rights of the implicated defendant.").

245. *See* Richardson, *supra* note 126, at 859 (noting the similarities between the redaction in *Gray* and neutral pronoun redaction).

neither are directly accusatory nor compel speculation.[246] The Court's concern in *Gray* was that redaction using the word "deleted" or the blank space *directly* implicated a codefendant and alerted the jury to the omission of a name such that it would undoubtedly speculate as to the identity of "deleted."[247] The Court refused to allow symbol redaction because obvious redactions are just as "directly accusatory" as the unredacted statements in *Bruton*.[248]

Neutral pronoun redaction does not present the same problems as symbol redaction.[249] In the hypothetical discussed earlier, the phrase "Someone waited in the car while the others and I went into the bank," though clearly suggesting the involvement of others in the crime, is not an obvious redaction and does not *compel* the inference that "someone" was Jane or that "the others" were John and Mary.[250] These phrases may only become incriminating when viewed in light of other evidence; the witness's statement that he saw Jane in the car, for example, is the only factor that reveals "someone" to be Jane. Such incrimination only through contextual linkage, however, does not violate defendants' rights, according to the Court in *Richardson*; confessions are incriminating only if the statement itself "powerfully incriminates" the other defendant. Neutral pronouns do not "obviously refer directly to someone, often obviously the defendant,"[251] in the way that an obvious deletion marked by a blank space does. The Court's distinction between obvious deletions and those, like neutral pronouns, that do not obviously incriminate another person, is, therefore, one of constitu-

246. *See* Ritter, *supra* note 45, at 894 ("The presence of a blank or 'X' becomes a red flag inviting the jury to play detective and attempt to figure out or speculate concerning the identity of the mystery accomplice.").

247. Gray v. Maryland, 523 U.S. 185, 193 (1998) (holding that an obvious deletion would "call the jurors' attention specially to the removed name").

248. *See id.* at 194.

249. *See* Ritter, *supra* note 45, at 893-94 ("[B]lanks or 'X' say to the jury that a name once contained in the confession has been removed and is being kept secret from them. The use of words like 'another' or 'someone' leaves open the possibility that the unidentified accomplice was never actually named by the co-defendant.").

250. This form of redaction does not "notify the jury that a name has been deleted" in the same way that using a symbol or a blank space would. *See Gray*, 523 U.S. at 195. It is much less obvious that such a statement has been altered because it is much more likely that a defendant would say "me and the other guy did it" than it is that he would say to the arresting officer that "me and X did it."

251. *Id.* at 196.

tional significance. Because neutral pronouns do not compel the inference that a nonconfessing codefendant is the person to whom "the other person" or "someone" refers, their use ought not be restricted by the Court's pronouncement concerning symbol redaction in *Gray*.

Those who find the use of neutral pronoun redaction unconstitutional advocate either severing the trials, not using the confession, or completely redacting the confession—as in *Richardson*—as a way to avoid conflict.[252] These suggestions ignore the burden this "sever or never" rule would place on prosecutors and judicial resources, as well as the difficulties of full redaction.

The "sever" approach is not an adequate solution because joint trials are efficient[253] and can be necessary in certain circumstances. Joint trials obviate the need to have witnesses come to testify multiple times, which in some cases, as with extremely traumatic experiences or where the witness is a child, can be an unnecessarily difficult task.[254] There is also the possibility that having separate trials could result in different verdicts for defendants charged with

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252. Some courts and scholars have also advocated using separate juries in *Bruton* situations: one for the confessing defendant, which would hear his confession separately; and another for the balance of the trial. According to Professor Mueller, "when the confession of one defendant is offered, the jury for another is out of the room." Mueller, *supra* note 10, at 957. The separate jury option has drawbacks that make it an unappealing alternative, however:

> This approach [of using multiple juries] sometimes works, but it is hard to manage because: (a) courts are ill-designed for it; (b) such trials are hard to orchestrate (references to confessions may be made any time); and (c) it is hard to keep juries separated so that what one has heard does not come to the attention of another.

Id.

253. *See* Bruton v. United States, 391 U.S. 123, 134 (1968) ("Joint trials do conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial."). For a critique of the efficiency rationale, see Robert O. Dawson, *Joint Trials of Defendants in Criminal Cases: An Analysis of Efficiencies and Prejudices*, 77 MICH. L. REV. 1379 (1979).

254. Professor Dawson suggests that the fact that most witnesses are professionals undercuts this rationale, but this argument is far from convincing, especially in cases where a child was molested, for example. *See* Dawson, *supra* note 253, at 1384-85. His suggestion that parties merely stipulate to certain testimony in these cases ignores both the tactical advantages of having a witness testify as well as the requirement that a defendant be able to cross-examine his accuser. *See id.* at 1385. Furthermore, it is only fair to let the jury evaluate the credibility of a witness's statement after viewing him in court.

the same conduct.[255] The strongest attack by most opponents of joint trials posits that joining trials does not in fact conserve courts' time and resources because joint trials may be *more* complicated than individual trials.[256] While this argument certainly has some validity, it becomes less relevant when one considers that under certain circumstances it may be necessary, given the nature of the crime, to try the defendants together. Such is the case in conspiracy or racketeering cases, in which it is necessary to establish a connection between the various parties.[257]

The "never" approach would fail as well. Those who advocate that a confession not be used if the defendants are to be tried jointly ignore the fact that a freely and voluntarily given confession is often the best evidence of what occurred.[258] To put prosecutors in the position where they must ignore the most competent, and frequently the only substantial, evidence in a trial merely because it is more efficient or practical to conduct a trial jointly is unconscionable.

The third alternative proposed by those who contend that neutral pronoun redaction violates the dictates of *Bruton* is to completely redact the references to the codefendants.[259] The problem with this approach is that complete redaction may not be practical, and attempts to eliminate all references to a codefendant can often lead

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255. Professor Dawson claims that this argument is too weak to stand, but his statement that "if different lawyers have represented defendants in sequential trials, differences in their competency, zeal, or preparation may affect the juries' verdicts" seems to support, rather than undercut, the danger of inconsistent verdicts. *See id.* at 1391-92.

256. *See id.* at 1385-86 (arguing that joint trials are more difficult to schedule, more complicated to conduct, and take longer than individual trials).

257. *See, e.g.*, United States v. Blaylock, 421 F.3d 758, 766 (8th Cir. 2005) (recommending that "defendants who are 'charged in a conspiracy should be tried together, particularly where proof of the charges against the defendants is based upon the same evidence and acts'" (quoting United States v. Boyd, 610 F.2d 521, 525 (8th Cir. 1979))).

258. *See supra* note 169 and accompanying text. *But see* Richardson, *supra* note 126, at 860-61 (pointing out and discussing the dangers of assuming that a confession is an accurate depiction of what actually happened and noting that codefendants frequently try to shift the blame to the others involved in the crime, making the statements, whether redacted or not, of questionable reliability).

259. *See* Richardson v. Marsh, 481 U.S. 200, 211 (1987) (holding that admission of a confession in which all references to codefendants were completely redacted, thus eliminating "any reference to [their] existence," did not violate the Confrontation Clause); *see also* Bryant M. Richardson, *Rebuttal*, 55 U. MIAMI L. REV. 969, 969 (suggesting that "the only form of redaction that passes constitutional muster is redaction that removes all references to the existence of the codefendants").

to absurd or inconsistent results. Justice Scalia addressed this approach in *Gray*, noting that redacting all references in that case would have yielded a statement that was inconsistent with what actually transpired during the course of the crime.[260]

This third point is illustrated if we return to the hypothetical set out at the beginning of this part. In Bob's confession, he stated that "We all had guns and ski masks. Jane waited in the car while John, Mary, and I went into the bank." If the statement were completely redacted, it would read "I went into the bank," which does not accurately depict the events that transpired.[261] Although that statement, as redacted, might be acceptable because it makes sense and accurately describes Bob's role in the crime, confessions do not always lend themselves to easy redaction.[262] If, for example, Bob had said, "Mary told me that John would get the cameras and that she and I should get the money," there would be no way to remove all references to the other defendants without destroying what was actually said and transpired. The prosecutor is then left with the choice to either rewrite the sentence to make it grammatically correct, eliminate the sentence entirely, or choose not to use the confession.[263] The first two choices fail to respect the integrity of what was actually said, and the third penalizes the prosecutor because the police did not ask the questions in such a way as to yield redactable responses.

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260. *See supra* notes 217-21 and accompanying text.

261. Indeed, as Professor Mueller points out, it is possible that such complete redaction can make the defendant's conduct seem more egregious and culpable than it actually was. *See* Mueller, *supra* note 10, at 963 (describing how redaction in a murder case exaggerated the role of a minor player in the crime). According to Professor Mueller, "[t]here are some cases where redaction is unfair to other defendants, even if the resultant confession contains no words that could refer to them." *Id.* As he explains, "[j]ust as silent moments in a symphony or song can have great meaning, so the absence of words in a longer narration can have as much impact as the words themselves." *Id.*

262. According to one author, "comprehensive editing, although it protects the nonconfessor, casts confusion and saps the confession of probative value so as to prejudice the prosecutor's case." *Codefendants' Confessions*, 3 COLUM. J.L. & SOC. PROBS. 80, 89 (1967). This article presents an in-depth discussion of the difficulties of requiring complete redaction. *See id.* at 88-90.

263. Such modification by the prosecutor raises the concern that he may, whether inadvertently or intentionally, remove portions of the confession that may benefit the defendant. As Professor Mueller points out, "*the one who made the confession* may have objections if its wording is changed to delete part of what he said that bears on the case." Mueller, *supra* note 10, at 957.

2. A Jury Instruction Is Sufficient

The fact that neutral pronouns are different from symbols requires a reexamination of the jury instruction issue in light of these differences. The central issue that underscored the *Bruton-Richardson-Gray* line of cases was whether it was reasonable to presume jurors could follow instructions to ignore "powerfully incriminating" evidence and whether a jury instruction was sufficient to protect the rights of a defendant. *Bruton*'s premise was that some extrajudicial statements are so "powerfully incriminating" that juries may be unable to follow instructions to ignore them when deciding the guilt of the nonconfessing defendants they implicate.[264] *Gray* extended this rule to symbol redaction, finding that the danger that a jury would infer from a symbol the existence and complicity of a codefendant to be too great to be dispelled by a limiting instruction.[265] *Richardson* limited the extension of this rule, however, holding that a limiting instruction is sufficient in all circumstances except when a confession is "powerfully incriminating" on its face.[266]

As previously discussed, it is difficult to support the proposition that neutral pronouns are "powerfully incriminating" in the same way as symbols, given the fact that neutral pronouns do not compel the inference that a name was removed and do not directly incriminate a codefendant just by examining the face of the confession. As such, a jury more likely will be able to ignore the suggested inferential connection between a phrase like "someone" and a codefendant than the connection between a symbol like "X" and a codefendant. While the *Bruton* court found that the presumption that jurors could follow instructions was unreasonable in certain circumstances, its holding has indeed proven to be a "narrow exception," as the Court has not explicitly rejected the presumption as unreasonable in *all* circumstances.[267] Indeed, the

264. *See* Bruton v. United States, 391 U.S. 123, 135 (1968).

265. *See* Gray v. Maryland, 523 U.S. 185, 193 (1998).

266. *See* Richardson v. Marsh, 481 U.S. 200, 211 (1987) (finding limiting instruction sufficient where all references to codefendant were removed).

267. Some argue that reliance on the presumption that jurors follow instructions is misplaced and may actually be detrimental to the rights of defendants. *See, e.g.*, *Codefendants' Confessions*, *supra* note 262, at 82 ("The effectiveness of limiting instructions in ensuring that a jury does not improperly consider a confession is highly suspect."); Judith

proposition put forth in *Delli Paoli* still holds true: "It is a basic premise of our jury system that the court states the law to the jury and that the jury applies that law to the facts as the jury finds them."[268]

Courts presume juries follow instructions in other circumstances in which the evidence sought to be limited is far more likely to be used in an impermissible fashion than is the case with neutral pronouns. One such example was discussed by the Court in *Harris v. New York*, in which the Court permitted the introduction of an improperly obtained confession for the limited purpose of impeachment as long as the jury was instructed not to consider it as evidence of the confessor's guilt.[269] The jury was presumed to follow this instruction. Similarly, the Federal Rules of Evidence permit the introduction of character evidence and past act evidence solely for the purpose of assessing credibility.[270] Juries are instructed as to the limited purpose for such evidence, and they are presumed to use the evidence for this purpose only and not in considering the defendant's guilt or innocence.[271] Despite these examples, blind reliance on the proposition that jurors follow instructions would be fool-hardy. In light of the many instances in which an instruction is considered sufficient, however, many of which are far more likely than neutral pronoun redaction to be prejudicial, it is not unreasonable to presume that jurors can suppress their instinct to connect the word "someone" to a codefendant in a case where a confession has been redacted using neutral pronouns. Because neutral

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L. Ritter, *Your Lips Are Moving ... But the Words Aren't Clear: Dissecting the Presumption that Jurors Understand Instructions*, 69 MO. L. REV. 163, 165 (2004) (examining the basis for the presumption that jurors can follow instructions and suggesting that "[j]ustice is not advanced by the judiciary's reliance on an unsupported and false presumption"). See also *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932), in which Judge Hand referred to the concept that a jury can follow a limiting instruction in all circumstances as "the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else [sic]."

268. Delli Paoli v. United States, 352 U.S. 232, 242 (1956).

269. *See* Harris v. New York, 401 U.S. 222, 223, 225 (1971).

270. *See* FED. R. EVID. 404.

271. *See* Spencer v. Texas, 385 U.S. 554, 561 (1967) (holding that evidence of prior criminal acts was admissible for the purpose of determining the defendant's sentence). The Court in *Richardson* cited a number of other cases in which the jury is presumed to be able to use various pieces of evidence for one limited purpose but to ignore it for others. *See Richardson*, 481 U.S. at 206-07.

pronouns are not obvious redactions and do not compel the incrimination of nonconfessing codefendants, a limiting instruction is sufficient to protect the codefendants' rights.

D. A New Test

The reason that the issue of neutral pronouns has vexed and confounded prosecutors, trial courts, and appellate courts is not that the Supreme Court has failed to articulate a standard. On the contrary, the problem is that there are *too many* standards, and none of them is clear enough to guarantee consistent application. *Bruton* called for the exclusion of "powerfully incriminating" confessions.[272] *Richardson* held the Constitution prohibited the admission of confessions that were incriminating on their face as opposed to those which incriminated in light of other evidence.[273] *Gray* applied the "facially incriminating" standard, but found a confession that made no mention of the defendant to be "facially incriminating" by inference.[274] What has remained constant throughout the Court's jurisprudence, however, is the basic premise underlying *Bruton* and its progeny: that some codefendant confessions, whether redacted or not, are so "powerfully incriminating" that a jury instruction cannot prevent the jury from impermissibly considering them as evidence against the nonconfessing defendant.[275] In order to determine whether a redacted confession can be admitted, therefore, it is necessary to formulate a test that adequately defines and predicts when a confession is so incriminating that a jury instruction cannot cure the prejudice caused by its introduction. A potential solution to the problems of analysis facing the appellate courts in light of the Supreme Court's jurisprudence is a two-pronged test that melds the standards used by the Court and addresses all methods of redaction, including neutral pronoun redaction. In order for a confession to be considered "powerfully incriminating," and thus inadmissible, it must satisfy the requirements of both prongs of the test.

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272. Bruton v. United States, 391 U.S. 123, 135-36 (1968).
273. *Richardson*, 481 U.S. at 207.
274. Gray v. Maryland, 523 U.S. 185, 196 (1998).
275. *See supra* notes 98-99 and accompanying text.

1. Prong 1: Invitation to Speculate[276]

Courts must first determine whether the confession, as redacted, invites the jury to speculate that a redaction has occurred and that a particular defendant is the one who has had his name redacted. This is a "four corners" test—only the confession itself is to be examined. This prong is a question of what the "reasonable juror" would believe—whether the reasonable juror, looking only at the confession itself, would be invited, more likely than not, to speculate as to the existence or true identity of a codefendant. If a confession invites speculation, it satisfies this prong and must be considered under the second prong. If it fails to invite speculation, the confession would not be "powerfully incriminating" and therefore would be admissible.

Under this prong, the confession in *Richardson* would clearly be admissible. Without any references to the defendant, the jury would have no reason to speculate as to the identity of a codefendant; no evidence of such a person's existence would be found in the confession. The confession in *Gray* would clearly induce a reasonable juror to at least speculate as to the identity of "deleted."[277] The confession would thus satisfy the first prong by inviting speculation and would have to be considered under the second prong. Less certain is the question whether a confession that is redacted using neutral pronouns would satisfy the first prong. One could certainly argue that a juror seeing the phrase "someone and me" would not be aroused to speculate as to the identity of "someone," as the redaction is not obvious. It is more likely, however, that such a redaction would invite a juror to speculate as to the existence of a coconspirator or accomplice, and thus the resolution of the neutral pronoun question must depend on the answer to the second prong of the test.

276. *See supra* note 185 and accompanying text.
277. *See supra* note 246.

2. Prong 2: The Degree of Inference[278]

Those confessions that invite a reasonable juror to speculate must next be examined to determine whether the degree of inference is great. This prong of the test is premised on the rationale behind the "compelling inference" standard: when the inferential connection between the redaction and the identity of the codefendant whose name was redacted is great, it is highly likely that a jury will, at least unconsciously, consider the statement with regard to the defendant.[279] In such a circumstance, a limiting instruction would not be enough to prevent the jury from considering the inadmissible evidence. Conversely, when the inference is so attenuated that the inferential connection is weak, a jury more likely could ignore the tenuous connection on orders from the judge. The risk is not the same in the latter case as it is in the former: when a connection is not obvious or easily discovered, it is reasonable to expect jurors to ignore the possible inference. As with the first prong, the standard for evaluation under this prong would be whether the reasonable juror would be more likely than not to make a strong inferential connection.

This prong, unlike the first, necessarily considers the totality of the circumstances at the trial; it is, therefore, more akin to the "contextual implication" standard than it is to the "facially incriminating" test. Among the factors that must be considered in evaluating the strength of the inferential connection is the method of redaction. The confession in *Bruton*, for example, would clearly satisfy this prong, and thus become inadmissible, because the strongest of the inferential connections is clearly connecting someone's name, as read in a confession, to the person herself.[280] Similarly, using the word "he" as a substitute for the name of the

278. *See supra* note 184 and accompanying text.

279. This concern was emphasized by Justice Breyer in his decision in *Gray*. *See supra* notes 197-211 and accompanying text.

280. A redaction that completely eliminates the name and existence of the other defendant—like that in *Richardson*—would create no inferential connection and would therefore fail this prong's requirement of a strong inferential connection, thus making the confession admissible. But as explained *supra* Part IV.D.1, such a redacted confession would likely fail to invite speculation, thus satisfying the first prong and thereby becoming admissible; this result obviates the need to consider a *Richardson*-type redaction under the second prong.

only other defendant in the trial, who is a male, would create a strong inferential connection and thus be inadmissible under this prong, as would the use of the phrase "the white guy" in a trial in which all but one of the defendants are black.[281] Another factor to be considered is the number of codefendants in the trial. This consideration necessarily works in tandem with the examination of the type of redaction. If, for example, a confession is redacted to read "me and someone" and there is only one other defendant, there is a strong inferential connection that the only other codefendant is the "someone."[282] When there are twelve defendants, however, "someone" is not nearly as incriminating.[283] Another factor that

281. The Court has held that the use of nicknames or physical descriptions as a method of redaction is impermissible, as these methods are obviously incriminating in the same way that blank spaces are obviously incriminating. *See* Gray v. Maryland, 523 U.S. 185, 195 (1998) (citing Harrington v. California, 395 U.S. 250, 253 (1969) (finding a *Bruton* violation where a defendant's confession, which gave a description of his codefendant's age, height, weight, and hair color, was redacted to replace his codefendant's name with "white guy")). The Seventh Circuit discussed the use of descriptive words as a redaction method in *United States v. Hoover*, 246 F.3d 1054, 1059 (7th Cir. 2001). In *Hoover*, the government introduced one defendant's redacted confession, having replaced the name of defendant Hoover, who was in jail at the time, with "incarcerated leader," and the name of the other defendant, Shell, who was free at the time, with "unincarcerated leader." *Id.* The court rejected the government's argument that the confession was not incriminating unless read in conjunction with evidence that Hoover was in jail and Shell was not. *Id.* The court found the redaction method to be an obvious indication of which defendants' names were redacted, and thus no different than the symbols used in *Gray*. *Id.* Indeed, according to the court, "[o]nly a person unfit to be a juror could have failed to appreciate that the 'incarcerated leader' and 'unincarcerated leader' were Hoover and Shell," and the redaction method used "no more concealed [the defendants'] identities than the substitution of 'Mark Twain' for 'Samuel Clemens' conceals the author." *Id.* In so holding, the Seventh Circuit rejected the "four-corners" test, holding instead that a court must consider the evidence linking the confession to the defendants in order to see if their Sixth Amendment rights would be violated by the admission of the confession.

282. As the *Hoover* court explained, *any* redaction method must "at least avoid[] a one-to-one correspondence between the confession and easily identified figures sitting at the defense table." Hoover, 246 F.3d at 1059; *see also* United States v. Sutton, 337 F.3d 792, 799-801 (7th Cir. 2003) (discussing the "one-to-one correspondence" and the strength of the inferential connection between a redacted confession and the identity of a particular defendant).

283. The Supreme Court recognized that numbers are important in its opinion in *Gray*, noting that "the reference might not be transparent in other cases in which a confession, like the present confession, uses two (or more) blanks, even though only one other defendant appears at trial." 523 U.S. at 194-95. Post-*Gray* decisions in the lower courts have underscored this concern about the number of defendants. In *United States v. Vega Molina*, for example, the First Circuit discussed the possibility that a redaction method, in light of the number of defendants, might "convey a compelling inference" as to the identity of the redacted name. 407 F.3d 511, 520-21 (1st Cir. 2005). According to the First Circuit:

must also be considered is the amount of evidence pointing to the codefendant as the one whose name was redacted. Where there is little evidence connecting the codefendant to the crime or the statement, it is unlikely that a jury will be compelled to infer the identity of the codefendant.

A redacted confession that creates a weak inferential connection between the redacted statements and the defendant's identity would fail to satisfy the requirements of this prong and would therefore be admissible at trial as redacted. Because there is a weak inferential connection between the redacted passage and the identity of the codefendant, it is therefore reasonable to presume that juries will follow limiting instructions with regard to the uses of this evidence.[284]

3. Administering the Test

In order for this two-pronged test to be effective, it must be administered by the trial judge *prior to trial.* This idea is consistent with the Federal Rules of Criminal Procedure, which require the judge to consider "*in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at trial" to determine whether the joinder of a trial would

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> A particular case may involve numerous events and actors, such that no direct inference plausibly can be made that a neutral phrase like "another person" refers to a specific codefendant. A different case may involve so few defendants that the statement leaves little doubt in the listener's mind about the identity of "another person." In short, each case must be subjected to individualized scrutiny.

Id. (citations omitted); *see also* United States v. Hernandez, 330 F.3d 964, 973-74 (7th Cir. 2003) (holding that use of the phrase "Latin Kings" referred to a group of people, thus lacking a "one-to-one correspondence" between the redaction method and the defendant, and was therefore not inculpatory with respect to a specific defendant, regardless of the number of defendants joined in the trial).

284. The question of symbol redaction presents a difficulty under this prong. There are certainly situations in which the substitution of "X" or "deleted" will be sufficient to protect the defendant under this test, as it may require a fair amount of logic to make the inferential connection between the symbol and the identity of the defendant. The Supreme Court recognized this in *Gray*, noting that "in some instances the person to whom the blank refers will not be clear." *See Gray*, 523 U.S. at 194. This Note's two-pronged test is not undermined by deferring to the precedential value of *Gray*, which declared that all symbol redaction is per se unconstitutional. *See id.* at 195.

in any way prejudice a defendant.[285] In determining whether the admission of a redacted confession would be prejudicial under the previously discussed two-pronged test, the judge may request that the prosecutor provide a summary of the evidence and witnesses the state intends to introduce at trial. Again, such an approach is not inconsistent with other practices according to which a judge may require *in camera* inspection of evidence prior to determining its admissibility.[286] If the judge concludes that the confession as redacted is not "powerfully incriminating," either because it fails to invite speculation or because there is a tenuous inferential connection between the redactions and the codefendants, the court may properly admit the confession provided the court issues an appropriate limiting instruction to the jury. A judge's decision to admit a redacted confession would be reviewed under an abuse of discretion standard, which would require the appellate court to examine the trial judge's decision as to what the reasonable juror would believe regarding the confession.[287] By requiring pretrial examination of whether a confession is "powerfully incriminating" to the point of being prejudicial, prosecutors would avoid the difficulties of having to put on their entire case before learning whether a confession is admissible.[288]

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285. *See* FED. R. CRIM. P. 14 (concerning the joinder and severance of trials).

286. Such might be the case when a judge must weigh the probative value of evidence against its prejudicial effect before submitting it to the jury, as required under the Federal Rules of Evidence. *See* FED. R. EVID. 403 (requiring a balancing test to determine whether evidence is unduly prejudicial).

287. In the exceptional circumstance where a properly admitted redacted confession is read into the record by a witness who accidentally mentions the name of the codefendant instead of the redaction, an appellate court would have to consider whether the mistake, in light of the presumption that a limiting instruction is sufficient to protect a defendant where a redacted confession was properly admitted, amounted to harmless error.

288. The common practice in many courts has been to require the prosecutor to put on his entire case before the judge would rule on the admissibility of the confession (and thus whether joinder is appropriate). Justice Scalia advocates this practice as opposed to the pretrial examination, for, as he suggested in *Richardson*, the pretrial examination would be "time consuming and obviously far from foolproof." Richardson v. Marsh, 481 U.S. 200, 209 (1987). Surely such a prophylactic measure is not more time consuming and burdensome than forcing the prosecutor to put on his entire case only to find that the trial must be severed because the confession was too prejudicial to be admissible. Similarly, the suggestion that the fear of taking too much time should take precedence over providing the defendant the greatest protection of his constitutional rights is not persuasive. As the dissent in *Richardson* explained, "[o]n the scales of justice, ... considerations of fairness ... outweigh administrative concerns." *Id.* at 217 (Stevens, J., dissenting).

CONCLUSION

Various justifications have been offered to explain the recent prevalence of joint criminal trials. These factors include the tactical advantages to the prosecution of having all defendants in the courtroom at the same time, the benefits of not having to introduce the same evidence or call the same witnesses multiple times, the relaxed evidentiary rules in conspiracy trials, the desire to preserve the efficiency of the courts, and America's increased focus on prosecuting group crime.[289] Although these reasons for joinder may be compelling in some circumstances, the fact remains that joint trials can often work to the detriment of the rights of a defendant. The danger that a defendant's rights may be trampled on in such a trial is vividly illustrated by the *Bruton* problem. Jurors are human beings, and it is sometimes impossible for them to suppress their natural inclination to try to discover the identity of the redaction in a defendant's confession and to not use the confession as evidence against his codefendant. In attempting to protect the rights of defendants to cross-examine the witnesses against them, however, the Supreme Court has only muddied the waters as to how a confession of a codefendant may be introduced into evidence consistent with that right.[290] It is of no comfort to say that simply severing the trials or refusing to use the confession is the solution to this problem, as these options may not be practical or may be overly burdensome to prosecutors or defendants in some circumstances. It is necessary, therefore, for the Court to finally and authoritatively settle the remaining issues that arise when the confession of a nontestifying codefendant is introduced into evidence in a joint trial.

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289. *See* Marcus, *supra* note 6, at 67-69 (discussing the reasons for the prevalence of multiple-defendant criminal trials and noting that prosecutions of group criminal activity have increased).

290. Some states have attempted to clarify the issue of codefendant confessions on their own through legislation. *See, e.g.*, VT. R. CRIM. P. 14(b)(2)(C) (requiring the trial court, when ruling on a motion for severance based on the offer of a confession into evidence, to give the prosecuting attorney who intends to offer the confession the choice of either severing the trials, not using the confession, or using the confession, provided "all references to the moving defendant have been deleted" and "provided that the court finds that the statement, with the references deleted, will not prejudice the moving defendant").

On the question of neutral pronoun redaction, a method on which the Court has not directly spoken, this Note has concluded that allowing the admission of confessions redacted using neutral pronouns would be consistent with the *Bruton-Richardson-Gray* line of cases in light of the differences between neutral pronouns and symbols, as well as the tenuous inferential connection suggested by neutral pronoun redaction. This Note has also offered a two-pronged test that accounts for the Court's precedent in this area and will make the evaluation of which confessions are "powerfully incriminating" easier. Under this test, which requires both a facial evaluation *and* a contextual evaluation of the confession, one method of redaction the Court has not addressed, neutral pronoun redaction, would be found generally permissible given the attenuated nature of the inference required to connect a neutral pronoun to the name it has replaced.[291] Furthermore, this test balances the interest in efficient and effective prosecution with the need to protect a defendant's Sixth Amendment rights in a way that the Supreme Court's current jurisprudence on the issue does not. Without question, one of the most cherished rights in America is the right to a fair trial. Until the Supreme Court decides whether neutral pronouns are "powerfully incriminating" and sets out a clear approach for determining when a redacted confession is admissible, no defendant who finds himself in a *Bruton* conundrum will be able to fully enjoy that right.

Bryan M. Shay[*]

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291. This test must be administered on a case-by-case basis, considering the factors outlined in Part IV.D.2. As such, there are some circumstances under the recommended test in which neutral pronoun redaction may not be sufficient to protect the defendant. Generally, however, because of the weak inferential connection between neutral pronouns and a particular defendant's identity, such redaction would be sufficient. As previously discussed, under the Court's present standards, neutral pronoun redaction would be found permissible given the differences between it and the symbol method found unconstitutional in *Gray*.

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