**Cornell Law Review**

Volume 74
Issue 4 *May 1989*

Article 3

# Right to Confrontation in Codefendant Confession Cases: Richardson v. Marsh and Cruz v. New York

Aviva Jezer

# NOTES

## THE RIGHT TO CONFRONTATION IN CODEFENDANT CONFESSION CASES: *RICHARDSON v. MARSH* AND *CRUZ v. NEW YORK*

In its October 1988 Term, the Supreme Court attempted to clarify sixth amendment confrontation right[1] jurisprudence by deciding two cases dealing with the admissibility of nontestifying codefendant confessions that implicate the defendant. As in all nontestifying codefendant confession cases, the trial courts in these two cases—*Richardson v. Marsh*[2] and *Cruz v. New York*[3]—tried each defendant jointly with an alleged cohort who exercised his right not to testify at trial. Prior to trial, the codefendant in each case confessed to having participated in the crime with which both he and the defendant were charged, and these confessions implicated the defendant. The trial court in both cases admitted the codefendant's inculpatory confession into evidence.

Technically, juries can use nontestifying codefendant confessions only against the confessor and not against the defendant, for the sixth amendment dictates that a defendant have an opportunity to confront her accuser. A serious sixth amendment problem arises, however, if the jury uses these confessions against the defendant as well as against the confessor. The Supreme Court has attempted to remedy the resulting confrontation right problem in two ways. It has required trial courts that admit such confessions to instruct their juries to use the codefendant's confession as evidence only against the confessor,[4] and it has disallowed courts from admitting certain types of confessions altogether, even if the court issues limiting instructions.[5]

The *Richardson* and *Cruz* trial courts chose the former approach, admitting the confessions while issuing limiting instructions. This

---

1 "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. The right to confrontation is fundamental and is obligatory on the states through the fourteenth amendment. Pointer v. Texas, 380 U.S. 400, 402 (1965).

2 481 U.S. 200 (1987).

3 481 U.S. 186 (1987).

4 *See, e.g.*, Tennessee v. Street, 471 U.S. 409 (1985); Parker v. Randolph, 442 U.S. 62 (1979) (plurality); Delli Paoli v. United States, 352 U.S. 232 (1957), *overruled*, Bruton v. United States, 391 U.S. 123 (1968). This Note refers to these instructions as "limiting instructions."

5 *See, e.g., Bruton*, 391 U.S. 123.

approach, however, gives great cause for concern because it places a substantial amount of faith in the efficacy of limiting instructions. The Supreme Court has acknowledged the potential yet serious fault with this approach[6] and has consciously struggled with whether, and if so when, to adopt the second approach, that is, to exclude the confession entirely.[7]

In *Richardson* and in *Cruz* the Court determined the admissibility of two different types of inculpatory codefendant confessions in seemingly contradictory ways. In *Richardson* the Court held that admitting a codefendant's redacted confession[8] does not implicate the defendant's right to confrontation if the trial court instructs the jury to consider the confession only against the confessor. In *Cruz* the Court held that trial courts may not admit interlocking[9] confessions even if the judge gives the jury limiting instructions.

This Note first discusses the purposes of the confrontation right and reviews cases defining the right's scope. It then proposes a method for deciding confrontation right cases that simultaneously

---

6 *See infra* note 137. Commentators have also doubted the efficacy of such limiting instructions. *See infra* note 138.

7 *See, e.g.*, Parker v. Randolph, 442 U.S. 62 (1970) (plurality) (permitting introduction of interlocking confessions if trial judge issues limiting instructions); *see also Street*, 471 U.S. 409 (permitting for rebuttal purposes admission of nontestifying third party confession implicating defendant); Ohio v. Roberts, 448 U.S. 56 (1980) (permitting admission of preliminary hearing testimony of unavailable witness because preliminary hearing offered opportunity for cross-examination); California v. Green, 399 U.S. 149 (1970) (permitting prosecutor to read preliminary hearing testimony to refresh witness's memory because opportunity to confront witness existed at trial).

*See generally* ABA STANDARDS RELATING TO JOINDER AND SEVERANCE § 2.3(a) (1968):

> When a defendant moves for a severance because an out-of-court statement of a codefendant makes reference to him but is not admissible against him, the court should determine whether the prosectuion intends to offer the statement in evidence at the trial. If so, the court should require the prosecuting attorney to elect one of the following courses:
>
> (i) a joint trial at which the statement is not admitted into evidence;
>
> (ii) a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been effectively deleted; or,
>
> (iii) severance of the moving defendant.

8 A redacted confession is one from which the prosecutor deletes, at the very least, all direct references to the defendant. In *Marsh*, the trial court omitted all indications that anyone other than the codefendant participated in the crime. 481 U.S. at 203.

9 In New York, confessions are interlocking "if their content is substantially similar." People v. Cruz, 66 N.Y.2d 61, 70, 485 N.E.2d 221, 226, 495 N.Y.S.2d 14, 19 (1985). There is no clear definition of the term "interlocking." The Supreme Court has not defined "interlocking" and lower courts have differing definitions of the term. *See* Note, *The Present Status of an Interlocking Confession Exception to* Bruton v. United States, 36 S.C.L. REV. 659 (1985). Indeed, "[f]ew courts have focused on the definitional requirements of an 'interlocking confession.' " *Id.* at 660 n.7. The second circuit has the most developed law on the definition of "interlocking confessions." *See, e.g.*, United States *ex rel.* Stanbridge v. Zelker, 514 F.2d 45, 48 (2d Cir.), *cert. denied*, 423 U.S. 872 (1975); United States *ex rel.* Oritz v. Fritz, 476 F.2d 37, 39 (2d Cir.), *cert. denied*, 414 U.S. 1075 (1973); *see also* Forehand v. Fogg, 500 F. Supp. 851, 853 (S.D.N.Y. 1979) (same).

respects the right's purposes and accommodates efficiency and other state concerns. This proposal combines the various considerations the Court has used when deciding confrontation right cases. Using the proposal, this Note shows that neither *Richardson* nor *Cruz* fully respects the notions underlying the right to confrontation.

## I
## BACKGROUND

### A. The Sixth Amendment Right to Confrontation

#### 1. *The Purposes of the Confrontation Right*

The overarching goal of the right to confrontation is to provide a defendant with a fair trial.[10] Confrontation theoretically attains this goal by ensuring that the trier of fact receives both an accurate and a reliable depiction of the alleged crime.[11] Cross-examination, a method of truthfinding, satisfies the confrontation right,[12] and has become virtually synonymous with the right.[13] Cross-examination seeks accuracy by permitting the defendant to "test[] the recollection and sift[] the conscience of the witness"[14] and by giving the

---

10 Pointer v. Texas, 380 U.S. 400, 404 (1965) ("The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution."). Other goals of confrontation relate specifically to the relationship between confrontation and testifying under oath. This relationship impresses on the witness the seriousness of the matter and also attempts to abolish fabricated testimony. *See Green*, 399 U.S. at 158.

11 *Roberts*, 448 U.S. at 64; United States *ex rel.* Thomas v. Sielaff, 404 F. Supp. 1037, 1039 (S.D. Ill.), *aff'd*, 539 F.2d 715 (7th Cir. 1975); R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 96 (2d ed. 1983) ("the right to confrontation is provided in order to protect a defendant's right to challenge the accuracy and reliability of evidence against him"); *see also* Chambers v. Mississippi, 410 U.S. 284, 295 (1973) (absence of confrontation at trial "calls into question the ultimate 'integrity of the fact-finding process.'") (quoting Berger v. California, 393 U.S. 314, 315 (1969)); 5. J. CHADBOURN, WIGMORE ON EVIDENCE § 1367, at 32 (1974) [hereinafter WIGMORE] (cross-examination is the "greatest legal engine ever invented for the discovery of trnth").

12 *Green*, 399 U.S. at 166 (1970) ("[T]he opportunity for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause . . .") (quoting Barber v. Page, 390 U.S. 719, 725-6 (1968)); *Pointer*, 380 U.S. at 404 ("It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him."); E. CLEARY, K. BROWN, G. DIX, E. GELLHORN, D. KAYE, R. MEISENHOLDER, E. ROBERTS & J. STRONG, MCCORMICK ON EVIDENCE § 19, at 48 (3d ed. 1984) [hereinafter MCCORMICK] (courts place a great deal of emphasis on cross-examination for satisfying the right to confrontation).

13 R. LEMPERT & S. SALTZBURG, *supra* note 11, at 596 ("confrontation" and "cross-examination" are virtually interchangeable).

14 Alford v. United States, 282 U.S. 687, 691 (1931) ("[cross examination's] permissible purposes . . . are that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood . . . [and] that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment."); Mattox v. United States, 156 U.S.

defendant an opportunity to probe the evidence against her.[15]

Moreover, cross-examination aids in reliable fact-seeking by affording both judge and jury an opportunity to weigh a witness's credibility.[16] It compels the witness "to stand face-to-face with the jury in order that they may look at him and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."[17] Courts consider viewing a witness's reactions to questions and hearing the witness's tone of voice two of the most important elements in accurate fact finding.[18]

---

237, 242 (1895); *see* 5 WIGMORE, *supra* note 11, § 1395 at 150 ("Our Law requires persons to appear and give their testimony 'viva voce' . . . and their falsity may sometimes be discovered by questions that the party may ask them, and by examining them to particular circumstances which may lay open the falsity of a well-laid scheme, which otherwise . . . might have looked well at first; and this we are deprived of, if this examination should be admitted to be read.") (citing Fenwick's Trial, 13 How. St. Tr. 591, 638, 712 (1669); *see also* Delaware v. Fensterer, 474 U.S. 15, 22 (1985) ("The confrontation clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the fact-finder the reasons for giving scant weight to the witness' testimony."); *Green*, 399 U.S. at 158-59; Chambers v. Mississippi, 410 U.S. 284, 295 (1973) ("cross-examination . . . helps assure the accuracy of the truth-determining process"); Dutton v. Evans, 400 U.S. 74 (1970); Spears v. Circuit Court, Ninth Judicial Dist., 517 F.2d 360 (5th Cir. 1975); United States v. Downing, 454 F.2d 373, 376 (10th Cir. 1972).

15 *Green*, 399 U.S. at 159-60; Mattox v. United States, 156 U.S. 237 (1895); United States v. Downing, 454 F.2d 373, 376 (10th Cir. 1972).

16 Pointer v. Texas, 380 U.S. 400, 404 (1965). The Framers included the confrontation right in the Constitution because English prosecuting attorneys "would frequently allege matters which the prisoner denied and called upon them to prove. The proof was usually given by reading depositions, confessions of accomplices, letters, and the like; and this occasioned frequent demands by the prisoner to have his 'accusers,' *i.e.*, the witnesses against him, brought before him face to face." *Green*, 399 U.S. at 156-57 (quoting 1 J. STEPHEN, A HISTORY OF CRIMINAL LAW OF ENGLAND 326 (1883)). The confrontation right appears in the Bill of Rights because the Framers, believing that confrontation yields truth, wished to prohibit prosecutors from using depositions and ex parte affidavits against a defendant in lieu of face-to-face confrontation. *Mattox*, 156 U.S. 237.

17 *Green*, 399 U.S. at 158 (confrontation "permits the jury . . . to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility."); Barber v. Page, 390 U.S. 719 (1968); *see also* Pointer v. Texas, 380 U.S. 400, 404 (1965); *Mattox*, 156 U.S. at 242-43.

18 The acts of viewing witness's reactions and hearing the witness's tone of voice are so important that reviewing courts reverse lower court findings of fact in civil proceedings only if these findings are "clearly erroneous." FED. R. CIV. P. 52; *see* 5 WIGMORE, *supra* note 11, § 1395, at 153-54 ("There are many things, aside from the literal import of the words uttered by the witness while testifying, on which the value of his evidence depends. These it is impossible to transfer to paper. Taken in the aggregate, they constitute a vast moral power in eliciting the truth, all of which is lost when the examination is had out of court and the mere words of the witness are reproduced in the form of a deposition.") (citing State v. McO'Blenis, 24 Mo. 402, 421 (1857)).

### 2. *The Scope of the Confrontation Right and the Admissibility of Codefendant Confessions*

The right to confrontation is not absolute. Courts admit unconfronted testimony directly against a defendant when the witness is unavailable and when the testimony exhibits certain "indicia of reliability."[19] Following these criteria, courts admit dying declarations,[20] excited utterances,[21] and declarations of the state of the declarant's mind.[22] The central question in codefendant confession cases is under what circumstances the Supreme Court will allow trial courts to admit the unconfronted testimony and hence narrow the scope of the right.

Generally, the Supreme Court determines the admissibility of inculpatory codefendant confessions by issuing broad rules that either permit or forbid trial courts to admit these confessions.[23] Although it has not explicitly set forth its method of deciding these cases, the Court has implicitly decided them by weighing several factors. On the one hand, it has considered the likelihood that the jury will disregard its instructions. In the same vein, it has examined the degree of unfair prejudice inuring to the defendant if the jury disregards its instructions and uses the confession against the defendant. On the other hand, the Court has weighed the state's interests in conducting joint trials in which trial courts admit the confession against the confessor. Efficiency is the primary state interest, but others exist as well.[24]

## B. Early Conceptions: State and Other Considerations Outweigh the Defendant's Confrontation Right

Courts in the early and mid-twentieth century often expressed skepticism about the deterrent effect of limiting instructions in nontestifying codefendant confession cases, but ultimately held that furthering the state's interests in admitting the unconfronted confession against the confessor outweighed the risk of prejudice to the defendant. In *Nash v United States*,[25] for example, Judge Learned Hand held that a codefendant's incriminating confession was admissible for the jury's use against the confessor if the trial judge gave

---

19 *See* Ohio v. Roberts, 448 U.S. 56, 65-66 (1980); Dutton v. Evans, 400 U.S. 74, 89 (1970); *Green*, 399 U.S. 149, 155 (1970); *see also* MCCORMICK, *supra* note 12, at § 252.

20 *Mattox*, 156 U.S. 237; FED. R. EVID. 804(2).

21 United States v. Nick, 604 F.2d 1199 (9th Cir. 1979); FED. R. EVID. 803(2).

22 Lenza v. Wyrick, 665 F.2d 804 (8th Cir. 1981); FED. R. EVID. 803(3).

23 *See, e.g.*, Bruton v. United States, 391 U.S. 123 (1968); Delli Paoli v. United States, 352 U.S. 232 (1957).

24 For discussion of efficiency and other state concerns, see *infra* notes 54-55, 103-08 and accompanying text.

25 54 F.2d 1006 (2d Cir. 1932).

the jury limiting instructions. Although he noted that limiting instructions are "the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else,"[26] he permitted the court below to admit the unconfronted testimony because it facilitated truth-finding and because the other evidence against the defendant was overwhelming.[27] Similarly, in *Blumenthal v. United States*,[28] the Supreme Court weighed the state's interest in the efficiencies of joint trials against the likelihood that the jury would disregard its instructions and the resulting danger of unfair prejudice to the defendant. It explained that a "grave danger" lay in the possibility that the jury would consciously or unconsciously use the confession against the defendant.[29] It added that the "danger was real . . . . Perhaps even at best the safeguards provided by . . . adequate instructions, are insufficient to ward off the danger entirely."[30] Nevertheless, the Court admitted the testimony because the trial court had constructed its instructions carefully and because admission facilitated the state's interest in conducting joint trials.[31]

In its landmark *Delli Paoli v. United States*[32] decision, the Supreme Court also exhibited an ambivalence toward the presumption that juries follow their limiting instructions. In *Delli Paoli* the trial court admitted into evidence an inculpatory yet unconfronted codefendant confession made after the termination of an alleged conspiracy. The court kept intact the confession's references to the defendant and issued limiting instructions to the jury. The Supreme Court held that the trial court had not committed reversible error because the jury instructions were sufficiently clear to overcome any possible prejudice inuring to the defendant from the confession.[33] It did not, however, rest its reasoning entirely on the clarity of the

---

26 *Id.* at 1007; *see also* Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.") (citations omitted).

27 *Id.* at 1007. He also said in dictum, "the rule probably furthers, rather than impedes, the search for truth and this perhaps excuses the device which satisfies form while it violates substance." *Id.*

28 332 U.S. 539 (1947).

29 *Id.*

30 *Id.* at 559.

31 *Id.*

32 352 U.S. 232 (1957).

33 *Id.* at 238-39. The Supreme Court declared, "[t]he determination of this issue turus on whether the instructions were sufficiently clear and whether it was reasonably possible for the jury to follow them." *Id.* It also explained that the trial judge in this case repeated his admonition several times during cross-examination and in the final charge to the jury, *id.* at 233, and that "nothing could have been more clear than these limiting instructions. Petitioner . . . concedes their clarity." *Id.* at 240-41.

trial judge's instructions. The Court also proceeded "on the basis that the jury followed these instructions,"[34] explaining that the whole jury system makes little sense unless courts presume that juries are capable of following their instructions.[35] The Court noted that there may be cases in which it would be unreasonable to assume that the jury could follow its limiting instructions, but left the determination of when such cases arise to the trial judge's discretion.[36] The Court stated that when encountering such a case, the trial court should sever the trial.[37]

In dissent, Justice Frankfurter contended that juries are unable to follow limiting instructions and that a court should admit codefendant confessions only when they do not incriminate the defendant.[38] He argued that the difficulties a prosecutor may encounter when attempting to introduce a confession against the codefendant confessor are insufficient justifications for harming the defendant's case and denying him the right to confrontation. Frankfurter ex-

---

34 *Id.* at 241. The Court noted five factors suggesting that the jury could follow its instructions. These factors were (1) the elements of the crime of conspiracy were easy to understand; (2) the judge and defense attorneys emphasized the separate interests of the defendants throughout the trial; (3) the judge admitted the codefendant's confession only after the government completed its entire case so that the jury could consider it separately from other testimony; (4) the codefendant's testimony only corroborated that which the government had already established; and (5) nothing in the record indicated that the jury failed to follow its instrnctions or that it was confused. *Id.* at 241-42; *cf.* Opper v. United States, 348 U.S. 84, 95 (1954) ("To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict."). The Court cited a long list of cases supporting its recognition that clear instrnctions can overcome the possible prejudice from unconfronted incriminating codefendant confessions. 352 U.S. at 239 n.5.

35 *Delli Paoli*, 352 U.S. at 242. The Court based this presumption on the idea that "our system of the jury trial has produced one of the most valuable and practical mechanisms . . . for dispensing substantial justice." *Id.*; *see also* Bruton v. United States, 391 U.S. 123, 127 (1968); *Opper*, 348 U.S. at 95 ("Our theory of trial relies upon the ability of a jury to follow instructions."); Leland v. Oregon, 343 U.S. 790, 800 (1952) (although instrnctions were very complex and required jurors to make subtle distinctions, the Court explained that "to condemn the operation of this system here would be to condemn the system generally"); Note, *supra* note 9, at 663 ("It is unlikely that the majority in *Delli Paoli* maintained any sincere belief in the jury's capacity to disregard codefendant's statement during the [trial]. More probably, the majority was swayed by a combination of factors including a belief that the admission of the codefendant's statement was harmless error or, possibly, a belief that the jury's consideration of such statements was generally an aid to the truth-seeking purpose of a trial.") (footnotes omitted). Regardless of the Court's reasoning, however, trial and appellate courts interpreted *Delli Paoli* as support for the presumption that juries will obey limiting instructions.

36 *Delli Paoli*, 352 U.S. at 243.

37 *Id.* at 241.

38 *Delli Paoli*, 352 U.S. at 247 (Frankfurter, J., dissenting). "[T]he effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell." *Id.*

plained, "The Government should not have the windfall of having the jury be influenced by evidence against a defendant which . . . they should not consider but which they cannot put out of their minds."[39] He suggested that the trial judge either refuse to admit a confession that incriminates the defendant or sever the joint trial.[40] In the decade following *Delli Paoli*, the Court wavered between following and rejecting the *Delli Paoli* premise that clear limiting instructions cure possible prejudice from admitted inculpatory codefendant confessions, and that the efficiencies of joint trials can outweigh possible prejudice arising from jury disobedience.[41]

### C. *Bruton v. United States* and Its Progeny: Prejudice to the Defendant Outweighs Other Considerations

In *Bruton v. United States*[42] the Supreme Court explicitly overruled *Delli Paoli*.[43] In *Bruton*, the trial court admitted a nontestifying codefendant's confession that directly inculpated the defendant, and

---

39 *Id.*

40 *Id.* at 249; *see also* United States v. Delli Paoli, 229 F.2d 319, 324 (2d Cir. 1956) (Frank, J., dissenting) (suggesting that courts either refuse to admit the confessions or sever the trial).

41 In Spencer v. Texas, 385 U.S. 554, *reh'g denied*, 386 U.S. 969 (1967), for example, the Supreme Court found that a trial court may, consistent with the due process rights of the defendant, U.S. CONST. art. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."), U.S. CONST. amend. XIV ("[No] State [shall] . . . deprive any person of life, liberty or property, without due process of law. . . ."), admit evidence of the defendant's prior convictions and rely on limiting instructions to ensure that the jury uses the evidence exclusively in its sentencing deliberations. 385 U.S. at 565. The Court suggested that limiting instructions may be inadequate with this sort of schizophrenic use of the confession, *id.* at 562, but explained that it affords great deference to states in due process cases. *Id.* at 564-65. It thus essentially held that, at least in the fourteenth amendment due process realm, institutional concerns may outweigh possible prejudice to the defendant.

In contrast, the Court held in Douglas v. Alabama, 380 U.S. 415 (1965), that the confrontation right bars a prosecutor from reading a third party's incriminating confession when the third party refuses to answer questions. *Id.* at 419-20. The Court explained that although technically the statement that the prosecutor read was not testimony, and thus technically the jury could not use it against the defendant in its deliberations, "the Solicitor's reading may well have been the equivalent in the jury's mind of testimony that [the third party] in fact made the statement." *Id.* at 419. The Court thus found only a minimal likelihood that the jury would follow its instructions and concluded that allowing the prosecutor to read from the confession would thereby prejudice the defendant. The *Douglas* Court determined that this prejudice outweighed the state's interest in presenting its best possible case. Similarly, in Jackson v. Denno, 378 U.S. 368 (1964), the Court held that a trial court denied a defendant his due process rights by instructing the jury first to determine whether the defendant's confession was voluntary and to consider the confession as evidence against the defendant only if it were voluntary, but to disregard it if it were not voluntary. The Court's decision rested in part on its belief that a jury cannot set aside an involuntary confession that it believes to be true.

42 391 U.S. 123 (1968).

43 *Id.* at 126.

instructed the jury to consider the confession only against the confessor. The Supreme Court held that the trial court erred in admitting the codefendant's confession because there was a "substantial risk" that the jury would use the codefendant's confession against the defendant.[44] It noted that since *Delli Paoli* the Court had repudiated the presumption that there is a reasonable possibility that juries follow their limiting instructions.[45] The Court explained that "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequence of failure so vital to the defendant, that the practical and human limitations of the jury cannot be ignored."[46] The Court stated that one of the contexts in which unreasonable risk of jury disobedience exists is when, as in *Bruton*, "powerfully incriminating extra-judicial statements of a codefendant . . . are deliberately spread before the jury in a joint trial."[47] The *Bruton* opinion also questioned the accuracy of codefendant confessions by noting that the confession of a codefendant is "inevitably suspect" due to the confessor's "motivation to shift blame onto others."[48] The Court elaborated, stating that the unreliability of this evidence "is intolerably compounded when the alleged accomplice . . . does not testify and cannot be tested by cross-examination."[49] The Court hence found that the *Bruton* codefendant's confession posed a "substantial threat" to the defendant's case and was thus "devastating" to the defendant.[50]

The *Bruton* majority believed that the importance of the confrontation right outweighed the state's interest in conducting joint trials.[51] This holding left the prosecutor with a choice between seeking to admit the confession or to sever the trial. In dictum, the Court suggested that redacted confessions were a permissible alternative to severing the trial.[52]

---

44 *Id.* at 126. The Solicitor General as well as the defendant urged the Court to reverse the defendant's conviction because they both believed that the jury failed to follow its instructions. *Id.* at 125.

45 *Id.* at 126.

46 *Id.* at 135. The Court cited Douglas v. Alabama, 380 U.S. 415 (1965), and Jackson v. Denno, 378 U.S. 368 (1964), for this proposition.

47 391 U.S. at 135-36. The Court stated that limiting instructions are adequate in other contexts but did not elaborate.

48 *Id.* at 136.

49 *Id.*

50 *Id.* at 136-37.

51 *Id.* at 135 (citing People v. Fisher, 249 N.Y. 419, 432, 164 N.E. 336, 341 (1928) (Lehman, J., dissenting) ("The price [to a defendant's case] is too high.").

52 391 U.S. 123, 134 n.10 (1968). Writing in dissent, Justice White explained, "Effective deletion will probably require not only admission 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." *Id.* at 143 (White, J., dissenting).

The dissent first rejected the majority's contention that juries are incapable of following limiting instructions in codefendant confession cases, explaining that the decisions since *Delli Paoli* did not suggest that juries are less reliable than they were when *Delli Paoli* was decided.[53] The dissent argued that the state had a strong interest in joint trials because they "are more economical and minimize the burden on witnesses, prosecutors and courts . . . and avoid delays in bringing those accused of crime to trial."[54] The dissent also argued that the majority's decision would result in "varying consequences for legally indistinguishable defendants"[55] because those whom the prosecutor tries last have the advantage of already knowing the prosecutor's case.

Decisions subsequent to *Bruton* sought to determine the contexts in which both the risk of jury disobedience and harm to the defendant are low. Although the Court adhered to the purposes of the *Bruton* holding in some of its subsequent decisions,[56] the Court eventually carved exceptions to the broad rule.[57]

---

53 *Id.* at 139 ("There has been no new learning since *Delli Paoli* indicating that juries are less reliable than they were considered in that case to be.") Interestingly, Justice White wrote the majority opinion in *Jackson v. Denno*. He distinguished his *Jackson* opinion from his *Bruton* dissent on a perceived difference in the jury's ability to understand the purpose of its instructions in each case scenario. He explained that a jury can understand and follow its instructions in *Bruton*-type situations because it can recognize that the codefendant's confession is clearly unreliable. He argued, however, that a jury cannot understand the complicated reasoning underlying its limiting instructions in *Jackson*-type situations and hence the jury cannot follow its instructions. *Id.* at 142.

54 *Id.* at 143.

55 *Id.*

56 *See, e.g.*, Roberts v. Russell, 392 U.S. 293 (holding that courts should apply *Bruton* retroactively), *reh'g denied*, 393 U.S. 899 (1968).

57 In Tennessee v. Street, 471 U.S. 409 (1985), for example, the Court held that incriminating codefendant confessions are admissible to rebut the defendant's testimony if the court issues limiting instructions and if the state had no alternative means of rebuttal. *Id.* at 417. In Dutton v. Evans, 400 U.S. 74 (1970), the Court held that codefendant confessions are admissible if they are sufficiently "reliable." *See* Mancusi v. Stubbs, 408 U.S. 204 (1972) (testimony confronted in prior trial admissible if there are sufficient "indicia of reliability"); *see also* Ohio v. Roberts, 448 U.S. 56 (1980) (testimony from preliminary hearing in which defendant cross-examined the witness admissible under "indicia of reliability" test); Barber v. Page, 390 U.S. 719 (1968) (same) (case decided one month before *Bruton* but in same term). The Supreme Court also held in Harrington v. California, 395 U.S. 250 (1969), that the harmless error doctrine applies to *Bruton* violations, effectively limiting the importance of *Bruton* errors. *See also* Marshall v. Lonberger, 459 U.S. 422, 438-39 n.6 (1983) (evidence of prior convictions admissible if judge instructs jury not to use such evidence to determine guilt); Watkins v. Sowders, 449 U.S. 341, 347 (1981) (instruction not to consider erroneously admitted eyewitness identification sufficient); Harris v. New York, 401 U.S. 222 (1971) (instruction to use statements elicited in violation of Miranda v. Arizona, 384 U.S. 436 (1966), only to impeach defendant, not to assess guilt, permissible).

### D. Redacted and Interlocking Confession Cases after *Bruton*

#### 1. *Redacted Confessions*

After *Bruton*, courts split on whether redacted confessions were one of the "contexts" in which admitting these confessions posed too great a risk of jury disobedience or prejudice to the defendant's case.[58] Thus courts apparently disagreed on whether to follow the *Bruton* dictum approving redacted confessions as an alternative to severing a trial in codefendant confession cases. In *United States v. Belle*,[59] the defendant argued before the third circuit that admitting a redacted nontestifying codefendant confession[60] unfairly incriminated him because the jury could easily infer from the government's proof against him that he was the unnamed person in the confession.[61] The appeals court expressed some skepticism about the efficacy of limiting instructions, but nonetheless rejected the defendant's "contextual implication" or "evidentiary linkage" argu-

---

58 Federal courts disallowed redacted confessions in the following cases: Marsh v. Richardson, 781 F.2d 1201 (6th Cir. 1986), *rev'd*, 481 U.S. 200 (1987); Clark v. Maggio, 737 F.2d 471 (5th Cir. 1984), *cert. denied*, 470 U.S. 1055 (1985); English v. United States, 620 F.2d 150 (7th Cir.), *cert. denied*, 449 U.S. 859 (1980).

Federal courts admitted redacted confessions in the following cases: United States v. Burke, 700 F.2d 70 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983); United States v. DiGregorio, 605 F.2d 1184 (1st Cir.), *cert. denied*, 444 U.S. 937 (1979); United States v. Belle, 593 F.2d 487 (3d Cir. 1979) (en banc), *cert. denied*, 442 U.S. 911 (1979); United States v. Wingate, 520 F.2d 309 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976); United States v. Mulligan, 488 F.2d 732 (9th Cir. 1973), *cert. denied*, 417 U.S. 930 (1974); United States *ex rel.* Nelson v. Follette, 430 F.2d 1055 (2d Cir. 1970), *cert. denied*, 401 U.S. 917 (1971).

59 593 F.2d 487 (3d Cir.) (en banc), *cert. denied*, 442 U.S. 911 (1979). This case influenced the Supreme Court's decision in Richardson v. Marsh, 481 U.S. 200 (1987).

60 For definition of "redacted," see *supra* note 8. The *Belle* court labeled the confession as "informally" redacted. The court did not define an "informally" redacted confession and did not distinguish such a confession from one that is "formally" redacted. The third circuit, however, apparently treated the *Belle* confession as a regularly redacted confession, 593 F.2d at 492 n.6, as did the Supreme Court in Richardson, 481 U.S. at 206.

61 593 F.2d at 493. In *Belle*, the prosecutor charged both the defendant and codefendant with conspiracy to possess, and possession of, illegal drugs. The codefendant confessed as follows: he said that he had transported heroin to a certain donut shop two or three times previous to the arrest leading to this trial. He also said that he had met with a man by the name of O'Neill Roberts twice before at this location. (The opinion spells the man's name as "O'Neill" and "O'Neil"). The codefendant further stated that he was planning to deliver heroin the evening of the arrest at the donut shop where he had previously sold drugs and met Roberts. The defendant did not state that he had sold drugs with or to Roberts. The jury knew that the defendant was arrested with Roberts at the donut shop.

The defendant argued that the jury could infer from the confession along with other evidence at the trial that the codefendant conducted his previous transactions with Roberts. He also claimed that the jury could infer tbat he was involved in the drug deal the evening of the arrest because the police arrested him after they requested that he emerge from the car parked in the donut shop parking lot in which he and Roberts were sitting.

ment.[62] It explained that the risk of prejudice to the defendant was far lower in this case than in *Bruton*[63] and held redacted confessions admissible. In support of its decision, the court explained that the confession was not "powerfully incriminating" because it did not explicitly name the defendant.[64] It also reasoned that the confession in this case was reasonably reliable, because the codefendant had no motivation to shift blame to the defendant.[65]

The third circuit found that the state's interest in efficiency and fairness outweighed the risk of prejudice to the defendant. It explained that if it were to adopt the contextual implication argument, courts would be obliged to hold "mini-hearings" at which they would examine all of the government's evidence to determine whether there was sufficient evidentiary linkage to hold the confession inadmissible.[66] The appellate court feared that these mini-hearings would be time-consuming for both the courts and the state because the state would have to expose its whole case prior to trial. It also feared that requiring the state to expose its entire case prior to trial would give the defendant an unfair advantage.[67]

The sixth circuit, in contrast, rejected the *Belle* analysis. In *Marsh v. Richardson*,[68] the appeals court held inadmissible a codefendant's redacted confession that contextually implicated the defendant, explaining that admissions of such confessions are per se violations of *Bruton*.[69] The sixth circuit stated that the *Belle* approach iguores the practical limitations of the jury system that the *Bruton* Court clearly acknowledged.[70]

### 2. *Interlocking Confessions*

The *Bruton* decision also left unresolved whether judges may admit interlocking confessions,[71] and decisions after *Bruton* provided no clear answer.[72] In *Parker v. Randolph*,[73] a plurality of the

---

62 *Id.* at 494.
63 *Id.* at 493.
64 *Id.*
65 *Id.* at 495 n.12.
66 *Id.* at 496.
67 *Id.*
68 781 F.2d 1201 (6th Cir. 1986), *rev'd*, 481 U.S. 200 (1987).
69 *Id.* at 1212.
70 *Id.*
71 For a definition of interlocking, see *supra* note 9.
72 The courts holding *Bruton* inapplicable to interlocking confessions admissions included: United States *ex rel.* Stanbridge v. Zelker, 514 F.2d 45 (2d Cir.), *cert. denied*, 423 U.S. 872 (1975); United States *ex rel.* Duff v. Zelker, 452 F.2d 1009 (2d Cir. 1971), *cert. denied*, 406 U.S. 932 (1972); United States *ex rel.* Catanzaro v. Mancusi, 404 F.2d 296 (2d Cir. 1968), *cert. denied*, 397 U.S. 942 (1970).

The courts holding that *Bruton* applies to interlocking confessions admissions included: Hodges v. Rose, 570 F.2d 643 (6th Cir.), *cert. denied*, 436 U.S. 909 (1978);

Supreme Court held that *Bruton* does not preclude admitting a codefendant's confession "when the defendant himself has confessed and his confession 'interlocks' with and supports the confession of his codefendant."[74] Four Justices[75] held that interlocking codefendant confessions are admissible in all cases.[76] Justice Blackmun concurred in the outcome[77] by finding that the admission was a *Bruton* error, but that the error was harmless. The three dissenting Justices[78] argued that the trial judge committed a reversible *Bruton* error.

Justice Rehnquist, writing for the plurality, noted two important distinctions from *Bruton*. First, he explained that the *Bruton* codefendant's confession was "devastating" to the *Bruton* defendant because it added "substantial, perhaps even critical, weight to the Government's case."[79] He reasoned that, in contrast, interlocking confessions pose minimal prejudice to the defendant because the defendant's own admission stands unchallenged before the jury.[80] Elaborating, he stated that cross-examination has little practical value to a confessing defendant when prejudice is low. Second, Rehnquist noted that the *Bruton* Court found that the "natural motivation to shift blame onto others" rendered codefendant confessions "inevitably suspect." He explained, however, that interlocking confessions are far more reliable than the *Bruton*-type confession because the codefendant's confession corroborates that of the defendant.[81] The Justice further reasoned that because the possibility of prejudice to the defendant is low, the general presumption that juries follow their instructions applies.[82] Rehnquist

---

United States v. DiGilio, 538 F.2d 972 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); Ignacio v. Guam, 413 F.2d 513 (9th Cir. 1969), *cert. denied*, 397 U.S. 943 (1970) (impliedly holding that *Bruton* applies).

Some courts found *Bruton* inapplicable but also explained that if it were applicable, the error would be harmless beyond a reasonable doubt. *See, e.g.*, Mack v. Maggio, 538 F.2d 1129, *reh'g denied*, 542 F.2d 575 (5th Cir. 1976); Metropolis v. Turner, 437 F.2d 207, 208-09 (10th Cir. 1971); Ignacio v. Guam, 413 F.2d 513 (9th Cir. 1969), *cert. denied*, 397 U.S. 943 (1970); *see also* Note, *supra* note 9, at 660 (courts prior to Parker v. Randolph, 442 U.S. 62 (1979) (plurality), uncertain about which standard to employ in interlocking confession cases).

73 442 U.S. 62 (1979) (plurality).

74 *Id.* at 64.

75 Justice Rehnquist wrote the plurality opinion, joined by Chief Justice Burger and Justices Stewart and White.

76 442 U.S. at 75.

77 *Id.* at 77 (Blackmun, J., concurring).

78 *Id.* at 81 (Stevens, J., dissenting). Justices Brennan and Marshall joined Justice Stevens in dissent.

79 *Id.* at 72 (citing *Bruton*, 391 U.S. at 128).

80 *Id.* at 73.

81 *Id.*

82 *Id.* at 74.

concluded by arguing that when the jury is able to follow its instructions and the evidence is minimally prejudicial, "the constitutional scales tip" toward the state interest.[83]

Justice Blackmun concurred in the result but objected to the adoption of a per se rule in favor of admitting interlocking confessions.[84] He noted that the plurality decision departed from the harmless error approach that the Court had until then applied to all *Bruton* errors. Blackmun argued that juries are not necessarily responsible enough to follow their instructions[85] and that many interlocking confessions can be highly prejudicial.[86] He suggested that if the plurality intended to abandon the harmless error approach when deciding the admissibility of interlocking confessions, it should at least require courts to determine the degree to which confessions interlock before admitting the confessions.[87]

In dissent, Justice Stevens explained that the plurality's decision rested on two faulty assumptions. First, the Court erroneously assumed that the jury is more likely to disregard a codefendant's confession when it is corroborated by the defendant's confession.[88] This assumption is faulty, he explained, because if all of the evidence except the codefendant's confession only dubiously supports the defendant's confession, the defendant's confession "would enhance, rather than reduce, the danger that the jury would rely on [the codefendant's confession] when evaluating [the defendant's] guilt."[89] Second, Stevens argued that the majority incorrectly assumed that all unchallenged defendant's confessions are equally reliable.[90] He explained that a confession may be ambiguous or incomplete or may result from coercive influences or from the "well-recognized and often untrustworthy 'urge to confess.' "[91] Furthermore, "there is nothing [the defendant] could say or not say about his own alleged confession that would dispel the dramatically

---

83 *Id.*

84 *Id.* at 77 (Blackmun, J., concurring).

85 *Id.* at 79; *see* Note, *supra* note 9, at 667 ("the critical distinction between the *Parker* plurality's opinion and those of the concurrence and dissent is whether limiting instructions are a sufficient safeguard of a defendant's sixth amendment rights when the defendant has himself made an interlocking confession.").

86 442 U.S. at 78. He explained that prejudice may arise in three ways: (1) from confessions that interlock to some degree; (2) from confessions that interlock only in part, covering only a part of the events in issue; and (3) from the codefendant's confession that implicates the defendant even if the confessions are internally inconsistent. *Id.* at 79.

87 *Id.* at 80.

88 *Id.* at 84 (Stevens, J., dissenting).

89 *Id.* at 85.

90 *Id.*

91 *Id.* at 86.

damning effect of [his codefendant's confession]."[92] The dissent further explained that an unchallenged confession is not inherently more reliable than a challenged one[93]—indeed, the defendant may choose not to challenge his confession because he wishes not to emphasize it. Stevens argued that if courts admit interlocking confessions, they should insist upon a strong showing that the codefendant's confession is reliable.[94] He concluded by explaining that the crucial question is whether courts should engage in the presumption that juries follow their instructions and, referring to *Bruton*, argued that the cost to the defendant in making such a presumption is too high in these contexts.[95]

## II
## THE CASES

### A. *Richardson v. Marsh*

In *Richardson v. Marsh*,[96] defendant Marsh was convicted of felony murder and assault with intent to murder. Marsh admitted her presence at the crime scene but denied having the requisite intent to commit the crimes. The prosecution's apparent theory was that Marsh acquired the requisite intent while she rode in the back seat of an automobile with her codefendant and a third person because she overheard the front-seat occupants' conversation that schemed to rob and kill the people at the scene. In support of its theory, the prosecution was prepared to offer the confession of Marsh's codefendant, one of the two friends who sat in the front seat of the car. The confession stated that, during the ride, the codefendant and the driver of the car discussed their plans to "stick up" a location and to "take [the victims] out after the robbery."[97] Marsh admitted that she rode to what became the crime scene in the back seat of an automobile and that her two friends sat in the front seat. She, however, maintained that she could not hear the conversation of the two people sitting in the front seat because the car's radio drowned out the front occupants' conversation. She explained that the crime scene was the home of some acquaintances and claimed that she thought that she and her automobile companions were driving to her acquaintance's house to pick up something. Marsh said that to her

92 *Id.*
93 *Id.*
94 *Id.* at 87. Stevens also wrote that the prosecution must offer a strong showing that it is impossible, or at least difficult, for the prosecution to make the accuser available. Stevens explained that this showing would be difficult to make because the accuser is at the trial. *Id.*
95 *Id.* at 89.
96 481 U.S. 200 (1987).
97 *Id.* at 203 n.1.

surprise, upon their arrival at the house, her two friends stole money from the three people they found there and then shot them, killing two. The key issue in determining whether Marsh had the requisite intent was thus whether she heard the conversation in the front seat.

The prosecutor redacted the codefendant's confession to delete all direct references to Marsh, and the trial court admitted the confession into evidence and gave the jury limiting instructions. Citing *Bruton*, Marsh argued that the trial court erred because the jury could infer from her codefendant's confession that she heard the front seat conversation. She claimed that had she been able to confront the confessor, she would have been able to elicit testimony from him that corroborated her story about the volume level of the car's radio.[98]

The Supreme Court held that admitting the confession did not deny the defendant her right to confrontation. Justice Scalia, writing for the majority, began his opinion by noting that *Bruton* erected a narrow exception to the general presumption that jurors follow their instructions. He continued by stating that the *Bruton* exception applies only to the introduction of facially incriminating nontestifying codefendant confessions.[99] Scalia then noted that the confession in this case was not incriminating on its face; it became incriminating only when linked with other evidence later introduced at trial. In contrasting redacted confessions with *Bruton*-type confessions, Scalia asserted that where linkage creates the incriminatory effect of the confessions, juries are less likely to disobey their instructions.[100] Nevertheless, Scalia did express some doubt about whether to trust juries to follow their instructions in redacted confession cases. He explained,

> [t]he rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process.[101]

Justice Scalia explained that the Court's decision furthered important state interests and that such interests outweigh any possible prejudice to the defendant. The Justice stated that the result of a holding rendering *Bruton* applicable to contextually implicating codefendant confessions would inexcusably harm the state.[102] He ex-

---

98 *Id.* at 205.
99 *Id.* at 211.
100 *Id.*
101 *Id.*
102 *Id.* at 209-10. By indirectly referring to Judge Lehman's statement in People v.

plained that prosecutors would be required to postpone the introduction of codefendant confessions until the end of their trials, and would have to await the trial courts' decisions on whether the jury could link the confession to other evidence and if the jury could do so, the extent of such linkage's potential harm. Scalia feared that waiting until the end of trial to introduce the confession would harm the state by creating difficult strategic decisions for prosecutors and by granting to defense attorneys the opportunity to manipulate their cases to ensure that the trial court either excludes the confession or declares a mistrial.[103]

Justice Scalia rejected the proposition that courts should try codefendants separately when prosecutors seek to use an incriminating codefendant confession. For support, Scalia pointed to the greater efficiency of joint trials over separate trials. He noted that in contrast to separate trials, joint trials require each witness to testify only once.[104] The Justice also contended that the likelihood of eliciting a confession from a codefendant increases as the number of trial participants increases.[105] Moreover, Scalia noted that separate trials impair fairness by "randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand."[106] He noted that joint trials generally serve the interests of justice by avoiding the possibility of inconsistent verdicts for legally indistinguishable defendants.[107] The opinion asserted that joint trials also permit juries accurately to assess the relative culpability of the defendant and his codefendant, an assessment that may actually operate to the defendant's benefit.[108]

Justice Stevens, writing in dissent, argued that juries paying vigorous attention to the proceedings will sometimes naturally proceed down " 'the path of inference.' "[109] Thus, he argued that limiting instructions are often ineffective. Stevens also argued that trial courts should determine on a case-by-case basis[110] whether a confession is "powerfully incriminating." In addition, Stevens rebutted the majority's contention that joint trials are essential to an

---

Fisher, 249 N.Y. 419, 432, 164 N.E. 336, 341 (1928), quoted in *Bruton*, he explained that "that [foregoing the use of codefendant confessions] is too high," because those confessions are essential to furthering society's compelling interest in punishing those who violate the law.

103 481 U.S. at 209.

104 *Id.* at 210.

105 *Id.* at 209-10 (citing Memorandum of David L. Cook, Administrative Office of the United States Courts, to the Supreme Court Library (Feb. 20, 1987)).

106 *Id.* at 210.

107 *Id.*

108 *Id.*

109 *Id.* at 213 (Stevens, J., dissenting).

110 *Id.* at 214.

efficient prosecution by offering several alternatives to joint trials.[111] Moreover, Stevens stated that assessing the prejudicial effect of a codefendant confession at the end of the trial would not impair fairness because attorneys are not inclined to risk an entire case in order to force a mistrial and, in any event, trial judges are sufficiently experienced to deal with such tactics.[112]

B. *Cruz v. New York*

In *Cruz v. New York*,[113] Eulogio and Benjamin Cruz each confessed to the slaying of a gas station attendant. Over Eulogio's two objections, the trial court jointly tried the two men for murder and admitted the interlocking confessions of the two men. The Supreme Court reversed and held the interlocking confession inadmissible,[114] rejecting the *Parker v. Randolph*[115] plurality approach and expressly adopting Justice Blackmun's harmless error argument.[116] Justice Scalia, again writing for the majority, explained that the *Parker* plurality erroneously assumed that interlocking confessions are generally not sufficiently devastating to render their admission a *Bruton* violation.[117] He explained that, in fact, interlocking confessions can be highly devastating to a defendant's case[118] because criminal defendants often try to avoid rather than to adopt their own confessions. He noted that admitting a codefendant's interlocking confession harms the defendant who tries to shun his own confession because the codefendant's confession makes the defendant's already damning confession appear reliable.[119] Scalia contended that because the codefendant's confession enhances the reliability of the defendant's confession, a jury is likely to ignore limiting instructions and hence use the codefendant's confession in its deliberations on the defendant's fate. Scalia noted that his opinion was consistent with precedent because it considers "the likelihood that the instructions will be disregarded, the probability that such

111 *Id.* at 219. The alternatives to a joint trial included granting immunity, making plea bargains and waiting to introduce the codefendant confession until the government has concluded its case against the defendant and the codefendant.

112 *Id.* at 220.

113 481 U.S. 186 (1987).

114 *Id.* at 193.

115 442 U.S. 62 (1979).

116 *See id.* at 77 (Blackmun, J., concurring). For discussion of the Blackmun approach, see *supra* notes 85-87 and accompanying text. The *Parker* dissent also used the harmless error methodology but, whereas Justice Blackmun found that the error was harmless, the dissent found that it was not harmless.

117 481 U.S. at 192.

118 Justice Scalia wrote, "it seems to us that interlocking bears a positively inverse relationship to devastation." *Id.* It is evident from his discussion, however, that he meant a positive relationship.

119 *Id.*

disregard will have a devastating effect, and the determinability of these facts in advance of trial."[120] In an apparent response to efficiency arguments, Scalia explained that the interlocking nature of a codefendant's confession positively affects the confession's reliability and that sufficiently interlocking codefendant confessions may thus actually be reliable enough to be admitted directly against the defendant.[121] Absent such reliability, however, Scalia's opinion barred codefendant confession admissions.

Justice White, writing in dissent, argued that the defendant's own confession is the most devastating evidence against him and thus that the codefendant's confession cannot devastate the defendant's case.[122] Although he noted that the damaging effect of a defendant's confession may vary from case to case, he argued that because the *Bruton* rule is prophylactic in nature and imposes siguificant burdens on the prosecution, it should be confined to those cases where ineffective limiting instructions are most likely to change the verdict. White contended that interlocking confessions do not fit into this category.[123]

## III
## ANALYSIS

In its decisions on the admissibility of inculpatory codefendant confessions, the Supreme Court has fashioned per se rules either admitting or barring the admission of particular types of confessions. The Court has examined several factors when determining the admissibility of the confessions before it. One pivotal factor it has considered is the efficacy of limiting instructions.[124] Other factors have included the degree to which an inculpatory confession

120 *Id.* at 193 (citing Richardson v. Marsh, 481 U.S. 200 (1987)).

121 *Id.* at 192-93. For a discussion of the admissibility of reliable evidence, see *supra* notes 19-22 and accompanying text.

122 *Id.* at 195 (White, J., dissenting). Justice White referred to Justice Rehnquist's plurality opinion in *Parker v. Randolph* to support this argument. He described the majority's analysis that the more interlocking the confession the more devastating it is to the defendant's case as "remorseless logic" that should bow to common sense. *Id.* at 197.

123 *Id.*

124 Courts' views toward the jury's ability to follow limiting instructions have made dramatic changes from the 1930s to the present. The period between 1930 and 1950 witnessed one extreme view that almost irrebuttably presumed that the jury is able to follow limiting instructions. This view was rooted both in a general trust of the jury and in the practicalities of making such a presumption. *See, e.g.*, Cwach v. United States, 212 F.2d 520, 526-27 (8th Cir. 1954); United States v. Simone, 205 F.2d 480, 483-84 (2d Cir. 1953); Metcalf v. United States, 195 F.2d 213, 217 (6th Cir. 1952); United States v. Leviton, 193 F.2d 848, 855-56 (2d Cir. 1951), *cert. denied*, 343 U.S. 946 (1952); United States v. Gottfried, 165 F.2d 360, 367 (2d Cir.), *cert. denied*, 333 U.S. 860 (1948); United States v. Pugliese, 153 F.2d 497, 500-01 (2d Cir. 1945); Johnson v. United States, 82 F.2d 500 (6th Cir.), *cert. denied*, 298 U.S. 688 (1936); Nash v. United States, 54 F.2d 1006,

"powerfully incriminates" the defendant or prejudices the defendant's case,[125] efficiency and other state concerns,[126] and, to a lesser extent, the reliability of the codefendant's confession.[127]

Although the Court has generally considered these factors when determining whether to admit a codefendant confession, it has not articulated how much weight trial courts ought to accord each one and seemingly has not even itself given them consistent weight.[128] As a result, the Supreme Court has vacillated between narrowly defining a defendant's confrontation right to include only those situations in which the prosecutor introduces evidence directly against the defendant[129] and broadly defining the right so that it applies only to situations in which the prosecutor introduces evidence indirectly as well as directly inculpating the defendant.[130] *Richardson v. Marsh*[131] and *Cruz v. New York*[132] reflect each of the Court's tendencies.

Using the underlying principles of the confrontation right[133] and considerations that the Court has used in its codefendant confession decisions, this section offers a proposal for determining the admissibility of redacted and interlocking confessions. This section then uses the proposal as a framework for critiquing the two cases.

---

1007 (2d Cir.), *cert. denied*, 285 U.S. 556 (1932); Waldeck v. United States, 2 F.2d 243, 245 (7th Cir. 1924), *cert. denied*, 267 U.S. 595 (1925).

In the 1960s, courts drastically altered their attitude toward the efficacy of limiting instructions, adopting a strong distrust of the jury's ability to follow its instructions. *See, e.g.*, Bruton v. United States, 391 U.S. 123 (1968); *see also* Douglas v. Alabama, 380 U.S. 415 (1965).

More recently, in the 1970s and 1980s, the Supreme Court has shifted to a middle-of-the-road ambivalence toward the jury's ability to follow limiting instructions. *See, e.g.*, Parker v. Randolph, 442 U.S. 62 (1979); Richardson v. Marsh, 481 U.S. 200 (1987); *Cruz*, 481 U.S. 186.

125 *See, e.g.*, *Richardson*, 481 U.S. 200; *Cruz*, 481 U.S. 186; *Parker*, 442 U.S. 62 (1979) (plurality); Dutton v. Evans, 400 U.S. 74 (1970); Bruton v. United States, 391 U.S. 123 (1968); *see also* United States v. Belle, 593 F.2d 487 (3d Cir.) (en banc), *cert. denied*, 442 U.S. 911 (1979).

126 *See, e.g.*, *Richardson*, 481 U.S. 200 (1987); *Cruz*, 481 U.S. 186; Tennessee v. Street, 471 U.S. 409 (1985); *Parker*, 442 U.S. 62; *Bruton*, 391 U.S. 123 (1968); Barber v. Page, 390 U.S. 719 (1968); *see also Belle*, 593 F.2d 487.

127 *See, e.g.*, *Dutton*, 400 U.S. 74; *Bruton*, 391 U.S. 123; *see also* Ohio v. Roberts, 448 U.S. 56 (1980) (testimony from preliminary hearing in which defendant cross-examined witness admissible under "indicia of reliability" test); Mancusi v. Stubbs, 408 U.S. 204 (1972) (under "indicia of reliability" test, confronted testimony form prior trial admissible).

128 *Compare Barber*, 390 U.S. 719, *with Bruton*, 391 U.S. 123.

129 *See, e.g.*, Delli Paoli v. United States, 352 U.S. 232 (1957); Mattox v. United States, 156 U.S. 237 (1895).

130 *See, e.g.*, *Bruton*, 391 U.S. 123.

131 481 U.S. 200 (1987).

132 481 U.S. 186 (1987).

133 *See supra* notes 10-18 and accompanying text.

### A. Proposal for the Admissibility of Redacted and Interlocking Confessions

In general, the Supreme Court should require lower courts to determine the admissibility of inculpatory codefendant confessions on a case-by-case basis.[134] The Court should deviate from this approach only when it appears that the case-by-case approach will almost always disallow the admission of particular types of confessions. In such circumstances, the Court and reviewing courts should issue per se rules disallowing these particular types of confessions.

When determining the admissibility of confessions, lower courts should weigh possible harm to the confrontation right against efficiency and practical concerns but should give substantially more weight to the possible harm. The Court has implicitly incorporated various versions of this calculus in its decisions, although it has cast its holdings as per se rules.[135] A per se rule admitting inculpatory codefendant confessions fails by admitting confessions in cases where harm to the confrontation right outweighs efficiency and practical concerns. Similarly, a per se rule barring the admission of codefendant confessions fails by excluding confessions in cases in which efficiency and practical concerns outweigh harm to the confrontation right. A case-by-case proposal is therefore preferable because it narrowly fulfills the purposes of the confrontation right while allowing the use of joint trials when doing so does not undermine the right's purpose. Refining the case-by-case approach to permit courts not to admit codefendant confessions makes sense only when the case-by-case approach would usually result in disallowing the admission of a particular type of confession. The refinement promotes the most efficient use of judicial resources while avoiding the possibility of harming the defendant's confrontation right.

#### 1. *The Court Should Presume That Juries Do Not Follow Their Instructions in Codefendant Incriminating Confession Cases*

An important basic question underlying the admissibility issue in codefendant confession cases is the frequency with which juries will disregard their limiting instructions and use unconfronted con-

---

134 *See Cruz*, 481 U.S. at 191 ("[*Bruton*] did not suggest that the existence of such an effect should be assessed on a case-by-case basis.") (citation omitted). *But see Richardson*, 481 U.S. at 214 (Stevens, J., dissenting) ("*Bruton* has always required trial judges to answer the question whether a particular confession is or is not 'powerfully incriminating' on a case-by-case basis . . .") Stevens, dissenting in *Richardson*, was even willing to extend the case-by-case approach to confessions that expressly mention the defendant. *Id.* at 213 n.2.

135 *See supra* notes 124-32 and accompanying text.

fessions against the defendant.[136] Courts[137] and commentators[138] have strongly doubted juries' abilities to follow limiting instructions. Because considerable doubt exists that juries can follow their instructions, the Court should presume that juries will not follow limiting instructions in codefendant confession cases.[139] The Court should reverse the usual presumption that juries follow their instructions[140] because confrontation right infringements jeopardize a trial's fairness by undermining accurate and reliable fact-finding.[141]

---

136 Marsh v. Richardson, 781 F.2d 1201, 1207 (6th Cir. 1986) ("The critical factor in assessing an alleged Confrontation Clause violation is the likelihood or probability that the jury will consider inadmissible evidence in assessing a defendant's guilt."), *rev'd*, 481 U.S. 200 (1987).

137 *See, e.g.*, Bruton v. United States, 391 U.S. 123, 135 (1968) ("there are some contexts in which the risk that the jury will not, or cannot, follow instructions is . . . great"); Delli Paoli v. United States, 352 U.S. 232, 241-42 (1957); Blumenthal v. United States, 332 U.S. 539, 559 (1947) (danger that the jury "would transfer, consciously or unconsciously, the effect of the excluded admissions" very great); Nash v. United States, 54 F.2d 1006 (2d Cir.), *cert. denied*, 285 U.S. 556 (1932).

138 Doob & Kirshenbaum, *Some Empirical Evidence on the Effect of § 12 of the Canada Evidence Act Upon an Accused*, 15 CRIM. L.Q. 88 (1972) (psychologists' viewpoint and an experiment suggesting that juries do not completely adhere to their instructions); Note, *To Take The Stand Or Not to Take The Stand, The Dilemma of the Defendant With a Criminal Record*, 4 COLUM. J.L. & SOC. PROBS. 215 (1968) (suggesting that juries do not disregard prior convictions in determining issue of guilt); Note, *Other Crimes Evidence At Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763 (1961) (showing that juries are unable or unwilling completely to follow their instructions); *see also* FED. R. CRIM. P. advisory notes:

> A defendant may be prejudiced by the admission in evidence against a co-defendant of a statement or confession made by that co-defendant. This prejudice cannot be dispelled by cross-examination if the co-defendant does not take the stand. Limiting instructions to the jury may not in fact erase the prejudice. . . . The purpose of the amendment is to provide a proceeding whereby the issue of possible prejudice can be resolved in the motion for severance.

139 Conceivably, the Court ought to adopt this presumption whenever a fundamental right is implicated.

140 The Court generally presumes that juries follow their instructions. *See, e.g.*, Francis v. Franklin, 471 U.S. 307, 325 n.9 (1985) ("[W]e adhere to the crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions."); Connecticut v. Johnson, 460 U.S. 73, 85 n.14 (1983) ("we must assume that juries for the most part understand and faithfully follow instructions") (citation omitted); Parker v. Randolph, 442 U.S. 62, 73 (1979) ("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."); *see also* Note, *supra* note 9, at 660.

The Court generally adopts this presumption regardless of the strength of its foundation. *See, e.g.*, Richardson v. Marsh, 481 U.S. 200, 211 (1987) ("The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true.").

141 *See supra* notes 10-18 and accompanying text.

### 2. *The Court Should Admit Codefendant Incriminating Confessions Only When The Efficiencies and Practicalities of Joint Trials Outweigh Harm to the Confrontation Right*

Despite presumed jury failure to follow limiting instructions, the Court should permit trial judges to admit unconfronted testimony when efficiency and other state interests[142] substantially outweigh the extent of harm to the confrontation right. Potential harm to the right arises when the incriminating confession does not comport with the right's function of ensuring that the jury hears both accurate and reliable evidence against the defendant. Because codefendant confessions are "inevitably suspect" due to codefendants' strong motivation to shift blame to another,[143] admitting these confessions poses a significant risk to the reliability and accuracy of the evidence against the defendant. The Supreme Court has presumed and should continue to presume[144] that codefendant confessions are unreliable and inaccurate unless the prosecutor can prove otherwise.

Not all unreliable and potentially inaccurate incriminating confessions, however, equally undermine the right's underlying purpose of affording a defendant a fair trial. Some confessions are more detrimental to the defendant's case than others.[145] When determining the degree of potential harm that a confession presents to the confrontation right, courts should consider the degree of prejudicial impact the confession presents to the defendant's case.[146] If the degree of prejudicial impact is minimal,[147] confrontation is of little importance. Conversely, codefendant confessions with high prejudicial impact severely harm the defendant's case because the defendant needs the opportunity to test the evidence's accuracy and reliability.

The Supreme Court should require lower courts to weigh the state's interest in the practical benefits and efficiencies emanating from joint trials[148] against harm to the right. The Court should

---

142 For discussion of efficiency and other state interest concerns, see *supra* notes 54-55, 104-07 and accompanying text.

143 *Parker*, 442 U.S. at 73; Bruton v. United States, 391 U.S. 123, 136 (1968); *see also* United States v. Belle, 593 F.2d 487, 495 n.12 (3d Cir.), *cert. denied*, 442 U.S. 911 (1979).

144 *See, e.g.*, *Bruton*, 391 U.S. 123.

145 *See supra* notes 88-93.

146 *See. e.g.*, *Bruton*, 391 U.S. at 135 (court looks at whether the confession is "powerfully incriminating" or "devastating" to the defendant's case).

147 Prejudicial impact is minimal when the error is harmless under a strict harmless error calculus.

148 For discussion of how joint trials are efficient and practical, see *supra* notes 54-55, 103-08 and accompanying text. See also the advisory note to the Federal Rules of Criminal Procedure, authorizing severance where it appeared that a defendant may have been prejudiced by a joint trial. "The purpose of the amendment is to provide a proceeding

skeptically approach arguments centering on state concerns, however, because such factors should not easily narrow the scope of a fundamental right that the Constitution confers in absolute terms.[149] The Court should explore alternatives[150] before allowing even strong state and efficiency concerns to outweigh less weighty confrontation right harm. Efficiency and other concerns should only outweigh harm to the right if they do so substantially.[151]

### B. *Richardson v. Marsh* Failed To Presume That Juries Do Not Follow Their Instructions and Created a Per Se Rule Harmful to the Confrontation Right

By adopting a per se rule admitting redacted codefendant confessions, the *Richardson v. Marsh*[152] Court did not sufficiently respect the defendant's confrontation right. Although it acknowledged the possibility that juries do not follow their instructions in facially implicating codefendant confession cases, it refused to invoke a strong form of the presumption in redacted confession cases. The Court explained, "[w]here the necessity of [contextually implicating the defendant] is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence."[153] Although the Court did not discuss the frequency with which juries disregard their instructions, it apparently adopted a relatively easy standard for finding jury obedience.[154] Because the right is essential to a fair trial[155] and because studies tend to show that juries fail to follow their instructions,[156] the Court should have presumed jury disobedience.

The Court considered the harm that such a rule inflicts on the

---

whereby the issue of possible prejudice can be resolved on the motion for severance." *Bruton*, 391 U.S. at 132 (citing FED. R. CRIM. P. 34).

149 This Note presumes that rights the Constitution characterizes in absolute terms are not absolute. The right to free speech, for example, is not absolute, as substantial government interests can override it. *See, e.g.*, Schad v. Mount Ephraim, 452 U.S. 61, 68 (1981) (total ban on live adult entertainment impermissible if such ban does not, *inter alia*, further a "sufficiently substantial government interest.").

150 For alternative ways the Court may approach redacted and interlocking confessions, see *infra* text accompanying notes 163-69.

151 This test mirrors the first amendment test for permitting the state completely to ban certain types of speech. *See supra* note 149. A lower threshold than "substantial" would in all likelihood permit the admission of too many confessions, thus rendering a defendant's confrontation right virtually meaningless.

152 481 U.S. 200 (1987).

153 *Id.* at 208.

154 The Court explained, "there does not exist the *overwhelming probability* of [jury] inability" to obey its instructions. *Id.* at 208 (emphasis supplied). The Court did not confront the fact that although the probability was not 'overwhelming' it may have been very likely.

155 *See supra* notes 10-18 and accompanying text.

156 *See supra* note 138 and accompanying text.

confrontation right but stated that redacted confessions are not by themselves "powerfully incriminating," as they do not expressly identify the defendant. By focusing exclusively on the confession and not on its contextual implications, the Court misconceived the reason for determining whether a confession powerfully implicates the defendant. Courts look at the degree of implication when determining whether a defendant should be given the opportunity to confront her accuser in order to assure that the jury uses only reliable and accurate evidence against her. Thus, a confession that in context strongly implicates a defendant should be subject to cross-examination. Even if the Supreme Court were correct that the confession in *Richardson* was not powerfully incriminating, redacted confessions in other fact scenarios may very well be incriminating.[157] By adopting a per se rule erring on the side of not affording a defendant the opportunity to confront the evidence against her, the Court permits prosecutors to introduce incriminating redacted confessions that may be prejudicial simply because those confessions fall into the "redacted confession" category. To remedy the overbreadth problem that the per se approach engenders, the Court should have required that lower courts consider the admissibility of redacted confessions on a case-by-case basis.[158]

Moreover, the Court's assumption that the confession did not impinge on the defendant's right is dubious even with the facts in *Richardson*.[159] By the time the prosecutor introduced the codefendant's confession, the evidence had established that Marsh's codefendant committed an armed robbery, killed two people and wounded a third, and that the defendant rode to the crime scene with those who committed the acts. The confession indicated that while in the automobile, two of the participants discussed killing the eventual victims. The main issue in the case was whether the de-

157 *See, e.g.*, Clark v. Maggio, 737 F.2d 471, 477-78 (5th Cir. 1984) (jury can easily link evidence to implicate the defendant), *cert. denied*, 470 U.S. 1055 (1985); English v. United States, 620 F.2d 150, 152 (7th Cir.) (admitting confession from which names of codefendants have been excised may violate *Bruton* rule if "in context the statement is clearly inculpating of a co-defendant, and vitally important to the Government's case"), *cert. denied*, 449 U.S. 859 (1980).

158 The *Bruton* Court suggested that one way to eliminate the unfair prejudice resulting from the admission of incriminating confessions is to delete from the confession all references to the defendant. Because it was so concerned with avoiding prejudice to the defendant, it is more than likely that the *Bruton* Court was referring to confessions in which all direct and indirect references to the defendant were deleted. The *Bruton* dissent interpreted the Court's suggestion in this manner. *See Bruton*, 391 U.S. at 139. The Court's reasoning in *Marsh* thus does not follow *Bruton*'s rule of safeguarding a defendant's right because redacted confesssions can be powerfully implicating even if the accusation is not apparent on its face.

159 For the case's facts, see *supra* text accompanying notes 96-98.

fendant knew that the two people intended to commit murder,[160] and Marsh would have had such knowledge if she had overheard the conversation. If the jurors had paid close attention to the evidence, they likely would have inferred that Marsh heard the conversation.

One of the concerns underlying the confrontation right is the reliability of statements the jury uses against a defendant. Courts have thus been concerned about the possibility of codefendants shifting blame to the defendant. Although the Court did not discuss the possibility of blame-shifting in redacted confession cases, there is no reason to assume that it does not remain a vital problem in such cases. By not affording a defendant her right to confrontation in these cases, the Court precludes the defendant from testing the reliability and accuracy of particularly suspect testimony. The Court's decision thereby fails to fulfill one of the functions of the right.

The *Richardson* Court relied heavily on the practicalities and efficiencies of joint trials,[161] and apparently believed that these always outweigh harm to the right in redacted confession cases. Although the practicalities and efficiencies of joint trials are important concerns, their power is somewhat diminished by the very real possibility that the confessing codefendant will plead guilty if the defendant is tried and convicted before the confessing codefendant's trial concludes. Moreover, the fundamental nature of the confrontation right dictates that such concerns should outweigh harm only if they do so substantially. In discussing the practicalities of joint trials, the Court explored and dismissed the dissent's suggested alternatives to severing a trial.[162] As discussed above,[163] the Court should carefully consider alternatives before permitting efficiency and state concerns to outweigh harm to the confrontation right.

The dissent offered several promising alternatives to severing the trial. The majority perfunctorily dismissed one of the most desirable of dissent's alternatives, that of holding a full trial and postponing the judge's decision on the confession's admissibility until the prosecution rests. This alternative is preferable to the majority's per se rule because it respects efficiency concerns by allowing courts jointly to try defendants; moreover, it respects the purposes of the confrontation right by not allowing the prosecution to admit unconfronted and therefore potentially inaccurate, and unreliable and/or prejudicial confessions.

---

160 481 U.S. 200, 206 (1987).

161 For these efficiencies and considerations, see *supra* notes 54-55, 103-08 and accompanying text.

162 *See supra* notes 111-12 and accompanying text.

163 *See supra* note 150 and accompanying text.

The Court also perfunctorily dismissed the promising suggestion that trial courts assess the effect of the confession at the end of trial, claiming that the alternative lends itself to defense manipulation.[164] As the dissent pointed out, however, it is highly unlikely that defendants would risk their entire case "to enhance the prejudicial impact of a codefendant's confession."[165] Thus, rather than holding admissible the naked redacted confession, the Court should at least have required trial courts to wait until the prosecution rests or until the end of trial to determine the admissibility of a redacted confession.

In addition, the *Richardson* Court dismissed the dissent's suggestion that courts hold a pretrial hearing at which both parties would reveal their evidence, enabling the judge to determine the confession's admissibility in advance of trial.[166] It offered two reasons for its dismissal. First, it was unsure of the option's feasibility under the Federal Rules of Criminal Procedure. The Court did not indicate the root of its uncertainty, but it seems to arise from the absence of guidance in rule 17.1,[167] the only rule that would control the matter. The Court should have utilized its inherent supervisory powers to decide the alternative's feasibility. Moreover, because the right is of such importance, the Court should have read the rule broadly, concluding that the alternative is feasible. The second reason the Court rejected conducting a pretrial hearing is that it believed that such a hearing is time-consuming and not foolproof.[168] The time element of the alternative should not preempt application of the right, however, because such efficiency concerns are too weak to outweigh harm. Furthermore, the mere lack of certainty about a procedure's foolproofness should not by itself prevent use of the alternative. Because the reasons rejecting the pretrial hearing option are unpersuasive, this option should also exist as a viable alternative.

In its discussion of the strength of the efficiency reasons in redacted confession cases, the *Richardson* Court also did not explore

---

164 *See supra* note 103 and accompanying text.

165 481 U.S. at 220 (Stevens, J., dissenting).

166 *Id.* at 209.

167 FED. R. CRIM. P. 17.1 provides:

> At any time after the filing of the indictment or information the court upon motion of any party or upon its own motion may order one or more conferences to consider such matters as will promote a fair and expeditious trial. At the conclusion of a conference the court shall prepare and file a memorandum of the matters agreed upon. No admissions made by the defendant or the defendant's attorney at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and the defendant's attorney. This rnle shall not be invoked in the case of a defendant who is not represented by counsel.

168 481 U.S. at 209.

the dissent's alternatives of granting immunity, making plea bargains, or waiting for the government's case to finish before admitting the confession.[169] Either of these alternatives would be acceptable because each would afford a defendant her confrontation right without impairing efficiency.

The Court did not address the most promising alternative, one that the dissent did not suggest. Under this alternative, the trial court would jointly try the defendant and codefendant but separate juries would sit for each of the defendants. This alternative would permit two juries to sit when the prosecutor introduces evidence pertaining to both defendants but would dismiss the defendant's jury when the prosecutor introduces the incriminating codefendant's confessions. This alternative promotes efficiency by permitting the state to conduct one trial for both defendants while respecting the defendant's confrontation right.

The *Richardson* decision has great potential for diluting a defendant's right to confrontation. The Court constructed a per se rule even though in some redacted confession cases juries would not be able to follow their instructions. As with any per se rule admitting a confession, this rule is faulty because it applies even when a redacted confession strongly implicates a defendant. If the Court had required determinations of the admissibility of redacted confessions on a case-by-case basis, it would have ensured that the confrontation right was not harmed while accommodating state interests by allowing some joint trials.

### C. *Cruz v. New York* Presumed That Juries Ignore Their Instructions But Impaired Efficiency by Offering a Per Se Rule

The *Cruz v. New York*[170] decision respected the purposes of the right to confrontation by presuming that juries will probably ignore their limiting instructions. The decision, however, explicitly refused to allow judges to determine the admissibility of an interlocking confession on a case-by-case basis and instead adopted a per se rule.[171] It did so presumably because it assumed that all interlocking confession cases are like the one in *Cruz*. Yet, although the *Cruz* confession had all the incidents associated with harm to the defendant's confrontation right—'powerfully incriminating' the defendant, unreliability and motivation to shift the blame to the defendant—not all interlocking confessions are as harmful as the one in *Cruz*. The Court explained its assumption by stating that "in

169 *Id.* at 219 (Stevens, J., dissenting).
170 481 U.S. 186 (1987).
171 *Id.* at 191-92.

the real world of criminal litigation, the defendant is seeking to *avoid* his confession—on the ground that it was not accurately reported, or that it was not really true when made."[172]

Cases do exist where the harm to the confrontation right arising from interlocking confessions is minimal. Such cases arise when the defendant wants to admit the truthfulness of her confession and therefore wants the corroboration that an interlocking confession offers. Examples of defendants wishing the codefendant's corroboration include: the defendant who pleads that he was mentally incompetent at the time of the incident; the defendant who wants her confession to support an affirmative defense; and the defendant who wishes to show how her actions diverged from the elements of the crime. Although occurrences in which defendants wish to have the corroboration of the codefendant's confession are probably rare—a fact supporting a per se rule disallowing admission of the confession—the Court still should have required a case-by-case analysis. Judges do not spend much time determining the admissibility of interlocking confessions because they would need to look only at the two confessions to make their determinations. Moreover, because the Supreme Court and lower courts have not formulated a clear definition of "interlocking,"[173] a per se rule may result in courts excluding interlocking confessions that do not interfere with defendant's confrontation right.[174] For example, courts may exclude confessions that only partially interlock or confessions that interlock in such a way that they do not inculpate the defendant.

## CONCLUSION

The confrontation right aims toward affording a defendant a fair trial by ensuring both accurate and reliable fact-finding. Supreme Court case law has both narrowly and broadly interpreted this right and *Richardson v. Marsh* and *Cruz v. New York* reflect the Court's contradictory approaches. To respect the right to confrontation as well as state concerns, the Court should balance harm to the right against state interests on a case-by-case basis, giving more weight to the right. The Court should deviate from this approach and use the per se rule only if the case-by-case method would generally exclude the admission of certain types of confessions. The *Rich-*

172 *Id.* at 192.

173 *See supra* note 9.

174 *See* Parker v. Randolph, 442 U.S. 62, 79 (1979) ("The fact that confessions may interlock to some degree does not ensure . . . that their admission will not prejudice a defendant so substantially that a limiting instruction will not be curative. 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 codefendant.").

*ardson* Court differed from this proposal by giving undue weight to state concerns and by establishing a per se rule permitting all codefendant confessions to come into evidence. The *Cruz* Court respected the purpose of the confrontation clause, but set down a per se rnle that fails to acknowledge the situations in which harm to the right is not a strong concern. The *Cruz* per se rule also fails to account for the fact that case-by-case determinations of the admissibility of an interlocking confession are not significantly less efficient than making such determinations using a per se rnle.

*Aviva Jezer*