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THE CONFRONTATION CLAUSE AND CO-DEFENDANT CONFESSIONS: THE DRIFT FROM *BRUTON* TO *PARKER V. RANDOLPH*†

Paul Marcus*

I. INTRODUCTION

An important aspect of criminal actions against joint defendants is the constitutional limitation of the prosecution's ability to introduce a confession by one of the accused. When the confessing party fails to testify, the Confrontation Clause of the sixth amendment restricts the admissibility of the confession to establish the guilt of other defendants.¹ Few advocates have seriously argued that the Confrontation Clause permits the introduction of a non-testifying declarant's statement for the purpose of convicting another defendant identified in the confession. As the Second Circuit recently noted, "[O]f course, naming him [the joint defendant] would have involved a direct violation of his confrontation rights"² However, when the jury is specifically instructed to consider the confession only as evidence against the confessing party and not against the other defendants,³ the issue of

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

2. *United States v. Danzey*, 594 F.2d 905, 917 (2d Cir. 1979). For discussions of the origins of the Confrontation Clause, see Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99 (1972); Griswold, *The Due Process Revolution and Confrontation*, 119 PA. L. REV. 711 (1971); Larkin, *The Right of Confrontation: What Next*, 1 TEX. TECH. L. REV. 67 (1969); Read, *The New Confrontation-Hearsay Dilemma*, 45 S. CAL. L. REV. 1 (1972).

3. Such a charge is generally referred to as a "limiting instruction;" the jury is told to limit its consideration of the confession only to the party confessing. At the close of the prosecution's case in *Bruton v. United States*, 391 U.S. 123 (1968), the jury had received the following instructions: "[The admission] if used, can only be used against the defendant Evans. It is hearsay insofar as the defendant George William Bruton is concerned, and you are not to consider it in any respect to the defendant Bruton, because insofar as he is concerned it is hearsay." *Id.* at 125 n.2.

The trial judge had repeated the warning that Evans's confession was to be considered for a limited purpose:

admissibility is hotly contested.

In 1968 the Supreme Court decided *Bruton v. United States*,⁴ holding that despite such a limiting instruction, introduction of the confession violated the joint defendant's Confrontation Clause rights.⁵ Many observers believed that *Bruton* would seriously inhibit the use of confessions and admissions in a large number of joint defendant trials, especially in conspiracy trials. In fact, one law professor and practicing criminal lawyer characterized the case as the "most meaningful roadblock placed during recent years in the path of the advance of the conspiracy-type maneuver toward vicarious proof of guilt."⁶

The optimism with which the defense bar greeted *Bruton*, however, has proved to be unfounded. *Bruton* did not deter the use of confessions in joint defendant trials. Instead, prosecutors have been encouraged by a steady erosion of the *Bruton* rule within the last decade. Courts have broadly applied the principle of harmless error, the redaction process⁷ and the interlocking confessions exception⁸ to severely limit the basic *Bruton* principle. Indeed, as illustrated by the most recent opinion in this area, *Parker v. Randolph*,⁹ these extraneous principles may yet render the *Bruton* rule impotent.

Because of the great number of joint defendant cases—chiefly, but not exclusively, related to the increasingly popular conspiracy charge¹⁰—a clear explanation of post-*Bruton* law is extremely important. The Supreme Court's most recent foray into this area, however, left no majority opinion on point. Consequently, the conclusion that the *Bruton* rule has been replaced by its exceptions is still premature. But, I jump ahead. We cannot see what the future holds without analyzing *Bruton* and the developments of the last decade.

A confession made outside of court by one defendant may not be considered as evidence against the other defendant, who was not present and in no way a party to the confession. Therefore, if you find that a confession was in fact voluntarily and intentionally made by the defendant Evans, you should consider it as evidence against Evans, but you must not consider it, and should disregard it, in considering the evidence in the case against the defendant Bruton.

It is your duty to give separate, personal consideration to the cause of each individual defendant. When you do so, you should analyze what the evidence shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against some other defendant. Each defendant is entitled to have his case determined from his own acts and statements and the other evidence in the case which may be applicable to him.

Id.

4. 391 U.S. 123 (1968).

5. See discussion in text accompanying notes 17-48 *infra*.

6. Lewis, *New Answers to an Old Problem: The Extra Judicial Statement in Conspiracy-Type Prosecutions*, 7 J. MAR. J. PRAC. & PROC. 83, 103 (1973). See generally P. MARCUS, PROSECUTION AND DEFENSE OF CRIMINAL CONSPIRACY CASES § 5.06 (1978 with 1979 Supp.).

7. Redaction refers to the deletion of references to co-defendants in the confession. See text accompanying notes 83-104 *infra*.

8. An interlocking confession is an admission of the defendant which corroborates a co-defendant's confession. See text accompanying notes 105-09 *infra*.

9. — U.S. —, 99 S. Ct. 2132 (1979). See text accompanying notes 110-50 *infra*.

10. See generally Marcus, *Conspiracy: The Criminal Agreement in Theory and in Practice*, 65 GEO. L.J. 925 (1977).

II. THE BASIC PROBLEM

A. *From Delli Paoli to Bruton*

The origins of the *Bruton* rule are easily traced to a dissent by Justice Frankfurter in a typical co-defendant confession case, *Delli Paoli v. United States*.¹¹ In *Delli Paoli*, the Supreme Court held that it was not error to admit in evidence a confession of one defendant even though that confession made reference to the other defendants. The Court determined that an instruction limiting the jury's consideration of the statement to the issue of the declarant's guilt precluded possible prejudice against his co-defendants.¹² Relying on the presumed effectiveness of such instructions, the majority premised its analysis on the assumption on that the jury had followed the instructions.¹³ Notwithstanding Justice Frankfurter's vigorous dissent, the majority attempted to justify this assumption:

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. Unless we proceed on the basis that the jury will follow the court's instructions¹⁴ where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense. Based on faith that the jury will endeavor to follow the court's instructions, our system of jury trial has produced one of the most valuable and practical mechanisms in human experience for dispensing substantial justice.¹⁵

In a powerful dissent Justice Frankfurter questioned the basic premise of the majority's decision to allow the use of confessions with limiting instructions. In carefully explaining why a jury could not follow the judge's instructions, Justice Frankfurter laid the groundwork for a majority opinion eleven years later:

The dilemma is usually resolved by admitting such evidence against the declarant but cautioning the jury against its use in determining the guilt of the others. The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should

11. 352 U.S. 232 (1957).

12. *Id.* at 239 n.5.

13. *Id.* at 241.

14. The Court would not allow the confession to be used without the limiting instructions. If the confession was used against the non-confessing defendants, it would be hearsay. Because it was not in furtherance of the conspiracy (coming after the arrest of the defendant) it did not fall within the co-conspirator's exception. *Id.* at 237, relying on *Fiswick v. United States*, 329 U.S. 211, 217 (1946): "[C]onfession or admission by one co-conspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise. It is rather a frustration of it."

15. 352 U.S. at 242.

not tell.¹⁶

Although Justice Frankfurter's opinion ultimately carried more weight than the views of other judges, many pre-*Bruton* opinions expressed judicial skepticism of the effectiveness of limiting instructions. In a famous concurring opinion, Justice Jackson had made the argument succinctly: "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."¹⁷ Perhaps the strongest statement was made by Judge Friendly shortly before the *Bruton* decision:

Not even appellate judges can be expected to be so naive as really to believe that all twelve jurors succeeded in performing what Judge L. Hand aptly called "a mental gymnastic which is beyond, not only their powers, but anybody's else." It is impossible realistically to suppose that when the twelve good men and women had [the co-defendant's] confession in the privacy of the jury room, not one yielded to the nigh irresistible temptation to fill in the blanks [caused by the redaction of the defendants' names] with the keys [the other evidence] provided and [to] ask himself the intelligent question to what extent Jones' statement supported [that evidence], or that if anyone did yield, his colleagues effectively persuaded him to dismiss the answers from his mind.¹⁸

Judge Friendly's criticism of the limiting instruction is well founded. While one may *agree* to seal one's mind off to certain references or descriptions, is it possible to actually do so? The Supreme Court, in 1968, finally gave a negative answer to this Confrontation Clause question.

B. Bruton v. United States,¹⁹ or How Do You Unring a Bell?²⁰

For all the fanfare which greeted the case, *Bruton* was very routine in some respects. Factually, the case was straightforward. A jury had convicted defendants Bruton and Evans on charges of armed postal theft. At trial a postal inspector testified that Evans orally confessed to the robbery with Bruton. This confession occurred in jail after the defendants' arrests. Obviously, as in *Delli Paoli*, this statement was not in furtherance of the conspiracy and hence could not fall within any recognized hearsay exception.²¹ Therefore, as in *Delli Paoli*, the trial

16. *Id.* at 247-48. See text accompanying notes 26-29 *infra*.

17. *Krulwitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring). See also *Blumenthal v. United States*, 332 U.S. 539, 559-60 (1947).

18. *United States v. Bozza*, 365 F.2d 206, 215 (2d Cir. 1966) (citations omitted).

19. 391 U.S. 123 (1968).

20. This phrase in this context is, unfortunately, not the author's but the Missouri Court of Appeals'. *People v. Rayner*, 549 S.W.2d 128, 133 (1977).

21. Although the hearsay exception is a statutorily created rule of evidence, while the defendant's confrontation rights are constitutionally protected, the two principles are sometimes used interchangeably. They are, however, quite different, both in origin and in application, as the Supreme Court emphasized in *California v. Green*, 399 U.S. 149, 155-56 (1969):

While it may readily be conceded that hearsay rules and the Confrontation Clause are gener-

judge instructed the jury to regard the confession only as evidence against the declarant and not against his co-defendant.²²

The Court granted certiorari to reconsider *Delli Paoli*. Yet, after the grant of certiorari, it became clear that the Court did not have to resolve *Bruton* on the Confrontation Clause ground at all. As it turned out, the failure of the police to give *Miranda* warnings to Evans prior to his statement raised serious doubts over the admissibility of the confession.²³ In light of this admissibility problem, the Solicitor General requested that the Court reverse the judgment and remand the case for a new trial.²⁴ The Court, however, in a very unroutine fashion, was not deterred for a moment; without really responding to the Solicitor General's request, Justice Brennan simply noted in his majority opinion that "We have concluded, however, that *Delli Paoli* should be overruled."²⁵

The majority opinion is not lengthy. Much of it, particularly the early portion, relies on the then recently decided case of *Jackson v. Denno*²⁶ to demonstrate why *Delli Paoli*, for practical purposes, had already been overruled. In *Jackson*, the Supreme Court expressly rejected the proposition that a jury could abide by an instruction to disregard a confession as evidence of the *declarant's* guilt, after finding that his statement was involuntary.²⁷ Therefore, the Court held that the Constitution requires the trial judge to determine whether the declarant confessed voluntarily before submitting the statement to the jury for their assessment of its credibility.²⁸ Writing for the *Bruton* majority, Justice Brennan asserted that the Court's premise in *Jackson* was basically the same as the principle set forth by Justice Frankfurter in his *Delli Paoli* dissent.²⁹ Thus, Justice Brennan believed that the Court's

ally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied.

22. See note 3 *supra*.

23. The *Bruton* trial began one week after *Miranda v. Arizona*, 384 U.S. 436 (1966) had been decided. In light of *Miranda*, the court of appeals had held that the confession was inadmissible and on retrial the co-defendant-declarant was actually acquitted. See 391 U.S. at 124 n.1.

24. *Id.* at 125-26.

25. *Id.* at 126.

26. 378 U.S. 368 (1964).

27. *Bruton v. United States*, 391 U.S. 123, 129 (1968), *citing* *Jackson v. Denno*, 378 U.S. 368, 388-89 (1964).

28. *Bruton v. United States*, 391 U.S. 123, 128-29 (1968).

29. "The basic premise of *Delli Paoli* was that it is '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." *Id.* at 126, *citing* *Delli Paoli v. United States*, 352 U.S. 232, 239 (1957) (Frankfurter, J., dissenting).

Indeed, the Court in *Jackson* quoted from Justice Frankfurter's *Delli Paoli* dissent in referring to the jury's knowledge that the defendant confessed. 378 U.S. at 388 n.15. This reference is

reasoning in *Jackson* necessarily implied the rejection of *Delli Paoli*.

One might argue that Justice Brennan's comparison of the *Jackson* voluntary confession procedure to the *Delli Paoli* co-defendant confession issue was inappropriate; that the *Jackson* decision was inevitable because an accused's own confession is much more prejudicial to him than a damaging confession by a co-defendant. Because the *Jackson* and *Delli Paoli* situations may be distinguishable, the *Jackson* Court arguably did not overrule *Delli Paoli* by implication. This notion, though, was handily rebuked by Chief Justice Traynor of the California Supreme Court in the well-known case of *People v. Aranda*:

Although *Jackson* was directly concerned with obviating any risk that a jury might rely on an unconstitutionally obtained confession in determining the defendant's guilt, its logic extends to obviating the risks that the jury may rely on any inadmissible statements. If it is a denial of due process to rely on a jury's presumed ability to disregard an involuntary confession, it may also be a denial of due process to rely on a jury's presumed ability to disregard a codefendant's confession implicating another defendant when it is determining that defendant's guilt or innocence.

Indeed, the latter task may be an even more difficult one for the jury to perform than the former. Under the New York procedure, which *Jackson* held violated due process, the jury was only required to disregard a confession it found to be involuntary. If it made such a finding, then the confession was presumably out of the case. In joint trials, however, when the admissible confession of one defendant inculcates another defendant, the confession is never deleted from the case and the jury is expected to perform the overwhelming task of considering it in determining the guilt or innocence of the declarant and then of ignoring it in determining the guilt or innocence of any codefendants of the declarant. A jury cannot "segregate evidence into separate intellectual boxes." . . . It cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A.³⁰

Apart from its analogy to *Jackson*, the Court found additional grounds to support its conclusion that its reliance on the limiting instruction ruling in *Delli Paoli* was erroneous. The *Bruton* majority wrote that three main reasons had been given to support the holdings in cases similar to *Delli Paoli*. The first, a somewhat dubious one, had been offered by Learned Hand. He had suggested that even though the

especially significant because Justice White was the author of both the *Jackson* majority opinion and the vigorous dissent in *Bruton*, see text accompanying notes 41-48 *supra*. Moreover, Justice Rehnquist placed heavy reliance on the *Bruton* dissent in his plurality opinion in *Parker v. Randolph*. See text accompanying notes 126-28 *infra*.

30. 63 Cal. 2d 518, 528-29, 47 Cal. Rptr. 353, 359-60, 407 P.2d 265, 271-72 (1965).

jury probably would consider the prejudicial confession if instructions were given, admitting the confession was proper because it likely "further, rather than impedes, the search for truth. . . ." ³¹ Observers of the Warren Court in the late 1960's would have expected a frontal attack on such a notion; after all, that argument can be raised to criticize many of the evidentiary rulings required by application of the exclusionary rule. Instead, the *Bruton* majority dealt rather softly with that argument. The Court merely stated that the prosecution could have introduced evidence other than the confession of Bruton's co-defendant and that "[w]here viable alternatives do exist, it is deceptive to rely on the pursuit of truth to defend a clearly harmful practice."³²

A second argument commonly offered in support of limiting instructions to allow the admission into evidence of co-defendant confessions is the general policy of preserving the benefits of joint defendant trials. The inadmissibility of certain confessions in joint defendant proceedings could induce prosecutors to bring separate actions, thereby sacrificing the benefits of a joint trial to ensure the admissibility of a confession against the declarant.³³ This argument, however, does not justify the Court's holding in *Delli Paoli*. Presumably, alternative prosecutorial techniques are avoidable in most multi-defendant cases. Thus, precluding the admission of co-defendant confessions would not necessarily have a significant impact on the number of joint defendant trials.³⁴ Moreover, and more to the constitutional point, Justice Brennan noted that the Court's interest in efficient joint proceedings must yield to a defendant's confrontation rights. In that respect, he quoted from *People v. Fisher*, a leading opinion of the New York Court of Appeals:

We still adhere to the rule that an accused is entitled to confrontation of the witnesses against him and the right to cross-examine them. . . . We destroy the age-old rule which in the past has been regarded as a fundamental principle of our jurisprudence by a legalistic formula, required of the judge, that the jury may not consider any admissions against any party who did not join in them. We secure greater speed, economy and convenience in the administration of the law at the price of fundamental principles of constitutional liberty. That price is too high.³⁵

Without question, the Court articulated the most cogent defense of the limiting instruction rule in *Delli Paoli*. In that opinion the Justices expressed their deeply rooted faith in the jury system: "Unless we pro-

31. *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932).

32. 391 U.S. at 134. The major alternative referred to by Justice Brennan has become known as redaction. "Some courts have required deletion of references of codefendants where practicable." *Id.* n.10. After *Bruton*, the redaction process was pursued with a vengeance. See text accompanying notes 83-104 *infra*.

33. *Bruton v. Parker*, 391 U.S. 123, 134 (1968).

34. See note 32 *supra*.

35. 249 N.Y. 419, 432, 164 N.E. 336, 341 (1928), quoted at 391 U.S. at 134-35.

ceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense."³⁶ That notion is generally correct; if it were not valid in the bulk of criminal cases, the jury system would deteriorate rapidly. Nevertheless, in some cases such unshakable faith in the jury system is unwarranted and improper. *Jackson* was such a case, and, as the Court observed, *Bruton* was another: "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."³⁷ As Justice Brennan forcefully argued, the Confrontation Clause requires a per se rule excluding co-defendant confessions because the defense has no opportunity to cross-examine the declarant and also because limiting instructions are ineffective.³⁸

Justice Stewart joined the opinion of the *Bruton* majority but also wrote a concurring opinion. His short concurrence is significant in light of the Court's subsequent split on the co-defendant confession issue in *Parker v. Randolph*.³⁹ First, Justice Stewart stated that even though he disagreed with *Jackson* he felt that precedent required the Court to overrule *Delli Paoli*. Second, he concluded that the Confrontation Clause compelled the overruling of *Delli Paoli* quite apart from *Jackson*, stating:

I think it clear that the underlying rationale of the Sixth Amendment's Confrontation Clause precludes reliance upon cautionary instructions when the highly damaging out-of-court statement of a codefendant, who is not subject to cross-examination, is deliberately placed before the jury at a joint trial. 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

36. 352 U.S. at 242.

37. 391 U.S. at 135.

38. Justice Brennan argued that the facts of *Bruton* required the application of a per se rule: Such a context is present here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but the credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame unto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination.

391 U.S. at 135-36.

This distrust of accomplice testimony continues to be conveyed to juries in the standard criminal instructions. See, e.g., District of Columbia Criminal Jury Instructions [Young Lawyer Section, Bar Association of the District of Columbia] §§ 2.22, 2.225 (3d ed. 1978); E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 17.06 (3d ed. 1977).

39. In *Parker* it was Justice Stewart's vote which made Justice Rehnquist's opinion, rather than Justice Brennan's, the plurality opinion. See text accompanying notes 110-50 *infra*.

minimal weight it logically deserves, *whatever* instructions the trial judge might give. It is for this very reason that an out-of-court accusation is universally conceded to be constitutionally *inadmissible* against the accused, rather than admissible for the little it may be worth. Even if I did not consider *Jackson v. Denno* controlling, therefore, I would still agree that *Delli Paoli* must be overruled.⁴⁰

Only Justice White filed a dissenting opinion, which Justice Harlan joined.⁴¹ Although Justice White responded to most of the substantive points raised by Justice Brennan, the primary focus of his dissent was his conclusion that "juries can reasonably be relied upon to disregard the codefendant's references to the defendant."⁴² As a consequence, he simply saw no Confrontation Clause issue.

Another major source of disagreement between the majority and the dissent was the precedential value of *Jackson v. Denno* for the case at hand. Justice White, the author of *Jackson*, believed that the co-defendant confession issue presented in *Bruton* was distinguishable from *Jackson* for two reasons. In Justice White's view, of primary importance was the exceedingly probative and prejudicial impact of the defendant's own confession in *Jackson*.⁴³ Also, according to Justice White, coerced or involuntary confessions are generally inadmissible because they are unreliable. Even if the coerced confession were reliable, however, due process considerations would compel a judicial ruling of inadmissibility.⁴⁴ In defense of the *Jackson* requirement that the defendant's confession be found voluntary before it is presented to the jury, Justice White pointed to practical considerations: "[J]uries would have great difficulty in understanding that policy, in putting the confession aside, and in finding the confession involuntary if the consequence was that it could not be used in considering a defendant's guilt or innocence."⁴⁵

Justice White could easily distinguish the *Bruton* issue of co-defendant confessions from the *Jackson* question of voluntariness. The confession of the co-defendant is hearsay, it is not reliable, and it is treated "with special suspicion."⁴⁶ Justice White believed that a jury can understand these reasons for ignoring the co-defendant's confession in its determination of the defendant's guilt. As a result, Justice White concluded, an instruction to disregard a co-defendant's confession is effective.⁴⁷

40. 391 U.S. at 137-38 (citations omitted).

41. Justice Marshall did not participate in *Bruton*.

42. 391 U.S. 138 n.8 (White, J., dissenting).

43. Justice White expressed doubts about the effectiveness of limiting instructions in this context: "Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so." *Id.* at 140.

44. *Id.*

45. *Id.* at 141.

46. *Id.*

47. Justice White argued:

Considerable doubt may be cast on Justice White's conclusion that a jury views a co-defendant's confession as inherently more unreliable than a coerced confession.⁴⁸ For our purposes, though, his two other points are even more significant. First, with regard to the damage or prejudicial impact of a defendant's own confession, it is undoubtedly the most probative and prejudicial item of evidence which can be offered against the defendant. This by itself would explain the holding in *Jackson*. Of potentially equal probative and prejudicial value, though, is the confession of a co-defendant who in many cases has known the defendant for several years. While a confession is certainly highly probative on the question of the defendant's guilt, it will also have a profound impact on the jury's determination of the culpability of co-defendants named in the statement. One defendant has admitted his criminal activity and has explicitly named the other defendant as a criminal, thus severely prejudicing the co-defendant's case.

Justice White also argued that a jury could more easily disregard an unreliable statement than a reliable one. This conclusion is somewhat problematical. Lawyers and judges find a co-defendant's confession unreliable because it is hearsay and generally inaccurate. Yet, consider the following scenario. The prosecutor meticulously establishes a foundation for the confession, describing in great detail the long and close relationship between the defendants. The confession describes, also in great detail, the participation of the confessing defendant and also the more culpable participation of the non-confessing defendant. For the jury to ignore that confession in its determination of the guilt of the non-confessing defendants would be at best an extremely difficult task. Notwithstanding the legal profession's conclusion that the statement is unreliable as it relates to the non-confessing defendant, jurors may conclude that it is very reliable, particularly if some of the details are corroborated. In short, the ability of the jurors to disregard such a statement must certainly be suspect.

At this point it is helpful to reconsider the central difference of opinion in *Bruton*, as debated by Justices Brennan and White. The two Justices had disagreed about the prejudicial impact of co-defendants'

[T]he codefendants' admissions cannot enter into the determination of the defendant's guilt or innocence because they are unreliable. This the jury can be told and can understand. . . . Because I have no doubt that serious minded and responsible men are able to shut their minds to unreliable information when exercising their judgment, I reject the assumption of the majority that giving instructions to a jury to disregard a codefendant's confession is an empty gesture.

Id. at 142-43 (White, J., dissenting).

48. Justice White's emphasis on the unreliability of the co-defendant's confession is somewhat odd in light of the plurality opinion in *Parker v. Randolph*, which Justice White joined. In *Parker*, see text accompanying notes 110-50 *infra*, the impact of the co-defendant's statement was downplayed in light of its corroboration by the defendant's own statement. But, if a co-defendant's statement is inherently unreliable, it is not clear why the corroboration by the defendant's own statement should be so telling particularly when it may not agree on all material points. See text accompanying notes 140-50 *infra*.

statements and the ability of juries to limit their use of such statements. Justice White lost the argument; the *Bruton* majority held that a non-testifying co-defendant's statements were inadmissible because of their extremely prejudicial nature and also because a jury might violate the sixth amendment by using the confession as evidence against the non-confessing defendants. As the subsequent discussion of the limited impact of *Bruton* will reveal, the apparently broad language of the majority has been severely limited by the use of harmless error, redaction, and, ultimately, interlocking confessions.

III. THE RULE WEAKENS

A. Harmless Error

Relatively few trial errors are reversible per se.⁴⁹ A *Bruton* error is not one of them. Indeed, just one year after the case was decided, the "Court rejected the notion that erroneous admission at a joint trial of evidence such as that introduced in *Bruton* automatically requires reversal of an otherwise valid conviction."⁵⁰ As the Court stated: "In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission so insignificant by comparison, that it is clear beyond a reasonable doubt that introduction of the admission at the trial was harmless error."⁵¹

The difficulty in this area is not so much that a harmless constitutional error rule exists; the cause for concern is the rather cavalier way in which courts apply the rule. Based on *Bruton's* strong condemnation of the use of co-defendant confessions, a reasonable prediction would have been that the Supreme Court would apply the rule strictly. Such a prediction would have been wrong, as illustrated in the first of the Supreme Court harmless error cases in this area. In *Harrington v. California*,⁵² the government introduced confessions by three of the four defendants at a joint trial. Only one of the confessors took the stand. The fourth defendant, Harrington, did not confess but made statements that placed him at the scene of the crime.⁵³ The Ninth Circuit later summarized the Supreme Court's holding in *Harrington*: "The Court held that the purported *Bruton* violation was harmless beyond a reasonable doubt because of the overwhelming evidence of Harrington's guilt and the relatively insignificant impact of the codefendants'

49. The two most prominent are the coerced confession and the failure to appoint counsel at trial. For good and succinct discussions of the per se rule, see J. ISRAEL & W. LAFAYE, CRIMINAL PROCEDURE IN A NUTSHELL: CONSTITUTIONAL LIMITATIONS 315-17 (2d ed. 1975). See also *Harriman v. Estelle*, 597 F.2d 927, 929 n.5 (5th Cir. 1979).

50. Justice Rehnquist made this observation in his plurality opinion in *Parker v. Randolph*, — U.S. —, —, 99 S. Ct. 2132, 2138 (1979). Justice Rehnquist was referring to *Harrington v. California*, 395 U.S. 250 (1969).

51. *Parker v. Randolph*, — U.S. —, —, 99 S. Ct. 2132, 2138 (1979).

52. 395 U.S. 250 (1969).

53. *Id.* at 252.

largely cumulative statements."⁵⁴

On its face, the Supreme Court's analysis of the harmless error problem in *Harrington* was sound. If the other evidence was overwhelming and if the statements were cumulative, they would not have significantly prejudiced Harrington's case. Careful scrutiny of the facts, however, coupled with the arguments expressed by Justice Brennan in dissent, reveals substantial flaws in the majority's assertion of harmless error. Four defendants were tried in the case. Harrington was white, the other three were black. Each of the three confessions refers to the fourth person as either "the white boy" or "this white guy."⁵⁵ Although the testimony of two victims placed Harrington at the scene of the crime, their earlier testimony that all four of the robbers were black impugned their credibility.⁵⁶ Moreover, the confession of Rhone, the one defendant who did take the stand, was somewhat suspect because it was self-serving. Rhone had a gun on his person at the time of his arrest but testified that Harrington had given him the gun after the robbery. In addition, Rhone stated at trial that Harrington had carried the gun during the theft.⁵⁷ Thus, the only untainted evidence against Harrington consisted of a self-serving confession and statements made by victims who had earlier misidentified the perpetrators of the crime. Harrington admitted being at the scene but did not concede that he had participated in the attempted theft.⁵⁸

In *Bruton* the Supreme Court had held that the use of co-defendant confessions is so dangerous that the Confrontation Clause precludes their admission. Yet, despite the absence of other probative evidence against Harrington, the same Court held that the Confrontation Clause violations of admitting two co-defendant confessions constituted harmless error. It seems inconceivable that members of the *Bruton* majority could find that these constitutional errors did not, beyond a reasonable doubt, contribute to Harrington's conviction.

The second major Supreme Court decision to address the issue of harmless error in the admissibility of co-defendant confessions, *Schneble v. Florida*,⁵⁹ raises the same troublesome question. Once again, at first blush, the majority made a compelling case in support of the harmless error conclusion. But, as in *Harrington*, a closer look at the facts must give pause. In *Schneble* the evidence showed that the defendant and his co-defendant were traveling through Florida when the victim was murdered. Initially the defendant stated to the police

54. *United States v. Vissars*, 596 F.2d 400, 403 (9th Cir. 1979).

55. 395 U.S. at 253.

56. *Id.*

57. *Id.* at 257 (Brennan, J., dissenting).

58. *Id.* at 256.

59. 405 U.S. 427 (1972). In *Brown v. United States*, 411 U.S. 223 (1973) the Court also dealt with the harmless error problem in the *Bruton* context. The discussion there, however, was a short one and with the fact situation involved the case has had limited precedential value.

that he was not present in the car when the murder took place, but he later admitted that he strangled the victim and that his co-defendant then shot her. Considerable question was raised as to whether his statements were voluntary.⁶⁰ The Court, however, limited its grant of certiorari to the *Bruton* issue, assuming the Florida ruling on voluntariness was proper. The *Bruton* issue arose when one of the police officers testified at trial to a statement made to him by the co-defendant. The co-defendant's statement implicated the defendant in the murder by placing him at the scene of the crime. The Court found that the admission of the statement of the non-testifying co-defendant was error, but that it was harmless. Primarily the Court found the error harmless beyond a reasonable doubt because of the petitioner's own minutely detailed confession which corroborated most of the major points in the co-defendant's statement.⁶¹

The real difficulty in the case results from the interplay between the voluntariness question and the *Bruton* issue. Because the case was tried prior to *Jackson v. Denno*⁶² the question of voluntariness went to the jury. The jury received a general voluntariness instruction to determine whether the confession was involuntary and therefore inadmissible.⁶³ Thus, according to the Supreme Court majority, the instruction ensured that the *Bruton* error was harmless. That is, the Court concluded that the jury must have found that the defendant's confession was voluntary, because the remaining evidence, including the co-defendant's statement, was insufficient to convict Schneble.⁶⁴ Therefore, the Court held that because the jury must have first concluded that Schneble's confession was voluntary and then relied on this evidence to convict him, any error in admitting the co-defendant's statement could not have affected the outcome of the trial.⁶⁵

If the Court correctly analyzed the manner in which the jury used the evidence, the error was undoubtedly harmless. With the defendant's own devastating statement properly in evidence the co-defendant's less probative remarks could not have influenced the jury. The conclusion is correct, *if* the jury found that Schneble spoke voluntarily. Justice Marshall, in dissent, cast doubt on the validity of that assumption:

60. The defendant confessed "after he was subjected to a series of bizarre acts by the police designed to frighten him into making incriminating statements. . . ." 405 U.S. at 434 (Marshall, J., dissenting). The bizarre acts included taking the defendant out for a ride in a car and giving him the clear "impression that in the car following were some of [the co-defendant's] torpedoes who intended to put him out of business. The officers had the officer in the second car shoot off firecrackers to make Schneble believe they were being fired upon." *Schneble v. State*, 201 So. 2d 881, 884 (Fla. 1967).

61. 405 U.S. at 431.

62. 378 U.S. 368. See text accompanying notes 26-29 *supra*.

63. 405 U.S. at 431.

64. The co-defendant's statement did not assert that the defendant committed the murder, it simply placed him at the scene of the crime. *Id.*

65. 405 U.S. at 431-32.

[W]e cannot say with even a minimal degree of certainty that the jury did not find the statements involuntary and that it did not choose to disregard them and almost all of the other evidence in the case which was derived from those statements. We also cannot be certain that the jury did not base its verdict primarily on the statement of the codefendant.⁶⁶

Alternatively, the jury may have found the statement voluntary but nevertheless relied heavily on the co-defendant's statement to corroborate. Finally, it is also possible that the jury found the statement involuntary and then relied heavily on the co-defendant's statement.⁶⁷ The fact is that any of these situations was possible, particularly in view of the general instructions given to the jury. No one can say, with any degree of certainty, what the jury did or did not do when it retired to deliberate. We know what evidence it should have relied on, but not what testimony it actually considered. As Justice Marshall pointed out, it is "impossible to perceive how the Court can conclude that the violation of *Bruton* was harmless error."⁶⁸ Perhaps Justice Marshall overstated the intent of the *Schneble* majority when he said that the Court may have wanted to "emasculate *Bruton*."⁶⁹ As an overstatement, however, it does not miss the mark by much. The facts in the case raise a very real possibility that a jury used a confession in precisely the manner outlawed in *Bruton*. To find, *beyond a reasonable doubt*, that the error did not affect the outcome of the trial clearly indicates the very limited importance the *Schneble* majority attached to *Bruton*.

In light of decisions such as *Schneble* and *Harrington*, the lower courts quite predictably followed the Supreme Court's lead and have broadly applied the harmless error rule in *Bruton* cases during the past decade. Although some courts do focus careful attention on the reasonable doubt standard,⁷⁰ the broad sweep of the Supreme Court decisions has led many courts to find harmless errors in very questionable situations. *United States v. Vissars*⁷¹ is a recent illustration of this point. *Vissars* involved a variant of the usual situation because the defendant raised an entrapment defense. The government accused the two defendants of participating in a scheme to steal scrap metal from a naval shipyard. One defendant, Keenberg, managed a private scrap metal company; Vissars, the other defendant, was his truck driver. Vissars's principal defense was that Keenberg was responsible for

66. *Id.* at 436 (Marshall, J., dissenting).

67. This would mean that the jury convicted on insufficient evidence. As the majority said: "[T]he jurors could on no rational hypothesis have found *Schneble* guilty without reliance on his confession." *Id.* at 431. See also *id.* at 436-37 (Marshall, J., dissenting).

68. *Id.* at 437.

69. *Id.*

70. For a good discussion of the problem, see *United States v. Gonzalez*, 555 F.2d 308 (2d Cir. 1977).

71. 596 F.2d 400 (9th Cir. 1979).

whatever wrongdoing occurred.⁷² This point acquires particular importance in light of the trial problem that developed. At trial, the government had a solid case against both defendants because—unbeknownst to them—they had dealt with an undercover agent of the Naval Investigative Service at the navy yard.⁷³

The agent testified against both parties and explained how the theft took place. The *Bruton* problem which arose involved a statement made by Vissars to the F.B.I. upon arrest. This statement both implicated Keenberg and cast doubt on his story that he had not previously committed thefts. Vissars did not testify at trial, and the government sought to introduce his statement through the testimony of the F.B.I. agent who had taken the statement. After a hearing on the Confrontation Clause question, the trial judge admitted the statement with a stipulation that the prosecution delete all references to Keenberg. All references were deleted on direct examination. On cross-examination, however, Vissars's lawyer elicited testimony in which the agent repeated incriminating statements concerning Keenberg.⁷⁴

In its review of the trial court proceedings, the Ninth Circuit assumed *arguendo* that the agent's testimony violated *Bruton*.⁷⁵ Nevertheless, in the following short discussion, the court dismissed the error as harmless:

Our reading of the record indicates that the alleged *Bruton* violation here was harmless beyond a reasonable doubt under *Harrington* and *Schneble*. Keenberg testified in his own behalf and admitted the two thefts of the scrap metal, leaving as the only issue whether he had been entrapped by Baker. Keenberg reiterated all the evidence concerning his participation in the crime he now contends violated his rights when elicited from Larson. Both Keenberg's attorney and the district judge acknowledged that Keenberg had admitted the thefts. Thus, the testimony of agent Larson was cumulative and provided the jury with no information they would not otherwise have heard. Putting aside Larson's testimony, Keenberg's guilt was abundantly established. Based on our reading of the record, we conclude that Larson's testimony had an insignificant impact, if any, upon the minds of the jurors. In short, any violation of *Bruton* was harmless beyond a reasonable doubt.⁷⁶

72. Brief for Appellant Keenberg at 16, *United States v. Vissars*, 569 F.2d 400 (9th Cir. 1979) [hereinafter cited as Brief].

73. The shipyard had been under surveillance due to thefts from the yard. 596 F.2d at 401-02.

74. Arguably this line of questioning was beyond the scope of the direct examination, but no one objected. *Id.* at 403. Still it is hard to imagine that the questions from Vissars's lawyer could have been restricted when Vissars's defense was to pin the crime on Keenberg.

75. *Id.* Why it only assumed the error *arguendo* is a mystery. After all, the government itself seemingly conceded the error at trial when it proposed that references to Keenberg be deleted.

76. *Id.* at 404 (footnotes omitted).

Although this analysis is not terribly objectionable because Keenberg did "admit" the thefts, the harmless error conclusion is incorrect. As Judge Hufstedler pointed out in dissent the "case against Keenberg was strong, but I do not believe that it was overwhelming."⁷⁷ More important, this was not a standard *Bruton* case.⁷⁸ Here the defense raised an entrapment claim, a realistic argument in light of the broad testimony of the undercover agent.⁷⁹ Once the trial court admitted this damaging statement, Keenberg was forced to take the stand because the statement sharply challenged his credibility and raised the real possibility that he *did* have a preexisting intent to commit the crime.⁸⁰

Moreover, the harmless error argument becomes more problematical when placed in the particular context of *Vissars*. Not only was the entrapment issue a serious problem, but here the co-defendant, Vissars, was attempting to shift the blame onto his apparent boss. Co-defendant's counsel managed to place before the jury Vissars's statements to the F.B.I. incriminating Keenberg. In this situation, it seems disingenuous to conclude beyond a reasonable doubt that this evidence did not contribute to the jury verdict. Unfortunately, the Ninth Circuit relied on the broad language of *Harrington* and *Schneble* to reach precisely that conclusion. But if *Bruton* is to be taken seriously, the facts of *Vissars* suggest a strong possibility of prejudicial error. One defendant was confronted with a powerful and incriminating statement by his co-defendant. This confrontation, introduced with no opportunity to cross-examine the declarant, violates the sixth amendment and may

77. *Id.* (Hufstedler, J., dissenting).

78. Judge Hufstedler argued:

I cannot conscientiously apply the constitutional error standard as the majority does. In reaching this conclusion I am influenced not only by the weight of the evidence as a whole, but also by the impact on the whole course of the trial of the improper admission of the testimony in violation of the *Bruton* rule. After the testimony was admitted, Keenberg had no practicable course open to him other than taking the stand and attempting to establish entrapment. Accordingly, I would reverse Keenberg's conviction for *Bruton* error.

79. See Brief, *supra* note 72, at 7-9.

80. The court noted:

In his brief before this court, Keenberg refers to the following statements and the inferences he claims the jury could draw:

That [Vissars] had been at Mare Island on more than the two occasions around which this case revolves . . . from which the jury might infer his employer's involvement in other, uncharged illegal acts particularly in light of the testimony from the chief government witness about the history of corruption at that facility;

That he "had come up with . . . Marc Keenberg";

That Keenberg had told him of the sand in the truck "about one week ago" . . .—the exact date and place of this never being specified . . . ;

That Keenberg directed Vissars where and when to dump the sand . . . , obscuring the fact that Baker had just instructed Keenberg about this;

That "an unidentified individual" who worked at Mare Island was let out of the truck before the dumping occurred on both occasions . . . ;

That Vissars surmised the purpose of the sand was to increase tare weight to conceal scrap . . . but "he had not questioned Keenberg about this as his attitude was if the boss told him to do something, he would do it" . . . ;

That "he realized what was going on was probably illegal". . . .

596 F.2d at 403.

have seriously prejudiced the defendant's case. Yet *Vissars* is hardly unique for its treatment of the harmless error argument. All too often harmless error has become the most attractive course of conduct for federal courts in the wake of the Supreme Court's own post-*Bruton* retreat.⁸¹

This discussion of the Supreme Court cases and lower court cases finding harmless error in *Bruton* violations is not intended to suggest that defendants in these cases unquestionably suffered prejudicial error. Yet, if *Bruton* is as important as the majority there thought and said, and if the standard for harmless error requires a determination by the court that the error did not affect the outcome beyond a reasonable doubt, one must seriously question both the current scope and viability of *Bruton*. A review of the harmless error cases in this area indicates that *Bruton* has been seriously diluted.⁸²

B. Redaction

Justice Brennan's *Bruton* opinion suggested that the courts could avoid Confrontation Clause difficulties and maintain effective prosecution in joint defendant trials by requiring "deletion of references to co-defendants where practicable."⁸³ With this process of deletion, generally known as redaction, the prosecution can use the confession against the declarant without implicating the other defendants, thereby reducing the risk of prejudice to their cases. Although even an effective redaction process might not eliminate all the problems,⁸⁴ Justice White in *Bruton* offered his view of the required components of a successful redaction. Because Justice White was dissenting, these standards apparently define the minimum the prosecution would have to satisfy:

Effective deletion will probably require not only omission of all direct and indirect inculpations of codefendants but also of 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.⁸⁵

Justice White's language is important because the *Bruton* majority did not discuss the redaction process; nor has the Court discussed it in

81. The Ninth Circuit experience is typical. See, e.g., *United States v. Steed*, 465 F.2d 1310, 1318 (9th Cir.), *cert. denied*, 409 U.S. 1078 (1972); *Nelson v. United States*, 425 F.2d 188 (9th Cir.), *cert. denied*, 399 U.S. 933 (1970); *Clark v. United States*, 412 F.2d 491 (9th Cir.), *cert. denied*, 396 U.S. 919 (1969).

82. This problem became even more aggravated when the Court ultimately considered *Parker v. Randolph*, — U.S. —, 99 S. Ct. 2132 (1979), in which the parties raised serious harmless error questions. The Court, however, went beyond these questions and found no error at all. See text accompanying notes 110-50 *infra*.

83. 391 U.S. at 134 n.10.

84. Justice White in *Bruton* was one who raised the question: "I would hope, but *am not sure* that by using these [redaction] procedures the Federal Courts would escape reversal under today's ruling." *Id.* at 144 (White, J., dissenting) (emphasis added).

85. *Id.* at 143 (White, J., dissenting).

the past ten years. Justice White's view of a successful deletion or redaction was undoubtedly correct; a redaction should only be viable if the confession makes no direct or indirect reference to the co-defendants. Otherwise, the process would simply require the jurors to interpret the indirect references; once they completed the puzzle, the confession would be as prejudicial as it was before redaction. If the courts had uniformly adhered to this definition of the redaction process, the use of confessions at joint trials would not have created serious problems. Unfortunately, many courts do not heed Justice White's advice, suggesting the routine nature of widespread violations of both the spirit and letter of *Bruton*.⁸⁶

A prosecutor intent on offering a co-defendant's statement generally does not use a crude or thinly disguised device to identify the defendant whose name has been excised. In some cases, it is true, the prosecution simply uses a "blank" instead of a name,⁸⁷ allowing the jury very quickly to "fill in the blank." Normally, though, the technique is somewhat more subtle, as in the standard case where references to the defendant are deleted but other evidence identifies the missing name quite clearly.

*United States v. Dady*⁸⁸ is a well-known example of the subtle redaction technique. In that case, three defendants were convicted of conspiracy to rob a bank. Properly admitted evidence⁸⁹ showed that the declarant and his two co-defendants had met several times to discuss the possibility of robbing the bank in question. An F.B.I. agent who testified at trial related the declarant's confession to the jury. The judge required the deletion of any reference to defendants other than the declarant. Notwithstanding the deleted references, the co-defendants appealed their conviction claiming a Confrontation Clause violation.

The appellants contended that the redaction was ineffective because other evidence established that they had accompanied the declarant to the bank. In addition, they argued that because the declarant admitted going to the bank with intent to commit robbery, the jury had to infer that the other defendants accompanying him had the same in-

86. Many courts do impose careful limitations on the process to ensure that the non-confessing defendants are not identified. *See, e.g.*, *Commonwealth v. Johnson*, 474 Pa. 409, 414, 378 A.2d 859, 861 (1977) ("Where, however, as in this case the confession does not contain a trace or a hint of participation in the crime by appellant redaction is permissible."); *United States v. Danzey*, 594 F.2d 905, 918 (2d Cir. 1979) ("The use of the word 'Blank' made it 'certain that the jury knew that the names were being redacted of the individuals in question.'"); *Hodges v. Rose*, 570 F.2d 643, 647 (6th Cir. 1978); *United States v. Cleveland*, 590 F.2d 24, 28 (1st Cir. 1978). Unfortunately, as can be seen below, such cases are all too often the exception to the rule rather than the law widely followed.

87. *See, e.g.*, *United States v. Danzey*, 594 F.2d 905 (2d Cir. 1979).

88. 536 F.2d 675 (6th Cir. 1976).

89. This evidence consisted of testimony of two early participants in the conspiracy. *Id.* at 676.

tent.⁹⁰ The appellate court quickly disposed of this dispute. For the Ninth Circuit, the issue was whether the jury could have convicted the co-defendants based on other evidence introduced by the prosecution. The court emphasized the probative value of this other evidence and did not focus on whether the jury in fact used the confession against the co-defendants:

If an inference arose that [the co-defendants] intended to rob the bank, it arose from the fact that independent evidence showed that they had accompanied Harrison to the bank, had discussed robbing the bank, and had discussed obtaining guns for that purpose. None of this evidence came from the confession, but came directly from the [other] testimony. . . .⁹¹

The court's concise analysis avoided the main thrust and purpose of *Bruton*. Justice Brennan, the author of *Bruton*, was disturbed by the prejudicial value of confessions introduced against co-defendants who do not have an opportunity to cross-examine the declarant. The confession admitted at trial in *Dady* had deleted all specific references to the co-defendants; nevertheless, the confession was offered in the context of other testimony placing the defendants with the confessing party at the time of the crime. Thus, the jury inevitably concluded that when the confessing party admitted to having the intent to commit robbery, he meant that all defendants had the same intent. In essence, the jurors used the declarant's confession against the defendants after they interpreted it by looking to lawfully admitted evidence. If the use of a confession against a defendant violates the Confrontation Clause when the declarant cannot be cross-examined, it is difficult to understand why the procedure in *Dady* was not contrary to the sixth amendment; the declarant's confession *was* used to incriminate the defendants. Nevertheless, the court did not pause in rejecting the constitutional argument.

Consistent with the *Dady* court's conclusion was the Third Circuit's recent opinion in *United States v. Belle*.⁹² The court faced a situation in which properly admitted evidence established that defendant Belle had met with two of the other defendants. One of the co-defendants confessed and stated that he was present at the site of the alleged meeting. This statement, however, did not refer to Belle. Nevertheless, other evidence linked Belle to the same location at the same time. Belle contended that the introduction of the confession violated *Bruton*:

In essence, Belle is asserting that whenever a codefendant incriminates himself in a statement which by its expressed terms does not mention or refer to a joint defendant the *Bruton* rule will preclude its admission into evidence in a joint trial if there is any other evidence which links the complaining defendant to the substance of

90. *Id.* at 677.

91. *Id.* at 678.

92. 593 F.2d 487 (3d Cir. 1979).

the statement.⁹³

The Third Circuit summarily rejected this argument. Pointing out that a confession is admissible when the prosecution redacts the names of joint defendants, the court reasoned that a confession which made no reference to other parties is also admissible.⁹⁴ Admitting the possibility that the confession had inculpated Belle, the court stated that it could have done so "only insofar as other evidence may connect Belle to [the declarant]."⁹⁵ Belle was not prejudiced the court concluded, because he was incriminated "only to the extent that the jury made inferences based on other clearly admissible evidence which may tend to connect Belle to [the declarants]."⁹⁶

Again, it seems that the court lost sight of the purpose of *Bruton* to prohibit the use of confessions which prejudice non-confessing defendants. In fairness to the *Belle* majority, the court faced an extended application of *Bruton* because the confession absolutely did not implicate the co-defendants except when considered in conjunction with lawfully admitted evidence. That problem, however, was of little concern to the court. Instead, the majority focused its attention on the government's need to prosecute joint trials:

To require what Belle seeks here would lead to the necessity for the Government to expose its entire case on a motion for severance. Indeed, whether or not a motion for severance is ever made, such a result would require the trial judge to examine under a microscope all the prosecution's evidence in order to determine whether any extra-judicial statement made by a nontestifying co-defendant could be admitted as to that defendant, or whether it would have to be excluded because of the existence of independent "linkage" evidence which might connect another defendant to the statement. This result would necessarily lead to either a complete "mini-trial" before the judge, or to the practical prohibition of joint trials.⁹⁷

The dissenting judge in *Belle* was not persuaded by the supposed impact of Belle's argument on joint trials. He focused attention on *Pointer v. Texas*,⁹⁸ where the Supreme Court had first applied the Confrontation Clause to the states.⁹⁹ Justice Black, writing for a unani-

93. *Id.* at 493.

94. *Id.* at 493-94. That may well be true for some confessions, where the confessions themselves have little to do with the other defendants. It cannot be true, however, where the entire basis of liability is association with other defendants who just happen to have their names deleted from the confession. The harm, in the latter case, is severe and directly related to the use of a confession, a practice which *Bruton* prohibited.

95. The court continued: "In such a case, we do not believe that the *statement qua statement* can be said to be 'powerfully incriminating' as to Belle and thus inadmissible under *Bruton*." *Id.* at 494.

96. *Id.* at 495.

97. *Id.* at 496.

98. 380 U.S. 400 (1965).

99. *Bruton* was first applied to the states in *Roberts v. Russell*, 392 U.S. 293 (1969).

mous Court, had there emphasized that the Confrontation Clause was vital to our system of criminal justice, protecting "fundamental" values, essential to due process and separate from the more instrumental concern for truth gathering.¹⁰⁰ This, the dissent in *Belle* wrote, was the essential linchpin of *Bruton*. Because the defendant's statements could prove extremely damaging to the co-defendant, and because the defendant had no opportunity to confront the declarant, introduction of the statement into evidence violates sixth amendment values. Applying this analysis, the *Belle* dissent noted that the defendant was in fact damaged by the declarant's statement; because the co-defendant could not cross-examine him, *Bruton* was violated. Unhappily, the majority in *Belle* never responded to this argument. Indeed, to cite the words of the dissent, "[O]ther than its arid exegesis of *Bruton* the majority has adduced no policy, principle, or purpose served by its narrow construction of Justice Brennan's language."¹⁰¹

Virtually any reading of *Bruton* supports the conclusion that the defendant's sixth amendment rights were violated in *Belle*. Even Justice White's dissent in *Bruton* had recognized limitations on admitting redacted confessions. And as the dissent in *Belle* persuasively argued,¹⁰² so-called "linkage testimony"¹⁰³ makes otherwise valid confessions unconstitutional in cases like *Belle*, even under Justice White's view of *Bruton*.

The most disheartening recent development in this area, however, has been the tendency of courts, such as the Third Circuit in *Belle*, to focus on the practical impact of constructions of *Bruton*. An increasing number of courts have begun to emphasize the potential harm to prosecutors from limiting the effect of redaction, while minimizing the dangers of infringing on joint defendants' constitutional rights. This threat to the prosecution, though, may be more apparent than real. It is not at all clear that a limited use of redactions would in fact eliminate joint trials or substantially decrease them. Even more important, if the two values at issue are maintenance of joint trials and violation of Confrontation Clause principles, surely the fundamental considerations of the sixth amendment must prevail. The dissent in *Belle* made this point well:

In an effort to defend its narrow construction of the Confrontation Clause on policy grounds, the majority argues that a broader rule covering linkage testimony would require the government "to expose its entire case on a motion for severance."

100. *Pointer v. Texas*, 380 U.S. 400 (1965).

101. 593 F.2d at 505 n.9 (Gibbons, J., dissenting). The dissent was vigorous in its criticism of the majority's position: "[T]he majority reads *Bruton* as if it were construing the terms of a carefully drafted contract. At no point does it offer a theory of that case or refer, even casually, to the general purposes of the Confrontation Clause." *Id.* at 501.

102. *United States v. Belle*, 593 F.2d 487, 505 n.10 (3d Cir. 1979).

103. *Id.* at 505.

This, the majority asserts, would result in "the practical prohibition of joint trials." I do not believe that applying *Bruton* to circumstantial evidence, as well as to direct accusations, entails such draconian consequences. At most, a broader rule would require trial courts to survey the codefendant statements which the government plans to introduce and order the production of those statements which are arguably substantial enough to supply meaningful linkage evidence. Trial judges are thoroughly familiar with such tasks, experienced as they are in the intricacies of complex discovery proceedings in modern litigation. I do not expect them to have any less facility with the responsibility that *Bruton* requires them to discharge. More critically, even if a less crabbed reading of *Bruton* does require fewer joint trials, this, at most, will produce some loss in the efficiency of the adjudicatory process. That small cost, however, will vindicate confrontation rights which Justice Black in *Pointer* termed "fundamental." The majority has sacrificed those fundamental rights on the altar of efficiency. The Constitution warrants better treatment.¹⁰⁴

C. Interlocking Confessions

The most intense battle for the extension, maintenance, or restriction of *Bruton* has arisen over the use of interlocking confessions. This confession problem arises when the defendant makes a statement which in some way implicates himself in the crime. The government then introduces the confession of a co-defendant which names the defendant and, at least in certain aspects, overlaps with or corroborates the defendant's own statement. The two statements are said to interlock. Defendants have strenuously objected to the admission of the co-defendant's statements in this situation, asserting that it violates *Bruton* because the declarant is unavailable for cross-examination, and that even with limiting instructions the confession will be used against the defendant.¹⁰⁵ The government, of course, typically counters this objection with the argument that the prejudice is created by defendant's own statement and that the co-defendant's statement is merely cumulative. The lower federal courts split on the issue.¹⁰⁶ Some held that *Bruton* applied in this context to make the co-defendant's statement inadmissible.¹⁰⁷ Others found *Bruton* inapplicable to interlocking confessions.¹⁰⁸

104. *Id.* at 511 n.25 (citations omitted).

105. There is no question that the co-defendant's statement is being *used* against the defendant, if he is in fact named in it. A properly redacted statement would avoid this problem. See text accompanying notes 83-104 *supra*.

106. The Court collected the cases in *Parker v. Randolph*, — U.S. —, n.4, 99 S. Ct. 2132, 2137 n.4 (1979).

107. *Hodges v. Rose*, 570 F.2d 643 (6th Cir. 1978); *United States v. DiGilio*, 538 F.2d 972 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). See also *Ignacio v. Guam*, 413 F.2d 513 (9th Cir. 1969), *cert. denied*, 397 U.S. 943 (1970).

108. *Mack v. Maggio*, 538 F.2d 1129 (5th Cir. 1976); *United States v. Spinks*, 470 F.2d 64 (7th Cir.), *cert. denied*, 409 U.S. 1011 (1972).

Still others avoided the central *Bruton* question and instead decided that the harmless error rule governed.¹⁰⁹

Quite apart from whether *Bruton* applies to interlocking confessions, many other questions have been raised in connection with these cases: what is an interlocking confession; how much of the defendant's own statement must be consistent with the co-defendant's statement; how significant is it if portions of the two statements are contradictory; would *Bruton* never apply if the defendant made a statement which was corroborated by the co-defendant. It was to answer these questions, as well as to settle the conflict between circuits over the basic question, that the Supreme Court granted certiorari in *Parker v. Randolph*.

IV. *PARKER V. RANDOLPH*

To quote the Sixth Circuit opinion, the facts of *Parker* involved "a sequence of events which have the flavor of the old West before the law ever crossed the Pecos. The difference is that here there are no heroes and here there was a trial."¹¹⁰ The saga unfolded when a gambler went to Memphis, Tennessee and began cheating Robert Wood at cards. Wood and his brother arranged to have the card game robbed by three persons, but before the robbery could take place the gambler was shot. The victim was dead when the three defendants entered the apartment. As to the culpability of the two brothers, the evidence was quite substantial; the problem in proof related to the three late arriving defendants, none of whom took the stand. The eyewitness could not identify any of them. The only significant testimony from an actual participant was that one of these three defendants other than Randolph had entered the room after the killing. This witness was unable to identify either of Randolph's companions.¹¹¹

The major evidence offered at trial against the three defendants was the confession of each, which had been given voluntarily to the Memphis police. Although the prosecution had eliminated the other defendants' names from each confession, a jury with access to all of the statements would not doubt which names had been deleted.¹¹² The three defendants were convicted under Tennessee's felony-murder law and received life sentences. The Tennessee Supreme Court affirmed, finding no *Bruton* violation because the trial court had instructed the

109. *Metropolis v. Turner*, 437 F.2d 207 (10th Cir. 1971); *United States v. Walton*, 538 F.2d 1348 (8th Cir.), *cert. denied*, 429 U.S. 1025 (1976). For discussion of the state cases in this area, see the Court's reference to the cases in *Parker*, — U.S. at —, 99 S. Ct. at 2137 n.4 (1979).

110. *Randolph v. Parker*, 575 F.2d 1178, 1179 (6th Cir. 1978), reversed, — U.S. —, 99 S. Ct. 2132 (1979). According to Justice Rehnquist: "The cast of characters playing out the scenes that led up to the final shooting could have come from the pen of Bret Harte." *Parker v. Randolph*, — U.S. —, —, 99 S. Ct. 2132, 2135 (1979).

111. 575 F.2d at 1180 n.2.

112. *Id.* at 1180.

jury that each confession could be used only against its declarant and because the confessions were "similar in material aspects."¹¹³ The Sixth Circuit affirmed the federal district court's grant of writs of habeas corpus, and ruled that *Bruton* had been violated. While expressly recognizing that its holding on the interlocking confessions theory was in conflict with that of other federal courts,¹¹⁴ the court found prejudicial error.¹¹⁵

In this posture, the case put the interlocking confessions issue squarely before the Supreme Court. Thus, interested members of the bar hoped that the Court would finally resolve this issue which had become increasingly burdensome for the lower courts. Unfortunately, with only eight Justices voting,¹¹⁶ the Court did not hand down a majority position on the *Bruton* issue. Three members of the Court (the Chief Justice, and Justices Stewart and White) joined the portion of the opinion of Mr. Justice Rehnquist (Part II) that discussed the application of *Bruton*. Justice Blackmun wrote a separate opinion in which he stated that he did not join in that part of the plurality's discussion. Justice Stevens, joined by Justices Brennan and Marshall, dissented.

The short plurality opinion by Justice Rehnquist is a disappointment. It is not a disappointment in the manner in which it states the law, for it does adopt a very clear position. In fact, Justice Blackmun characterized the *Parker* plurality opinion as "a per se rule to the effect that *Bruton* is inapplicable in an interlocking confession situation."¹¹⁷ Nor is the decision a disappointment for its failure to state a majority position on interlocking confessions;¹¹⁸ the plurality cannot be faulted for the Court's lack of accord. Rather, it is a great disappointment in its narrow view of *Bruton* and in its reliance on tired and outdated notions of the meaning of the Confrontation Clause and of the ability of jurors to follow instructions.

Much of the briefs, and the oral argument as well,¹¹⁹ was directed to the harmless error question. Justice Rehnquist made clear, however, that this was not to be the central issue for he preferred to "cast the issue in a slightly broader form than that posed by petitioner."¹²⁰ In the view of the plurality the dispositive fact was that the defendant had voluntarily confessed. With this confession the co-defendant's statement became far less material, for the defendant's confession is "probably the most probative and damaging evidence that can be admitted

113. — U.S. at —, 99 S. Ct. at 2136.

114. See text accompanying notes 107-09 *supra*.

115. For a discussion of the harmless error issue involved in the case, see text accompanying note 134 *infra*.

116. Justice Powell did not participate.

117. — U.S. at —, 99 S. Ct. at 2141 (Blackmun, J., concurring in part).

118. Justice Stevens makes this point bluntly by referring to the position of the plurality "if ever adopted by the Court. . . ." *Id.* at —, 99 S. Ct. at 2144 (Stevens, J., dissenting).

119. 25 CRIM. L. RPT. 4005 (1979).

120. — U.S. at —, 99 S. Ct. at 2139.

against him.”¹²¹ In what sounds suspiciously like a harmless error argument, the plurality stated that with the defendant’s own confession in evidence, “impeaching a codefendant’s confession on cross examination would likely yield small advantage to the defendant. . . .”¹²²

This conclusion by the plurality is both naive and wrong. In many cases such impeachment will be valuable when certain aspects of the two confessions are not wholly consistent.¹²³ Moreover, however small the advantage may appear to the Court,¹²⁴ the result here is identical to the situation condemned in *Bruton*: the co-defendant’s confession was being introduced into evidence against a defendant who had no opportunity to cross-examine the declarant.

Apparently recognizing the difficulty of defending this argument, Justice Rehnquist shifted ground and focused his attention on whether the co-defendant’s statement had been used against the defendant. If the jury did not use the statement, Justice Rehnquist explained, the defendant could hardly claim constitutional error. This argument, too, is a difficult one to make, for the defendant was named in the co-defendant’s statement.¹²⁵ Thus, the only way out of the dilemma is to say that the jury followed the trial judge’s limiting instructions to consider the co-defendant’s confession only against the co-defendant and not against the defendant. In fact, the plurality recognized that their opinion was predicated on this assumption:

A crucial assumption underlying that system [trial by jury] is that juries will follow the instructions given them by the trial judge. Were this not so, it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed.¹²⁶

If this language sounds strongly reminiscent of an earlier part of this article, the reader should review the remarkably similar language cited earlier from the *Delli Paoli* majority opinion¹²⁷ and from Justice White’s dissenting opinion in *Bruton*.¹²⁸ The problem with the use of such language, of course, is that the *Bruton* Court rejected precisely the argument made in those two opinions and concluded that in cases involving co-defendant’s confessions, juries either would not or could not follow the judge’s instruction to limit their consideration. Justice

121. *Id.*, quoting with approval Justice White’s dissent in *Bruton*, 391 U.S. 123 (1968).

122. — U.S. at —, 99 S. Ct. at 2139.

123. This point is developed strongly by Justice Stevens. *Id.* at —, 99 S. Ct. at 2143-48. See text accompanying notes 131-39 *infra*.

124. Reasonable people can differ on whether this advantage is great or not, but such an analysis is truly a harmless error consideration. It does not help when the question is, as a primary matter, whether the Confrontation Clause was violated.

125. The redaction used at trial had been unsuccessful. See text accompanying note 112 *supra*.

126. — U.S. at —, 99 S. Ct. at 2139.

127. See text accompanying notes 11-15 *supra*.

128. See text accompanying notes 43-48 *supra*.

Rehnquist attempted to avoid this difficulty by limiting the applicability of *Bruton* while conceding that the case is still good law. The case may be good law, but the *Parker* plurality took a significant step towards restricting *Bruton* to its own facts by concluding that: "[W]hen the defendant's own confession is properly before the jury, we believe the constitutional scales tip the other way."¹²⁹ The argument again appears to be a harmless error contention; the right to a fair trial has not been seriously impeded because the confession of the defendant was in evidence. Justice Rehnquist, however, went on:

The "rule"—indeed, the premise upon which the system of jury trials functions under the American judicial system—is that juries can be trusted to follow the trial court's instructions. *Bruton* was an exception to this rule, created because of the "devastating" consequences that failure of the jury to disregard a codefendant's inculpatory confession could have to a nonconfessing defendant's case. We think it entirely reasonable to apply the general rule, and not the *Bruton* exception, when the defendant's case has already been devastated by his own extra-judicial confession of guilt.¹³⁰

The plurality opinion creates a paradox. It may not be very prejudicial to have the co-defendant's statement in evidence when the defendant's own statement is before the jury. The *Bruton* majority, however, asserted that jurors typically will not disregard a prejudicial co-defendant confession; it is difficult to understand how they will disregard it when the defendant's own statement is also before them. Either limiting instructions work or they do not work. Nor is Justice Rehnquist's reference to the "devastating" impact of the evidence in *Bruton* relevant to the Confrontation Clause issue; rather, that fact related to the harmless error inquiry in that case. The *Bruton* error may not have affected the *Parker* trial; nevertheless an error did occur, because the prosecution used the statement of the co-defendant against the defendant who had no opportunity for cross-examination. This statement bears repeating for the plurality repeatedly misapplied the harmless error analysis to sixth amendment questions. Nevertheless, the plurality stood by its analysis, concluding "that admission of interlocking confessions with proper limiting instructions conforms to the requirements of the Sixth and Fourteenth Amendments to the United States Constitution."¹³¹

The plurality opinion is wrong, but it is not yet the law. Neither Justice Blackmun in his concurrence nor the three dissenting justices agree that *Bruton* does not apply to interlocking confessions. Justice Blackmun preferred to deal with *Parker* by finding that if *Bruton* error had occurred, it was harmless.¹³² The main issue in *Parker* was the

129. — U.S. at —, 99 S. Ct. at 2140.

130. *Id.* n.7.

131. *Id.* at —, 99 S. Ct. at 2140.

132. *Id.* at —, 99 S. Ct. at 2143.

identification of the defendants at the scene of the crime. Because each of their own confessions placed them at the scene of the crime, and because one participant placed at least one of the defendants there, Justice Blackmun had little difficulty finding that the co-defendants' confessions did not contribute to the conviction.¹³³

As Judge Edwards had argued persuasively in the court of appeals below, the co-defendant confessions were important to the prosecution's case because the three defendants did not take part in the act of killing the victim.¹³⁴ In fact, one could also argue that the lower court's conclusion of prejudicial error should have received far more deference.¹³⁵ Nevertheless, Justice Blackmun's harmless error conclusion is a reasonable one under the facts in *Parker*, because "[e]ach confession largely overlapped with and was cumulative to the others."¹³⁶

In terms of the major Confrontation Clause issue present in *Parker*, however, Justice Blackmun's discussion of the plurality's view of *Bruton* is far more important. Justice Blackmun expressly rejected the plurality's per se rule that *Bruton* does not apply to interlocking confessions:

I would not adopt a rigid per se rule that forecloses a court from weighing all the circumstances in order to determine whether the defendant in fact was unfairly prejudiced by the admission of even an interlocking confession. Where he was unfairly prejudiced, the mere fact that prejudice was caused by an interlocking confession ought not to override the important interests that the Confrontation Clause protects.¹³⁷

Moreover, he was concerned that in many cases the confessions may not totally interlock:

The two confessions may interlock in part only. Or they may cover only a portion of the events in issue at the trial. Although two interlocking confessions may not be internally inconsistent, one may go far beyond the other in implicating the confessor's co-defendant. In such circumstances, the admission of the confession of the codefendant who does not take the stand could very well serve to prejudice the defendant who is incriminated by the confession, notwithstanding that the defendant's own confession is, to an extent, interlocking.¹³⁸

As Justice Blackmun saw the situation, the courts should first determine whether the confessions truly interlock. In his view, if the

133. *Id.* at —, 99 S. Ct. at 2143.

134. *See* discussion at — U.S. at —, 99 S. Ct. at 2143 n.1.

135. Justice Stevens adheres to this position: "In my view, but not in his [Justice Blackmun], the concurrent findings of the District Court and the Court of Appeals that the error here was not harmless preclude this Court from reaching a different result of this kind of issue." — U.S. at —, 99 S. Ct. at 2143 (Stevens, J., dissenting).

136. *Id.* (Blackmun, J., concurring).

137. — U.S. at —, 99 S. Ct. at 2142.

138. *Id.*

statements do overlap, the question then becomes whether or not the defendant was "unfairly prejudiced"¹³⁹ by the use at trial of a non-testifying co-defendant's confession. Unlike the plurality, he could not adopt a rigid rule to wholly avoid the sixth amendment inquiry.

Justice Stevens began his dissent by focusing closely on the Court's language in *Bruton*. He also explained the policy behind the Confrontation Clause as stated in both *Bruton* and *Pointer*.¹⁴⁰ For Justice Stevens the resolution of the problem of the interlocking confessions was a straightforward one: "Evidence that a defendant has made an 'extrajudicial admission of guilt' which 'stands before the jury unchallenged' is not an acceptable reason for depriving him of his constitutional right to confront the witnesses against him."¹⁴¹ While his own opinion tracked the *Bruton* rationale to reach this conclusion, Justice Stevens also analyzed the plurality's opinion and found that Justice Rehnquist's contrary conclusion on interlocking confessions rested on two erroneous assumptions. The first was that "the jury's ability to disregard the co-defendant's inadmissible and highly prejudicial confession is invariably increased by the existence of a corroborating statement by the defendant."¹⁴² Justice Stevens's disagreement was justified because this assumption has no basis in fact or in law, at least none to which the plurality can or does point.¹⁴³ It takes little imagination to suppose that when given two confessions the jurors will compare them and use both of them against the defendant.

The second assumption that Justice Stevens found underlying the plurality opinion is that "all unchallenged confessions by a defendant are equally reliable."¹⁴⁴ This assumption has never been widely accepted in our criminal justice system. Although the judge determines the voluntariness of a confession under the *Jackson* rule,¹⁴⁵ juries are still specifically instructed to consider the circumstances surrounding the declarant's admission.¹⁴⁶ Thus, while juries cannot reverse the

139. *Id.*

140. In addition, he relied expressly on Justice Stewart's strong concurring opinion in *Bruton*; this point is interesting considering that Stewart joined the plurality in *Parker*. See text accompanying notes 39-40 *supra*.

141. — U.S. at —, 99 S. Ct. at 2145 (Stevens, J., dissenting) (citations omitted).

142. *Id.*

143. See text accompanying notes 129-31 *supra*.

144. — U.S. at —, 99 S. Ct. at 2145 (Stevens, J., dissenting).

145. See text accompanying notes 26-28 *supra*.

146. See, e.g., District of Columbia Criminal Jury Instructions, *supra* note 38, at § 2.46:

Evidence has been introduced that the defendant [confessed that he committed] [made an admission concerning] the crime charged. You should weigh such evidence with caution and should carefully scrutinize all the circumstances surrounding the [alleged] [confession] [admission] in deciding [whether the defendant made it and] what weight to give it, along with all the other evidence, in determining the guilt or innocence of the defendant.

In examining the circumstances of the [alleged] [confession] [admission] you may consider whether it was made by the defendant freely and voluntarily with an understanding of the nature of his [confession] [admission], without fear, threats, coercion, or force, either physical or psychological, and without promise of reward. You may consider the conversations, if any, between the police and the defendant, including whether the defendant was

judge's determination of voluntariness, they must consider the circumstances surrounding the making of the confession to decide how much weight the statement deserves. The reason for this instruction is undoubtedly that some confessions are reliable, while others are not.

A careful reading of Justice Rehnquist's opinion reveals that his conclusion of no constitutional error is predicated on the assumption that the interlocking confession simply cannot present a serious practical problem for the defendant at trial. Otherwise, Justice Rehnquist could not rely so heavily on his confidence in the jury's ability to follow instructions and yet not feel compelled to overrule *Bruton*. Justice Stevens set out a lengthy hypothetical example which reveals the flaw in Justice Rehnquist's assumption that the effect of the co-defendant's confession will necessarily be minimal.¹⁴⁷ The crucial aspect of the hypothetical is that the defendant's own statement, while somewhat incriminating, was ambiguous or silent on some major points and not very prejudicial. Nevertheless, it was voluntarily given; thus, a jury could use the statement as evidence against him. The co-defendant's statement, however, was a lengthy and detailed confession clearly implicating both himself and the defendant. Under these circumstances, it is difficult to avoid Justice Stevens's conclusion that the effect of the co-defendant's confession would be "devastating" and that the prejudice to the defendant's case would not "be entirely cured by the subsequent use of evidence of his own ambiguous statement."¹⁴⁸

Justice Stevens quite properly concluded his opinion by returning to the one issue which is central to the sixth amendment analysis: "[T]he controlling question must be whether it is realistic to assume that the jury followed the judge's instructions to disregard those confessions when it was evaluating petitioner's guilt."¹⁴⁹ In 1968 a majority of the Court said that it could not assume that jurors followed the judge's instructions to limit the use of confessions by co-defendants. No evidence was put forth then, or eleven years later, to counter what most practicing lawyers know: that jurors often rely on confessions be-

warned of his rights; the time and place that the [alleged] [confession] [admission] occurred; the length of time, if any, that the defendant was questioned; who was present; the physical and mental condition of the defendant; and all other circumstances surrounding the making of the [alleged] [confession] [admission], including the age, disposition, education, experience, character and intelligence of the defendant. In short, you should give the defendant's [alleged] [confession] [admission] such weight as you feel it deserves under all the circumstances.

147. Suppose a prosecutor has 10 items of evidence tending to prove that defendant X and codefendant Y are guilty of assassinating a public figure. The first is the tape of a televised interview with Y describing in detail how he and X planned and executed the crime. Items two through nine involve circumstantial evidence of a past association between X and Y, a shared hostility for the victim, and an expressed wish for his early demise—evidence that in itself might very well be insufficient to convict X. Item 10 is the testimony of a drinking partner, a former cellmate, or a divorced spouse of X who vaguely recalls X saying that he had been with Y at the approximate time of the killing. Neither X nor Y takes the stand.

— U.S. at —, 99 S. Ct. at 2145 (Stevens, J., dissenting).

148. *Id.* at —, 99 S. Ct. at 2145-46.

149. *Id.* at —, 99 S. Ct. at 2147.

cause they—perhaps unlike attorneys and judges—find them probative.¹⁵⁰

V. WHAT THE LAW IS, WHAT IT SHOULD BE

Even though the Supreme Court reviewed the Sixth Circuit's holding in *Parker* to resolve the conflict among the lower courts regarding interlocking confessions, that conflict has not been settled. Four members of the Court take the position that *Bruton* does not apply in this area. Four others think that it does. Until a fifth vote can be cast in an appropriate case we are left with an even split on this crucial point. Before the casting of that vote, however, the flaws in the *Parker* plurality opinion should be exposed. Preliminarily, the plurality's resolution raised more questions than it answered. For example, what is an interlocking confession? Would a casual statement by the defendant be sufficient if it mentioned a subject that was at the heart of the co-defendant's lengthy and detailed confession? Obviously, Justice Stevens was most concerned with this point, for that example *is* his hypothetical.¹⁵¹ His fears are well founded if the plurality opinion truly means that "so long as all the defendants have made some type of confession which is placed in evidence, *Bruton* is inapplicable without inquiry into whether the confessions actually interlock and the extent thereof."¹⁵²

Other unanswered questions remain after *Parker*. For instance, how is the judge to decide if the two confessions interlock? While some courts examine the extent of overlap quite carefully,¹⁵³ others simply ask whether the two confessions are substantially the same¹⁵⁴ or whether as "to motive, plot and execution of the crime they are essentially the same."¹⁵⁵ The *Parker* plurality gives no guidance to a court seeking to apply the appropriate standard. Even though the respon-

150. In *Blumenthal v. United States*, 332 U.S. 539, 559-60 (1947), Mr. Justice Rutledge remarked:

The grave danger in this case, if any, arose not from the trial court's rulings upon admissibility or from its instructions to the jury. As we have said, these were as adequate as might reasonably be required in a joint trial. The danger rested rather in the risk that the jury, in disregard of the court's direction, would transfer, consciously or unconsciously, the effect of the excluded admissions from the case as made against Goldsmith and Weiss across the barrier of the exclusion to the other three defendants.

That danger was real. It is one likely to arise in any conspiracy trial and more likely to occur as the number of persons charged together increases. Perhaps even at best the safeguards provided by clear rulings on admissibility, limitations of the bearing of evidence as against particular individuals, and adequate instructions, are insufficient to ward off the danger entirely. It is therefore extremely important that those safeguards be made as impregnable as possible.

151. See text accompanying notes 147-50 *supra*.

152. — U.S. at —, 99 S. Ct. at 2143 (Blackmun, J., concurring).

153. *E.g.*, *United States v. Fleming*, 594 F.2d 598 (7th Cir. 1979).

154. *United States ex rel. Duff v. Zelker*, 452 F.2d 1009 (2d Cir. 1971), *cert. denied*, 406 U.S. 932 (1972).

155. *United States ex rel. Ortiz v. Fritz*, 476 F.2d 37, 39 (2d Cir.), *cert. denied*, 414 U.S. 1075 (1973).

dents in *Parker* argued that the confessions did not interlock, the plurality opinion simply assumed the interlock.¹⁵⁶

It is unlikely that the Court will soon resolve these troublesome questions. Yet, the plurality's approach in *Parker* gives rise to a far more serious objection. The *Parker* plurality apparently ignored the Court's prior statements emphasizing the importance of Confrontation Clause protection. In *Pointer v. Texas*¹⁵⁷ the Court had unanimously held that the Confrontation Clause applies to the states and had recognized the absolute necessity that a defendant have the right to cross-examine adverse witnesses. Reflecting on the distance the Court has traveled from *Bruton* to *Parker*, the language of the Justices writing in *Pointer* is illuminating. For Justice Black there was little question that the Constitution required the application of the clause in the state judicial systems:

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. And 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 [We] have constantly emphasized the necessity for cross-examination as a protection for defendants in criminal cases. . . . There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.¹⁵⁸

Justice Harlan found that "a right of confrontation is 'implicit in the concept of ordered liberty.'" ¹⁵⁹ Justice Goldberg also thought that the sixth amendment right was "a fundamental right."¹⁶⁰ Finally, it is instructive to consider Justice Stewart's view:

The right of defense counsel in a criminal case to cross-examine the prosecutor's living witnesses is "[o]ne of the fundamental guarantees of life and liberty" and "one of the safeguards essential to a fair trial." It is, I think, as indispensable an ingredient as the "right to be tried in a courtroom presided over by a judge."¹⁶¹

These references are not put forth simply as an exercise to show

156. — U.S. at —, 99 S. Ct. at 2142 (Blackmun, J., concurring). The respondents' argument is set out in their brief before the Court. Brief for respondent at 10, *Parker v. Randolph*, — U.S. —, 99 S. Ct. 2132 (1979).

157. 380 U.S. 400 (1965).

158. *Id.* at 404-05.

159. *Id.* at 408 (Harlan, J., concurring), citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

160. *Id.* at 410 (Goldberg, J., concurring).

161. *Id.* (Stewart, J., concurring). The difference in language among the Justices reflects the philosophical difference between members of the Court regarding the incorporation doctrine. See the concurring opinions of Justices Harlan, *id.* at 408, and Goldberg, *id.* at 410.

how the sixth amendment was incorporated to apply to the states. Rather, they point very clearly to the close connection between *Pointer* and *Bruton*. The *Parker* plurality appears to have forgotten that the sixth amendment violation in *Bruton* resulted from the trial court's admission of a co-defendant confession implicating the defendant, notwithstanding the court's use of clear limiting instruction. In that respect, the *Bruton* majority's language is particularly relevant:

[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. . . . Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed.¹⁶²

Most striking about the plurality opinion in *Parker* is that the Court ignored the close connection between *Pointer* and *Bruton*. The fact is that the co-defendant's statements in *Parker* were admitted against the defendant in precisely the same way as they had been in *Bruton*. The only difference in *Parker* was that the defendant himself had made an incriminating statement. The admission of the co-defendant's confession in this situation cannot be justified on the ground that it is necessarily more reliable than the defendant's statements; certainly, in many situations, it will be less reliable. Of even greater concern, however, is the plurality's conclusion that Justice Jackson was wrong in his classic condemnation of limiting instructions: "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."¹⁶³

The *Parker* plurality found the *Bruton* principle inapplicable to interlocking confessions because the defendant himself had made an inculpatory statement. The fact that the defendant has also confessed is no reason to disregard his sixth amendment rights. Fortunately, we have only a four to four vote at this time. Hopefully, the fifth and majority vote will carefully apply the Confrontation Clause to find error whenever a non-testifying co-defendant's statement implicates a defendant.

162. 391 U.S. at 135-36.

163. *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring).