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BRUTON DOCTRINE INAPPLICABLE IN CASES INVOLVING INTERLOCKING CONFESSIONS—
PARKER V. RANDOLPH

The Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face, and I have done.

—Sir Walter Raleigh*

The confrontation clause of the sixth amendment was adopted to prevent the use of ex parte affidavits and depositions in lieu of available witnesses in criminal trials. The clause affords defendants the opportunity to face their accusers, and allows the judge and jury to view the witness’ demeanor to aid them in determining the reliability of the testimony. In the landmark de-

* 2 Howell, A Complete Collection of State Trials 15-16 (London 1816). Sir Walter Raleigh had been charged with endorsing a treasonous plot to replace King James with Lady Arabella Stuart. The prosecution relied primarily on depositions and letters by Lord Cobham, Raleigh’s alleged co-conspirator. Knowing that Cobham’s confessions had probably been extracted through coercion and that Cobham had since retracted the confessions, Raleigh repeatedly demanded the opportunity to face his accuser and cross-examine him. The judges refused to force the prosecution to produce Cobham, relying on the principle that “so many horsestealers may escape, if they may not be condemned without witnesses.” Id. at 18. Raleigh was convicted on November 17, 1603, and subsequently beheaded. See also W.O. Douglas, An Almanac of Liberty 144 (1954).

1. U.S. Const. amend. VI provides:
   In all criminal prosecutions, the accused shall enjoy the right to speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense (emphasis added).

2. The Supreme Court in Mattox v. United States, 156 U.S. 237, 242 (1895), stated that: “The primary objective of the constitutional provision in question [the sixth amendment] was to prevent depositions of ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of personal examination and cross-examination. . . .” See also Barber v. Page, 390 U.S. 719, 722-25 (1968) (reversed armed robbery conviction where transcript of accomplice’s confession was read at defendant’s trial and state did not make good faith effort to produce accomplice); Douglas v. Alabama, 380 U.S. 415, 418 (1965) (reversed conviction for murder where extrajudicial confession of accomplice was read before jury and defendant unable to confront accomplice through cross-examination); Pointer v. Texas, 380 U.S. 400, 406-09 (1965) (reversed robbery conviction because defendant was denied the opportunity to confront an adverse witness when deposition of major witness was used by prosecution at defendant’s trial).

3. The Mattox Court also stated that the objective of the sixth amendment was to secure cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

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cision of Bruton v. United States, the United States Supreme Court expanded that prevailing interpretation of the confrontation clause by holding that a defendant's confrontation rights are violated when a non-testifying codefendant's incriminating confession is introduced at a joint trial. The Court found that the violation exists because there is a substantial risk that the jury will disregard a judge's limiting instructions and consider the extrajudicial confession of one conspirator when determining the guilt of a co-conspirator.


The right to confront one's accusers has since been expanded to include the right to cross-examine. See Davis v. Alaska, 415 U.S. 308 (1974) (clause guarantees cross-examination of adverse witness for bias); Smith v. Illinois, 390 U.S. 129 (1968) (denial of right to ask adverse witness his name is denial of cross-examination as guaranteed by confrontation clause); Brookhart v. Janis, 384 U.S. 1 (1966) (denial of cross-examination, without waiver, is constitutional error of the first magnitude); Pointer v. Texas, 380 U.S. 400 (1965) (confrontation clause, which includes the right to cross-examine, applies to the states through the fourteenth amendment). See also WIGMORE, supra note 3, at 123 as follows:

The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination which cannot be had except by the direct and personal putting of questions and obtaining answers (emphasis in original). 4. 391 U.S. 123 (1968).

5. Id. at 124. The joint trial for armed postal robbery resulted in the conviction of codefendants Bruton and Evans. Although neither defendant took the stand at trial, a postal inspector testified that Evans had orally confessed to committing the robbery with Bruton, his accomplice. The trial judge instructed the jury to disregard Evans' confession for purposes of determining Bruton's guilt or innocence. Id. The Supreme Court reversed Bruton's conviction stating that his confrontation rights had been violated because he was unable to cross-examine his codefendant concerning the incriminating confession which had been presented to the jury. Id. at 126.

6. The limiting instructions in Bruton included the following:

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 voluntary and intentionally made by the defendant Evans, you should consider it as evidence in the case against Evans, but you must not consider it, and should disregard it, in considering the evidence in the case against the defendant Bruton.

Id. at 125 n.2.

7. Id. at 135-36. Writing for the majority, Justice Brennan noted that:

[As was recognized in Jackson v. Denno [378 U.S. 368 (1964)] there 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. [Cases omitted]. Such a context is presented here where the powerfully incriminating extrajudicial state-
In a recent decision, however, a plurality of the Supreme Court limited the application of the *Bruton* doctrine to situations in which the complaining defendant has not confessed. In *Parker v. Randolph*, the Court held that when a complaining defendant has made a confession which "interlocks" with the extrajudicial confessions of his or her codefendants, the admission of the non-testifying codefendants' confessions does not violate the *Bruton* rule. The Court reasoned that once a defendant's own confession is properly before the jury, the prejudicial impact of a codefendant's incriminating confession is minimal and that *Bruton*, therefore, is inapplicable.

8. Although there is no certified official version of the "Bruton rule," the doctrine seems to be that the introduction at a joint trial of a non-testifying defendant's extrajudicial confession, which inculpates a codefendant, violates the codefendant's right of confrontation as guaranteed by the sixth amendment. See, e.g., Ignacio v. Guam, 413 F.2d 513 (9th Cir. 1969), cert. denied, 397 U.S. 943 (1970).

9. *99 S. Ct. 2132 (1979).*

10. The term "interlocking confessions" originated in *Catanzaro v. Mancusi*, 404 F.2d 296 (2d Cir. 1968), *cert. denied*, 397 U.S. 942 (1970), in which, prior to their joint trial, both defendants made similar admissions which supported and interlocked with one another. Although there is no precise definition of what makes confessions interlock, the confessions apparently need not be absolutely identical in order to be termed "interlocking." All that is required is that the confessions be substantially similar and consistent concerning the major elements of the crime. See, e.g., *Stanbridge v. Zelker*, 514 F.2d 45, 50 (2d Cir. 1975), *cert. denied*, 423 U.S. 872 (1975) (confessions interlock in manslaughter conviction despite discrepancies as to whether codefendant knew his accomplice was armed); *Ortiz v. Fritz*, 476 F.2d 37, 39 (2d Cir. 1973) (confessions did not cover same facts and were considerably dissimilar as to time of commission of murder but were essentially similar regarding motive, plot, and execution); *Duff v. Zelker*, 452 F.2d 1009, 1010 (2d Cir. 1971), *cert. denied*, 406 U.S. 932 (1972) (admissions interlock despite inconsistencies regarding use of automobile because motive and presence at scene of crime were consistent).

See note 38 infra for the confessions deemed interlocking in *Parker*.

11. *99 S. Ct. at 2135 (1979).*

12. *Id.* at 2140. The Court found that when the confessing codefendant has not taken the stand and the other codefendant has maintained his innocence from the start, there is a violation of the confrontation clause. The Court, however, held that:

[When the defendant's own confession is properly before the jury, we believe the constitutional scales tip the other way. The possible prejudice resulting from the]
This Note first will trace the history and development of the Bruton doctrine and then will analyze the Parker Court's attempt to reconcile its holding with that doctrine. Further, this Note will criticize the Court's analysis and assess the probable impact of Parker in future Bruton situations.

EVOLUTION OF THE BRUTON DOCTRINE

In Bruton and Parker, the Court addressed the problem which arises at a joint trial when a non-testifying defendant has made an extrajudicial confession that inculpates his or her codefendant. Clearly the confession is admissible against the confessor.13 It is equally clear, however, that the confession may not be used as evidence of the codefendant's guilt.14 The problem, therefore, is how to use the admission against the confessor without prejudicing his or her codefendant. Before Bruton, courts seemingly solved this problem by allowing the confession into evidence and carefully instructing the jury that the confession was only admissible against its maker and could not be used as evidence of the codefendant's guilt.15 In Delli

failure of the jury to follow the court's instructions is not so "devastating" or "vital" to the confessing defendant to require departure from the general rule allowing admission of evidence with limiting instructions.

Id. at 2140.

13. An extrajudicial confession is admissible against one who made it as an exception to the hearsay rule. See Fed. R. Evid. 801(d)(1), which provides in pertinent part: "A statement is not hearsay if...[t]he statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity. . . ." See also 4 J. Wigmore, Evidence § 1048 (Chadbourn rev. ed. 1974); E. Morgan, Admissions as an Exception to the Hearsay Rule, 30 Yale L.J. 355 (1921); Strahorn, A Reconsideration of the Hearsay Rule and Admissions, 85 U. Pa. L. Rev. 484 (1937). For an in-depth discussion of the relationship between the hearsay rule and the confrontation clause, see generally D. Davenport, The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Harv. L. Rev. 1378 (1972); Comment, The Uncertain Relationship Between the Hearsay Rule and the Confrontation Clause, 52 Tex. L. Rev. 1167 (1974).


Some courts have employed redaction, whereby all references to the non-declarant codefendant were deleted. See, e.g., Kramer v. United States, 317 F.2d 114, 117 (D.C. Cir. 1963) (deletion of hearsay reference to codefendant is preferable to jury instruction); United States v. Jacangelo, 281 F.2d 574, 576 (3d Cir. 1960) (deletion of hearsay reference required where it adds new and damaging information about codefendant which is not corroborated by other pros-
Paoli v. United States,\textsuperscript{16} the Supreme Court gave its sanction to that method when it held that it was reasonable to assume that a jury would be able to follow a judge's instructions and disregard the apparently reliable incriminating confession when gauging a non-confessing defendant's guilt or innocence.\textsuperscript{17}

Seven years after Delli Paoli, in Jackson v. Denno,\textsuperscript{18} the Court effectively repudiated the Delli Paoli presumption.\textsuperscript{19} The Court held that the admissibility of a confession should be determined by a trial judge prior to its submission to the jury because a jury cannot be expected to disregard a confession if it is subsequently deemed inadmissible.\textsuperscript{20} The presumption that juries are able to ignore incriminating evidence was dealt a further blow in Douglas v. Alabama.\textsuperscript{21} In that case, a co-conspirator who had been found guilty in a separate trial was called as a witness in Douglas' trial. The Court found that Douglas' inability to cross-examine his accomplice, whose extrajudicial confession had implicated Douglas and had been read before the jury, violated Douglas' sixth amendment right of confrontation.\textsuperscript{22}
Finally, in *Bruton*, the Court expressly overruled *Delli Paoli* and stated that it could no longer accept limiting instructions as an adequate substitute for cross-examination of an adverse witness. It noted that the practical effect was "the same as if there had been no [limiting] instruction at all." Writing for the majority, Justice Brennan further justified the decision by referring to the 1966 amendment of Rule 14 of the Federal Rules of Criminal Procedure which authorizes a severance where it appears that a defendant may be prejudiced by a joint trial. Justice Brennan suggested that severance is an alternate means of achieving the benefit of using a confession against its maker without unduly prejudicing his or her codefendant.

Since *Bruton*, the courts have been flooded with cases requiring interpretation of the *Bruton* doctrine. Although most of those cases have produced uniform interpretations of how and when the *Bruton* doctrine is to be applied, the courts rarely have agreed on how to apply *Bruton* when, as in
Parker, all the codefendants have made extrajudicial confessions. Some courts have held simply that Bruton does not apply to situations involving interlocking confessions. Others have held that Bruton applies regardless of the existence of interlocking confessions. Still others have ruled on a case by case basis that, although Bruton applies, the admission of interlock-

cross-examination his codefendant's right of confrontation is satisfied); McHenry v. United States, 420 F.2d 927, 928 (10th Cir. 1970) (right of confrontation satisfied when declarant testifies at trial); United States v. Ballentine, 410 F.2d 375, 376 (2d Cir. 1969) (right of confrontation satisfied where declarant defendant was cross-examined by codefendant's counsel); Davis v. State, 445 S.W.2d 933, 939-41 (Tenn. Crim. App. 1969) (where codefendants freely testify at joint trial, admission of codefendant's confession implicating defendant does not violate confrontation rights of defendant). But see West v. Henderson, 409 F.2d 95, 97-99 (6th Cir. 1969) (confrontation right denied despite fact that confessor testified); In re Whitehorn, 1 Cal. 3d 504, 510-13, 462 P.2d 361, 364-66, 82 Cal. Rptr. 609, 612-14 (1969) (admission of codefendant's extrajudicial confession is sixth amendment error despite fact that confessor testified and was available for cross-examination); In re Hill, 71 Cal. 2d 997, 1009-13, 458 P.2d 449, 457-60, 80 Cal. Rptr. 537, 545-48 (1969), cert. denied, 397 U.S. 1017 (1970) (defendant's right of confrontation denied even though confessing codefendant takes stand).

Some courts have interpreted this right to cross-examination to be the right to effective cross-examination. See Townsend v. Henderson, 405 F.2d 324, 329 (6th Cir. 1968) (right to effective cross-examination not fulfilled if declarant takes the stand but denies making the statement); Goodwin v. Page, 296 F. Supp. 1205, 1212 (E.D. Okla. 1969) (Bruton doctrine applies even when declarant takes stand if he pleads the fifth amendment after being read his confession); State v. Coleman, 9 Ariz. App. 526, 528, 454 P.2d 196, 198 (1969) (right to effective cross-examination is denied if both codefendants are represented by the same attorney).

Additionally, there is a general consensus that the rule is inapplicable in bench trials. See, e.g., Cockrell v. Oberhauser, 413 F.2d 256, 257-58 (9th Cir. 1969); Brown v. State, 252 So. 2d 842, 844 (Fla. Dist. Ct. App. 1971); Brown v. State, 223 So. 2d 337, 339 (Fla. Dist. Ct. App. 1969). Most courts also agree that the rule is inapplicable when the codefendants have made statements prior to the termination of the conspiracy. See Dutton v. Evans, 400 U.S. 74, 80-81 (1970); Fiswick v. United States, 329 U.S. 211, 215-17 (1946); Clune v. United States, 159 U.S. 590, 593-95 (1895); McGregor v. United States, 422 F.2d 925, 925-26 (5th Cir. 1970); Parness v. United States, 415 F.2d 346, 347 (3d Cir. 1969). See Fed. R. Evid. 801(d)(2)(E) which states as follows:

(d) Statements which are not hearsay. A statement is not hearsay if—

(2) Admission by party-opponent. The statement is offered against a party and is

(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

See also 4 J. WIGMORE, EVIDENCE § 1079 (Chadbourn rev. ed. 1974).


ing confessions constitutes “harmless error.” It was against this backdrop of conflicting lower court interpretations of the Bruton rule that the Supreme Court granted certiorari to determine whether or not Bruton applied to situations involving interlocking confessions.

**PARKER’S FACTS AND REASONING**

In Parker, respondents Hamilton, Pickens, and Randolph aided Joe and Robert Wood in a robbery that resulted in a murder. After they were

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33. 99 S. Ct. at 2137.

34. Id. at 2135. In June of 1970, Las Vegas gambler William Douglas, alias Ray Blaylock, arrived in Memphis packing a .38 caliber pistol and a marked deck of cards. He contacted Walter Lee (Woppy) Gaddy who subsequently arranged a poker game between Mr. Douglas and Robert Wood, a local Memphis gambler. In return for making the “set up” and for the use of his apartment, Gaddy was to receive a cut of the winnings.

During the course of the initial contest between Wood and Douglas, Wood was relieved of nearly $2,000. A week later a second game produced similar results. Appendix to Briefs for Respondents and Petitioner, Parker v. Randolph, 99 S. Ct. 2132 (1979) [hereinafter cited as Appendix].

By this time, Wood had grown suspicious of Douglas’ good fortune and brought Tommy Thomas, another Memphis gambler, with him to the third game to determine if and how Douglas was cheating. Unbeknownst to Wood, however, Tommy Thomas was the son of renowned professional gambler “Titanic Thomas” a longtime friend of Douglas. Appendix, supra at 217.

After Wood suffered his third loss Thomas predictably reported to Wood that the game was “clean.”

Still convinced that Douglas was somehow cheating, Robert Wood met with his brother, Joe Wood, and the two men schemed to separate Douglas from his ill-gotten gains by staging a “holdup” of the upcoming fourth game. To execute the staged robbery, Joe Wood enlisted Isaiah Hamilton, one of his employees, who in turn recruited James Randolph and Wilbur Pickens.

On the night of July 6, 1970, the fourth game between Robert Wood and Douglas began with Joe Wood and Thomas present as spectators. At approximately 8:45 p.m., Joe Wood left to go out and get some beer. Appendix, supra at 217. After making the purchase he met Pickens, Randolph, and Hamilton and they all approached the apartment. When Douglas heard the noise of several people returning, he became suspicious and positioned himself behind the door armed with his .38 and a shotgun. After Douglas repeatedly inquired as to who was at the door, during which time respondents Hamilton, Randolph, and Pickens went back out to their car, Joe Wood convinced Douglas that he was alone and was admitted into the apartment. As a precautionary measure Douglas had Wood enter the apartment through a small window. The game was resumed and after a few minutes Joe Wood went into the bathroom. He emerged from the bathroom brandishing a derringer pistol and ordered Thomas and Douglas to lie on the floor. Handing the derringer to his brother, Joe Wood left the apartment to call the respondents. Suddenly, Douglas reached for the .38 pistol tucked in his waistband whereupon Robert Wood wheeled and shot Douglas with his brother’s derringer. Appendix, supra at 217. Within seconds the three respondents returned with Joe Wood and burst into the room. 99 S. Ct. at 2135. The money was taken from the table and everyone left except Thomas, who remained
apprehended, the respondents and Robert Wood all made separate confessions. Subsequently, the respondents and the Wood brothers were jointly tried, convicted of murder, and sentenced to life imprisonment. At trial, none of the respondents took the stand. Although Joe Wood identified Hamilton as one of the men recruited to help stage the robbery, the other two men could not be positively identified. Therefore, the state’s case against the respondents rested primarily on their confessions, introduced behind to attend the dying Douglas. Appendix, supra at 232. Upon their apprehension by the police, the respondents confessed to their part in the crime. 99 S. Ct. at 2135.

Respondents were charged with murder in the perpetration of a robbery under TENN. CODE ANN. § 39-2402 which reads in pertinent part that: “An individual commits murder in the first degree if: . . . . (4) he commits a willful, deliberate and malicious killing or murder during the perpetration of any arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharge of a destructive device or bomb.” (Emphasis added).

Tennessee court consistently have held that a killing is first degree murder if done in the commission of a robbery regardless of whether malice or premeditation is proven. See Philips v. State, 455 S.W.2d 637 (Tenn. Crim. App. 1970) (no need to prove malice or premeditation where killing done during the commission of a robbery); Smith v. State, 209 Tenn. 499, 354 S.W.2d 450 (1961) (killing during a robbery is murder in the first degree despite casual or unintentional nature of the killing); Woodruff v. State, 164 Tenn. 530, 51 S.W.2d 843 (1932) (killing of a police officer in order to effect escape from scene of crime is first degree murder).

Wharton defines the concept of imputed malice as the felony-murder rule as follows: “A murder committed in the course of the perpetration of a felony is murder on the theory that the element of malice may be implied from the fact of the commission of a felony, even though the killing is unintentional and accidental.” 1 F. WHARTON, WHARTON’S CRIMINAL LAW AND PROCEDURE § 251 (1957).

The following confessions were introduced through the oral testimony of police detectives:

Testimony of Detective Lewis Regarding Oral Statement of Isaiah Hamilton:

He stated that he worked on Summer Avenue and that a man there told him that another party had been playing poker with a man and that this man had been cheating him and taking his money. He stated that this party showed him where they were playing poker, that Monday afternoon, at some apartments over on Winchester just west of Airways. He told him to find two other parties and to meet him at the apartments at approximately 9:00. He drove over to the apartments on that day, Monday, got there a little early and circled around the lot and parked the car close to the apartments. He was joined a little bit later by this party. They were following this man back to the apartment at which time they got back to the apartment and someone looked out the window and asked who is with you. They asked this several times. At this time, Isaiah and the other parties went around to the side of the building and returned to where they had the car parked. Just shortly, this party came out to the car and told them to come on quick and follow him, that he had them lying on the floor. At this time they got out of the car and followed this party back to the apartments and were going inside. Before they did, they heard a shot come from the inside of the apartment at which time they tried to go in, found that the door was locked and began kicking on the door. The door was kicked open at which time they saw a white man lying on the floor on his back. There was another party behind, beside a closet door behind the front door of the apartment. At this time they turned and ran back to the car and returned to Isaiah
Hamilton’s apartment on Haynes at which time they were met by two other parties who gave them some guns at which time Isaiah Hamilton hid them in his attic. . . . Appendix, supra note 34, at 161-62.

Testimony of Detective Lewis Regarding Oral Statement of James Randolph

James Randolph stated that on Monday, July 6, 1970 that he was at his home on Seller with another party at approximately 7:00 p.m. He stated that another party came to his home and that this party was in a ’67 GTO Pontiac convertible and that this party tried to get him to go with him. Shortly after this party arrived, another party arrived in a maroon Plymouth. The party in the GTO convertible had told him that there was another party at some apartments on Winchester playing cards with another party and that this party was cheating this other party in the card game and taking his money. He stated that he wanted him to go to this apartment and stop the man from cheating and get the money back that had been taken and that the money was going to be taken even if he had to kill this man. He stated that, he told another party where the apartments were. James Randolph stated that he and two other parties went to the apartments on Winchester and upon arriving, another party came out of the apartment and got into the car with them and they went to the store and bought a six-pack of beer. When they returned, they went to the apartment and for some reason, the other party had to go into the apartment through a window. Shortly later they were joined by this party who came from the apartment and told them to follow him. They went back to the apartment, attempted to go in at which time they found the door to the apartment locked. They then heard a shot come from the inside of the apartment at which time this other party kicked the front door open and saw a man lying on the floor. There was also another party that came from behind the front door out of a closet and saw another party standing in there waving a pistol. . . . They then ran from the apartment and got into the ‘67 GTO convertible and went to another party’s apartment at which time they were shortly joined by two other parties who gave them $50 a piece and also gave them some guns which were hid in another party’s attic. James Randolph stated that he had a .38, another party had a .38 and another party had a saw off [sic] shotgun. He also stated that $1300 was taken from the apartment. . . . Appendix, supra note 34, at 163-64.

Redacted Statement of Pickens, Read During Testimony of Detective Straton:

. . . .

We went to this apartment on Winchester where the shooting happened. When we got to the apartment a guy came out and said he was going to get some beer. So, he told us to trail him up to the Krystal behind his car. It’s on Winchester and we got in his car after we got to the Krystal. . . . We went back to the apartment and parked out there in the parking lot. One guy got out and went to the front door. . . . Someone said, cause I couldn’t see inside, “Do you have someone with you?” He told them no, he didn’t have anybody. Then the person said, “Yes, you is because I saw them” and then we went back to the car. We went back to the car and we sat in the car. Then we got back to the car someone let the guy and the dog in through the window. . . . Then about five minutes later the guy came around to the side of the apartment and said, “Come here two of you all” and then the other guys jumped out of the front seat of the car and he told them, “I think they are going to hurt a fellow.” We all jumped out of the car. One guy had a sawed off shotgun. One had a pistol. I think it was a .22. I had a .38 revolver. We all ran to the door. Just before we got to the door we heard a shot inside the apartment. One guy tried to kick the door down, but he couldn’t. So the other three guys kicked the door down. I went in last. I looked and saw a man lying on the floor on his back. There was another man standing there with a .22 Daringer [sic] and he turned around and was pointing it towards the door and I was standing in the door.

. . . .
through police testimony. The case was appealed through the Tennessee state courts. The District Court for the Western District of Tennessee

Q: What was your purpose for being at 3403 Benbow Drive, Apartment No. 1 on the night of July 6, 1970?
A: A guy had left word with another guy for three of us to meet him there at 9:00 that night. A guy had planned for us to—I'll put it like this, to rob the poker game.

Q: When were these plans made and who was supposed to be in on the plans?
A: It was about a week and a half before Monday, July the 6th. A guy had asked two of us about sticking up him and another guy in order to rob this other man that was going to be in the game. One guy was supposed to come out the door at 9:00 the night of the game and we were supposed to be there. We were supposed to come on in and hold the game up, but we was parked in the lot and we wasn't there. A guy came to the car and asked us what happened and we told him we didn't know whether or not to bother the game or not. When the guy first talked to us about robbing the poker game he brought two of us by the apartment on Winchester and showed us which one it was. We was in a blue '67 Chevrolet. We didn't go back there any more until the night of the shooting.

Appendix, supra note 34, at 172-75.

39. Seeking to avoid prejudice to the other defendants, the court and all counsel subjected each of the confessions to the process of redaction whereby any reference to the other codefendants was replaced by "another party" or "another guy." Appendix, supra note 34, at 233. As noted by the Sixth Circuit Court of Appeals, however, the confessions were such "as to leave no possible doubt in the juror's minds concerning the persons referred to." Randolph v. Parker, 575 F.2d 1178, 1180 (6th Cir. 1978), aff'd in part and rev'd in part, 99 S. Ct. 2132 (1979). See note 15 supra for a discussion of redaction as a means of avoiding prejudice to a statement maker's codefendants.

Respondent Pickens' confession was admitted into evidence despite objections that it had been obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966). For the circumstances surrounding Pickens' confession see note 42 infra.

40. The Tennessee Court of Criminal Appeals reversed the defendants' convictions finding that, under Bruton, their sixth amendment right of confrontation had been violated. Appendix, supra note 34, at 218-19. (The opinion of the Tennessee Court of Criminal Appeals, filed on June 5, 1974, is unreported but is contained within the Appendix at pages 215-26). The court found that the mere omission of names was not sufficient to avoid prejudice. Quoting Judge Dwyer, in White v. State, 497 S.W.2d 751 (Tenn. Crim. App. 1973), the court stated:

To assume, as urged here by the state, that the insertion of "the other person" cured any possible prejudice to Johnson would be legal sophistry. Or as Justice Learned Hand states, it would be a "mental gymnastic which is beyond not only their (the jurors') powers, but anybody else's." See Nash v. United States, 54 F.2d 1006, 1007 (2nd Cir. 1932). We have stated before that a statement of the confessing codefendant could be used only if completely stripped of any incriminating references to the non-confessor. See Taylor v. State, Tenn. Cr. App., 493 S.W.2d 477. In this context the insertion of "the other person" does not meet that test. See Serio v. United States, 131 U.S. App. D.C. 38, 401 F.2d 989, 990.

Appendix, supra note 34, at 219.

Reversal was also predicated on the court's interpretation of the felony-murder rule. Finding that the evidence did not indicate that the killing was part of or in perpetration of the robbery, the court stated:

To the contrary, the evidence reflects that Robert Wood shot the deceased prior to the taking of the money from the apartment. The testimony of State's witness Tommy Thomas supports Robert Wood's statement that he shot Douglas as the latter was going for his gun. There is no evidence offered by the prosecution which supports the theory that Robert Wood was participating in the robbery of William
granted the respondents' writs of habeas corpus and reversed the convictions finding a Bruton violation. The sixth circuit affirmed and the Su-

Douglas at the time he shot Douglas. Even the confessions of codefendants Randolph, Hamilton and Pickens, support the conclusion that the shooting was not part of a robbery attempt.

Appendix, supra note 34, at 218.

The Tennessee Supreme Court reversed the court of criminal appeals, holding that the Bruton rule does not apply to situations where all the jointly-tried defendants have confessed. Appendix, supra note 34, at 246. (The opinion of the Supreme Court of Tennessee, filed on December 15, 1975, is unreported but is contained within the Appendix at pages 227-46). The court noted that this exception to the Bruton rule had been carved out by the Tennessee Court of Criminal Appeals in O'Neil v. State, 435 S.W.2d 597 (Tenn. Crim. App. 1970) (where all codefendants make intertwining confessions, jury is presumed to be able to follow judge's instructions). O'Neil served as direct precedent on this point in State v. Elliot, 524 S.W.2d 473 (Tenn. 1975) (Bruton inapplicable where evidence of codefendant's guilt is so overwhelming), and Briggs v. State, 501 S.W.2d 831 (Tenn. Crim. App. 1973) (no Bruton violation where all codefendants confess to murder).

The Tennessee Supreme Court also reversed on the felony-murder issue, holding that the concept of res gestae applied to cases of felony-murder. Appendix, supra note 34, at 234-38. The court found that the defendants were attempting to commit a robbery during which it was a foreseeable consequence that someone would be killed and that, therefore, the murderous act of one co-conspirator was attributed to them all. Appendix, supra note 34, at 238. The court has applied this concept before to felony-murder cases. In Smith v. State, 209 Tenn. 499, 354 S.W.2d 450 (1961), an armed robber shot and killed a liquor store owner who had drawn a gun and attempted to fire at the intruder. The court rejected the argument that the murder was merely collateral to the robbery stating: "We think that unquestionably this killing was done and is part of the res gestae of the whole acts embracing the robbery. It had a close and intimate connection with the felony and grew out of the attempt to commit the felony." Id. at 504, 354 S.W.2d at 452. The defendants need not believe that death would result nor must there be an intent to kill in order for res gestae to apply. All that is required is that death be a natural and probable consequence or result of the felony. See Dupres v. State, 209 Tenn. 506, 354 S.W.2d 453 (1962).

41. Appendix, supra note 34, at 320. (The case arose as separate petitions styled as James Randolph v. Chief Harry Parker, Civil C-76-68; Wilburn Pickens v. Chief Harry Parker, Civil C-76-69; and Isaiah Hamilton v. Chief Harry Parker, Civil C-76-310. The Memorandum Decision, filed on May 2, 1977, is unreported but contained within the Appendix at pages 215-26).

42. The court rejected the state's theory that "interlocking confessions" made Bruton automatically inapplicable and found that, alternatively, the admission of the confessions was not harmless error. Appendix, supra note 34, at 326. The court also reversed Pickens' conviction finding that his Miranda rights had been violated. Appendix, supra note 34, at 324. The court noted that the night prior to his arrest, Pickens saw his picture in a newspaper which stated he was wanted for Douglas' murder. He called his lawyer, Anthony Sabella, (who had already seen the picture and story) and asked him to accompany him to the police station. Sabella said he could not go with him that evening but that Pickens should come to his office in the morning whenupon they would go to the police. He advised Pickens that if he was arrested, he should immediately call Sabella. A few hours later Pickens was arrested and subsequently signed a confession. Pickens claimed he had been physically abused and denied access to counsel despite his repeated requests to call Sabella. The court stated:

It seems practically inconceivable to this court that Pickens, who had been in contact with his lawyer the evening before and had been instructed by his lawyer to tell the police that he wanted his lawyer present if he were arrested during the night, would not have mentioned this to the police, when they arrested him a few hours later and had him in custody. The police, it is true, testified that Pickens did not ask for or even mention that he had counsel, but the police were testifying
preme Court granted certiorari. The Court held that the *Bruton* doctrine is per se inapplicable where the complaining defendant has confessed and his or her confession interlocks with that of the codefendants'. Writing for the plurality, Justice Rehnquist stated that since a defendant is already prejudiced by his or her own confession, the additional harm caused by the admission of a codefendant's incriminating confessions is negligible. Justice Rehnquist also reasoned that once a defendant's confession stands unchallenged before the jury, the right to cross-examine and even impeach one's confessing codefendant would be of little or no value to the complaining defendant. This is true, argued Justice Rehnquist, despite the fact that a codefendant's confession is inevitably suspect and unreliable because of the tendency to shift blame onto others.

Responding to the argument that juries will disregard limiting instructions, the Court found that the jury system contemplated by the constitution mandates the presumption that juries follow a court's instructions. The Court stated that the sixth amendment does not bar every extrajudicial statement made by a non-testifying declarant simply because it incriminates the complaining defendant.

about, to them, a routine event eighteen months after the event. We are satisfied, therefore, that this record does not support the finding that Pickens did not ask for access to his lawyer.

Appendix, supra note 34, at 324.

43. Randolph v. Parker, 575 F.2d 1178 (6th Cir. 1978), aff'd in part and rev'd in part, 99 S. Ct. 2132 (1979). The court noted that: "in no instance has the Supreme Court overruled *Bruton* or suggested that either identity or greater or lesser similarity of confessions presented by hearsay and without confrontation served to make them admissible." Id. at 1183.


45. Parker v. Randolph, 99 S. Ct. 2132 (1979). In a 5-3 decision the judgment was affirmed as to Pickens and reversed as to the other respondents. Justice Rehnquist wrote for the plurality, in which he was joined by Chief Justice Burger and Justices Stewart and White. Justice Blackmun filed a concurring opinion. Justice Stevens filed a dissenting opinion in which Justice Brennan and Marshall joined. Justice Powell took no part in the consideration or decision of the case.

46. 99 S. Ct. at 2135.

47. Id. at 2139. Quoting liberally from Justice White's dissent in *Bruton*, Justice Rehnquist noted that a confession is the most damaging and probative type of evidence that can stand against a defendant and, since the defendant is "the most knowledgeable and unimpeachable source of information about his past conduct," it is difficult to imagine evidence which would be more damaging to the defendant. Id., quoting *Bruton* v. United States, 391 U.S. 123, 140 (1968) (White, J., dissenting). Curiously, this is the only support cited by the plurality for its argument that a non-testifying codefendant's confession will not have a "devastating" effect on a defendant's case.

48. 99 S. Ct. at 2139.

49. Id.

50. Id.

51. Id.

52. Id.
ANALYSIS OF THE DECISION

The Court Further Limits Application of the Bruton Doctrine

Adoption of the Parker rule\textsuperscript{53} is the latest attempt by the Court to narrowly define and limit the application of the Bruton doctrine. The first indication of this trend came in Frazier v. Cupp,\textsuperscript{54} in which the Court held that a denial of confrontation did not require automatic reversal.\textsuperscript{55} The prosecutor in Frazier summarized in his opening statement the confession he expected a codefendant to give.\textsuperscript{56} The codefendant, however, did not testify and the other defendant, Frazier, asserted a Bruton violation.\textsuperscript{57} The Court found that no such error existed when the confession was not entered into evidence because the jury would be able to successfully segregate the information.\textsuperscript{58}

The Court further limited application of the Bruton doctrine in Harrington v. California,\textsuperscript{59} in which three codefendants made extrajudicial confessions that were admitted at joint trial.\textsuperscript{60} All three of the confessions implicated non-confessing codefendant Harrington.\textsuperscript{61} Only one of the three confessors, however, took the stand and was available for cross-examination.\textsuperscript{62} Therefore, Harrington insisted that his Bruton rights were violated when he was denied an opportunity to cross-examine the non-testifying confessors.\textsuperscript{63} The Court admitted that a Bruton violation had occurred but concluded that, in light of the overwhelming evidence against Harrington,\textsuperscript{64} the lack of an opportunity to cross-examine his confessing codefendants constituted “harmless error.”\textsuperscript{65}

\begin{itemize}
\item \textsuperscript{53} For the purposes of this Note, the "Parker rule" shall be defined as the per se rule declaring the Bruton doctrine inapplicable to situations involving interlocking confessions.
\item \textsuperscript{54} 394 U.S. 731 (1969).
\item \textsuperscript{55} Id. at 735-36.
\item \textsuperscript{56} Id. at 733-34.
\item \textsuperscript{57} Id. at 734.
\item \textsuperscript{58} Id. at 735. The Court held that the confession had minimal prejudicial impact on the petitioner because: (1) only a paraphrase of the confession was presented to the jury; (2) the jury was subsequently instructed not to consider the opening statement as evidence; and (3) the codefendant’s confession was not a substantial element in the case against petitioner Frazier. Id.
\item \textsuperscript{59} 395 U.S. 250 (1969).
\item \textsuperscript{60} Id. at 252. The jury was instructed that each confession was to be considered only against its maker. Id.
\item \textsuperscript{61} Id. at 253. Although two of the confessions did not specifically refer to Harrington by name, the references to a “white guy” made it as clear as “pointing and shouting that the person referred to was the white man [Harrington] in the dock with the three Negroes.” Id.
\item \textsuperscript{62} Id. at 252.
\item \textsuperscript{63} Id.
\item \textsuperscript{64} Several witnesses and the victim had identified Harrington as a participant in the robbery. Additionally, Harrington made a statement identifying one of his codefendants as the “trigger man” and admitted that he had fled the scene of the crime with his codefendants. He also stated that he had dyed his hair and shaved his moustache following the murder. Id. at 252-53.
\item \textsuperscript{65} The Court’s decision was based on its feeling that unless no violation of Bruton could possibly be harmless, the conviction needed to be affirmed. Id. at 254. The doctrine of harmless
\end{itemize}
The Bruton rule was again diluted in Dutton v. Evans in which the Court concluded that a Georgia hearsay exception, holding statements made by one conspirator during the concealment of a crime admissible against all the conspirators, did not violate the Bruton doctrine. The Court held that the confrontation clause was not violated because the inferences the jury could draw from the hearsay statement would not have the devastating consequences contemplated in Bruton.  

error was first formulated in Chapman v. California, 386 U.S. 18, reh. denied, 386 U.S. 987 (1967), where a prosecutor made lengthy comments about the inferences the jury should make concerning a defendant's failure to testify. The Court ruled that, under Griffin v. California, 380 U.S. 609 (1965), which prohibited such comments, this error was not harmless because it was reasonably possible that the error contributed to the conviction. Chapman v. California, 396 U.S. 18, 23 (1967). The Court specifically declined to state that all federal constitutional errors could never be harmless. It noted that "some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." Chapman v. California, 386 U.S. 18, 22 (1967), reh. denied, 386 U.S. 987 (1967).

For a more in-depth look at the development of the harmless error doctrine and its effect on cases involving confessions see Note, Harmless Constitutional Error: A Reappraisal, 83 HARV. L. REV. 814 (1970); Note, Harmless Constitutional Error, 20 STAN. L. REV. 83 (1967); Note, Comment on Application of the Harmless Error Rule to "Confession" Cases, 1968 UTAH L. REV. 144. For cases applying the harmless error test to situations involving interlocking confessions see note 31 supra.

The Court again applied the harmless error doctrine in Schneble v. Florida, 405 U.S. 427 (1972), in which both codefendants had confessed to a murder. Id. at 428. The Court bypassed the denial of confrontation issue and looked to the similarity between the two confessions in determining that whatever error may have occurred was harmless. Id. at 431. The Court noted that, in addition to this similarity, the jury would not have found, beyond a reasonable doubt, the state's case any less persuasive if the codefendants' confessions had been excluded. Id. See also notes 113-15 and accompanying text infra.


67. GA. CODE ANN. § 38-306 (1954) provides: "After the fact of conspiracy shall be proved, the declarations by any one of the conspirators during pendancy of the criminal project shall be admissible against all."

68. This differs from the federal hearsay conspiracy exception which only admits statements made in the course of and in furtherance of the conspiracy, not statements made during the period of time when a conspirator attempts to prevent detection and punishment by concealing the criminal activity. See Lutwak v. United States, 344 U.S. 604, 616-17 (1953); Krulewitch v. United States, 336 U.S. 440, 444 (1949). See also Advisory Committee's Note, FED. R. EVID. 801(d)(2)(E), 51 F.R.D. 315, 418 (1971).

The Georgia hearsay exception, however, is not unique. See, e.g., Dailey v. State, 233 Ala. 384, 171, So. 729 (1936); Reed v. People, 156 Colo. 450, 402 P.2d 66 (1965); State v. Roberts, 85 Kan. 280, 147 P. 828 (1915). See also 3 F. WHARTON, CRIMINAL EVIDENCE § 643, at 338-39 (13th ed. 1955), which supports this interpretation by stating that a subsequent declaration by one conspirator may be admissible against a coconspirator "if the conspirators were still concerned with the concealment of their criminal conduct or identity. . . ." Id. at 339.


70. At the separate trial of one conspirator, Evans, testimony was presented showing that Williams, the other conspirator, had stated to his cellmate: "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now." Dutton v. Evans, 400 U.S. 74, 77
The Parker Rule: An Inconsistent Approach

The Parker rule is inconsistent with the Court's prior treatment of interlocking confession cases. Although the Court has never specifically ruled that Bruton applies regardless of the existence of interlocking confessions, it previously has identified a Bruton error in cases in which interlocking confessions were admitted into evidence. In Brown v. United States, Anderson v. Louisiana, and Hopper v. Louisiana, the Court found Bruton errors despite the presence of confessions which were corroborative and consistent with one another. Moreover, an analysis of these and other post-

(1970). The Court found that the admission of this statement did not deprive Evans of his right of confrontation because: (1) the statement was reliable due to its spontaneity and the lack of motive for the cellmate to lie; (2) Williams had direct knowledge of the murder; and (3) "the statement contained no express assertion about past fact, and consequently it carried on its face a warning to the jury against giving the statement undue weight." Id. at 88.

71. See Schneble v. Florida, 405 U.S. 427 (1972), where the Court had the opportunity to rule on the question of whether or not the Bruton doctrine applied in situations involving interlocking confessions but declined to do so. The Court held that the doctrine of harmless error applied to whatever Bruton error may have occurred. See notes 59-65 and accompanying text supra.

73. 403 U.S. 949 (1971).
74. 392 U.S. 658 (1968).
75. In Brown, two non-testifying codefendants made incriminating extrajudicial confessions to transporting stolen goods. These confessions, although not termed interlocking, were substantially similar and consistent regarding the major elements of the crime. Brown v. United States, 411 U.S. 223, 231 (1973). The Court found that the admission of these confessions violated Bruton. Id. at 231. The Court, however, found that the erroneously admitted confessions were merely cumulative of other overwhelmingly damaging evidence already before the jury and, thus, their admission constituted harmless error. Id. In Parker, Justice Rehnquist asserted that the Brown Court did not pass on the merits of the Bruton claim here because the Solicitor General had already conceded that a Bruton error had been made. 99 S. Ct. at 2138 n.5, 2140 n.8. A reexamination of the opinion, however, reveals that the Court felt there was indeed a Bruton error. Writing for a unanimous court, Justice Burger observed that:

Upon an independent examination of the record, we agree with the Court of Appeals that the Bruton errors were harmless. The testimony erroneously admitted was merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury. In this case, as in Harrington v. California [citation omitted] the independent evidence "is so overwhelming that unless we can say that no violation of Bruton can constitute harmless error, we must leave this ... conviction undisturbed," id. at 254. We reject the notion that a Bruton error can never be harmless.

411 U.S. at 231 (emphasis added).

Relying on Bruton, the Anderson Court reversed the convictions of four rape defendants. Anderson v. Louisiana, 403 U.S. 949 (1971). This application of the Bruton doctrine came despite the fact that the codefendants' confessions were substantially consistent and corroborative. State v. Anderson, 254 La. 1107, 1129, 229 So. 2d 329, 337 (1969). Similarly, in Hopper, two codefendants had made confessions which were interlocking and supportive of one another. State v. Hopper, 251 La. 77, 103-11, 203 So. 2d 222, 232-34 (1967). On appeal, the Supreme Court applied the Bruton doctrine and vacated the convictions despite the existence of these corroborating confessions. Hopper v. Louisiana, 392 U.S. 658 (1968). On remand, the Louisiana Supreme Court found that the Bruton violations existed but that they were harmless due to the
Bruton decisions reveals that the Court has consistently applied Bruton to cases in which a codefendant's confession inculpates another defendant notwithstanding the amount of additional incriminating evidence against that defendant. This has been true even though the defendant has been substantially incriminated by the evidence and has made incriminating statements which technically fall short of a confession. A further indication that the Parker per se analysis is a departure from the traditional Bruton analysis is found in the fact that five of the fourteen cases relied on for the Court's reasoning in Bruton involved interlocking confessions.

**Interlocking Confessions**

This analytic inconsistency is particularly unsettling because Parker does not indicate precisely what constitutes an "interlocking confession." As evidenced by the wide diversity in lower court applications of the interlock-
ing confessions doctrine, there is very little agreement as to what degree the admissions must interlock before Bruton is declared inapplicable and the damaging evidence is admitted. Some courts have limited the doctrine to those situations in which the two confessions do not contradict each other. Other courts have limited application of the doctrine to situations in which the codefendant's confession does not implicate the defendant to any greater extent than his or her own statement. Still other courts require that the confessions be only "substantially similar" or "dovetail in all the particulars." The Parker Court has failed to note these lower court discrepancies and, more importantly, has failed to present its own interpretation of how the doctrine should be applied in future Bruton analyses. Thus, it is unclear which definition of interlocking confessions, if any, the Court applied in Parker or will apply in future confessing codefendant cases.

This failure to define interlocking confessions is disturbing in light of the fact that the mere existence of interlocking confessions will not always guarantee that their admission will not prejudice a defendant. Situations will arise in which the confessions only partially interlock or in which one confession far exceeds the other with respect to incriminating evidence. Indeed, the Court's failure to define interlocking confessions becomes even more critical in light of the respondents' argument that their confessions were not, in fact, corroborative and interlocking.

80. See notes 81-85 and accompanying text supra.
82. E.g., Stanbridge v. Zelker, 514 F.2d 45, 49-50 (2d Cir. 1975), cert. denied, 423 U.S. 872 (1975); Rachel v. Commonwealth, 523 S.W.2d 395, 399-400 (Ky. App. 1975). See also State v. Elliot, 524 S.W.2d 473, 477-79 (Tenn. 1975) (if it increases chance of conviction or degree of offense the non-declarant may be charged with, then the confession may not be entered into evidence).
83. E.g., United States v. Spinks, 470 F.2d 64, 66 (7th Cir. 1972), cert. denied, 409 U.S. 1911 (1972).
84. E.g., Metropolis v. Turner, 437 F.2d 207, 208 (10th Cir. 1971).
85. As noted by Justice Blackmun in his concurring opinion, the plurality does not discuss how the confessions interlock but "simply assumes the interlock." 99 S. Ct. at 2142 (Blackmun, J., concurring).
86. For example, suppose prior to joint trial codefendants A and B make separate confessions to a robbery. Codefendant B, however, also states that he and defendant A committed a multiple murder and car theft during the course of the robbery. There is some evidence that, indeed, A and B did commit these other crimes. At trial, B does not take the stand, yet his confession is allowed into evidence under the interlocking confession doctrine. Clearly A is being prejudiced by the admission of B's confession. He or she is denied the opportunity to subject B to cross-examination concerning the confession which implicates him or her in the other crimes. This is disturbing due to the fact that B has a clear motive to shift the blame. Defendant A is being denied the very right the confrontation clause and Bruton were designed to protect—the right to confront his or her accuser, B.
87. Brief for Respondents at 34-40, Parker v. Randolph, 99 S. Ct. 2132 (1979) [hereinafter cited as Brief for Respondents]. The respondents argued that, in particular, respondent Hamilton's confession did not corroborate many important details in the other confessions:
A Confessing Defendant Reduces His Right
to Confront Witnesses Against Him

The plurality sought to distinguish Parker from Bruton by pointing out that the respondents in Parker confessed, whereas the complaining defendant in Bruton maintained his innocence from the start.88 As observed by dissenting Justice Stevens, however, this declaration seems to limit the application of Bruton doctrine to the "largely irrelevant set of facts in the case that announced it."89 Justice Rehnquist responded to that contention by stating that the facts in Bruton were far from irrelevant and that the Bruton doctrine is a narrow exception to the general rule.90 It is questionable, however, whether Bruton was meant to apply only to situations in which the complainting defendant has maintained his or her innocence from the start. In fact, as noted earlier, five of the fourteen cases relied upon by the Bruton Court involved interlocking confessions.91

Although in most cases a defendant's confession is so convincing and reliable that a Bruton error would be harmless,92 many confessions are not as reliable as the plurality suggests. Confessions often are tainted by physical coercion,93 trickery and deceit,94 or are a result of other coercive police

Nowhere in Hamilton's statement read to the jury is there any mention of a plan "to rob" the poker game. Nor does the statement show that he or any of the "two other partes" had any kind of weapons at the scene or received any money thereafter for their involvement. The statement doesn't even say that they entered the apartment. Therefore, assuming arguendo, that Hamilton's statement could be considered against him in a separate trial, there would not have been that degree of evidence "beyond a reasonable doubt" to have convicted him of "murder in the perpetration of a robbery."

Id. at 34-35.

The respondents also argued that Pickens' confession, which was tainted due to a Miranda violation, was by far the most detailed concerning the planning and execution of the robbery and that the jury probably could not have distinguished one confession from another. Id. at 38. Respondents argued that, undoubtedly, the jury filled the gaps in some confessions with the information contained in the other confessions. Id.

88. 99 S. Ct. at 2140.
89. Id. at 2146. (Stevens, J., dissenting).
90. Id. at 2140 n.7.
91. See note 78 and accompanying text supra.
92. See notes 59-65 and accompanying text supra.
93. E.g., Williams v. United States, 341 U.S. 97 (1951) (beating confession out of suspect with rubber hose); Lyons v. Oklahoma, 322 U.S. 596 (1944) (confession extracted from suspect through combination of physical abuse and intensive interrogation); Brown v. Mississippi, 297 U.S. 278 (1936) (confession produced by tying rope around suspect's neck, hanging him from a tree limb, and repeatedly whipping him until he admitted guilt).
94. See, e.g., Spano v. New York, 360 U.S. 315 (1959) (police officer who was close friend of suspect extracted confession by telling suspect that if he did not receive a confession from suspect, he would lose his job); Leyta v. Denno, 347 U.S. 556 (1954) (state psychiatrist, posing as a "doctor" employed to treat suspect, induced suspect to confess through subtle and suggestive questioning). See also C. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 140 (2d ed. 1970); C. WHITEBREAD, CONSTITUTIONAL CRIMINAL PROCEDURE 165 (1978).
tactics.  Also, it is widely recognized that at joint trial, a codefendant’s confession is inevitably suspect due to the tendency to shift blame onto others.  

Justice Rehnquist noted that when a defendant allows his own confession to stand unchallenged before the jury, the right to cross-examine his or her codefendant would be of little value.  Justice Rehnquist’s statement implies that the defendants on trial in Parker forfeited their right to impeach adverse witnesses simply because they chose to exercise their fifth amendment right not to testify. This implication is inexcusable as it is well established that no one should be penalized for exercising a constitutional right. It is also well established that failure to take the stand to refute incriminating evidence does not enhance the reliability of that evidence. This principle is demonstrated by cases in which a prosecutor has been prohibited from instructing the jury that it may properly infer guilt from a defendant’s failure to testify. Therefore, the fact that the defendants in

95. See, e.g., Culombe v. Connecticut, 367 U.S. 568 (1961) (intimidating thirty-three year old mental defective into confessing); Payne v. Arkansas, 356 U.S. 560 (1958) (taking advantage of poor education of suspect to trick suspect into confessing); Ashcraft v. Tennessee, 322 U.S. 143 (1944) (eliciting confession by continuously questioning suspect for thirty-six hours without rest or sleep); Bruner v. People, 113 Colo. 194, 156 P.2d 111 (1945) (confession result of threats to give suspect the “Chicago treatment” whereby one is handcuffed, hung over a door, and beaten until he produces a satisfactory admission). See also F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS 62 (2d ed. 1967), which depicts the “friendly-unfriendly” routine whereby one officer harasses and abuses the suspect while the other officer pretends to be the suspect’s friend and promises to help the suspect by getting the vicious officer off his back if he confesses to the crime. For a further discussion on the reliability of confessions see Foster, Confessions and the Station House Syndrome, 18 DEPAUL L. REV. 683 (1969).

It should be noted that both respondents Hamilton and Randolph testified outside the presence of the jury that they were subjected to physical abuse and not advised of their rights during the interrogations which led to their confessions. Brief for Respondents, supra note 87, at 32. Respondent Hamilton also testified that he had a third grade education and could not read or write. Id. Yet, the police were able to extract a written confession from Hamilton which was not produced at trial. Id. For the details regarding the voluntariness of respondent Pickens’ confession see note 42 supra.

96. See Parker v. Randolph, 99 S. Ct. 2132, 2139 (1979); Bruton v. United States, 391 U.S. 123, 136 (1968); Caminetti v. United States, 242 U.S. 470, 493 (1917); Crawford v. United States, 212 U.S. 183, 204 (1909); Stoneking v. United States, 232 F.2d 385, 388-89 (8th Cir. 1956). It is difficult to perceive how a confession which shifts blame onto an accomplice does not prejudice that accomplice. This is particularly true where one accomplice inculpates the other in excess of the other’s own confession. See note 86 and accompanying text supra.

97. 99 S. Ct. at 2139. Justice Rehnquist noted that: “Successfully impeaching a codefendant’s confession on cross-examination would likely yield small advantage to the defendant whose own admission of guilt stands before the jury unchallenged.” Id. (emphasis added).

98. See, e.g., United States v. Jackson, 390 U.S. 570 (1968), in which the Court struck down as unconstitutional a statutory clause which, in effect penalized a kidnapper for exercising his right to trial by jury. The clause held that a defendant charged with kidnapping, who chose to demand his right to jury trial, would risk the death penalty; however, if he abandoned his right to contest his guilt before a jury and pleaded guilty, he would be assured that he would not be executed.

Parker failed to testify in their own defense should not have been used to justify denying them their sixth amendment confrontation rights.

**Juries Are Again Capable of Performing “Mental Gymnastics”**

The plurality places great emphasis on the reliability of jury instructions and their role as the foundation of the system of jury trials. Traditionally, jurors have been presumed capable of following court instructions to disregard prejudicial evidence in the form of hearsay, improper outbursts, volunteered prejudicial comments, and material which is later withdrawn from evidence. The presumption that juries can perform these mental gymnastics, however, is precisely what Bruton "effectively repudiated." The essence of a Bruton analysis is that juries are not capable of ignoring certain prejudicial evidence. The argument of jury competence advanced by the plurality in Parker was the very same argument that was advanced and lost by the government in Bruton.

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100. In Nash v. United States, 54 F.2d 1006 (2d Cir. 1932), Judge Learned Hand severely criticized the proposition that a jury may be presumed capable of disregarding inadmissible hearsay evidence. He wrote that the limiting instruction is a "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else [sic]." Id. at 1007 (emphasis added). The Bruton Court, in overruling the Delli Paoli presumption that juries are capable of ignoring prejudicial evidence, adopted Judge Hand's eloquent criticism of that presumption. United States v. Bruton, 391 U.S. 123, 132, 132 n.8 (1968). In Parker, however, the Court appears to have resurrected the Delli Paoli presumption of jury ability, thereby indicating that juries, once again, are presumed capable of performing mental gymnastics.

101. 99 S. Ct. at 2139. The plurality stated that: "A crucial assumption underlying that system of jury trial contemplated by the Constitution is that juries will follow the instructions given them by the trial judge." Id.


106. Bruton v. United States, 391 U.S. 123, 126 (1968). Justice Brennan, writing for the majority, stated that: "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 this codefendant participated with him in the crime. . . . But since Delli Paoli was decided, the Court has effectively repudiated its basic premise." Id. (emphasis added).

107. Indeed, the whole purpose of Bruton is to shield juries from becoming prejudiced because a jury is unable to segregate evidence into "separate intellectual boxes." Bruton v. United States, 391 U.S. at 131, quoting People v. Aranda, 63 Cal. 2d 518, 529, 407 P.2d 265, 272, 47 Cal. Rptr. 353, 360 (1965). This reading of Bruton is further supported by the cases holding that the Bruton doctrine is inapplicable in non-jury trials. See, e.g., Cockrell v. Oberhauser, 413 F.2d 256 (9th Cir. 1969); Brown v. State, 252 So. 2d 842 (Fla. Dist. Ct. App. 1971).

108. Memorandum for the United States at 7-8, Bruton v. United States, 391 U.S. 123 (1968). The Court responded to this argument by noting:
Not only are jury instructions likely to be ineffective but also they may accomplish the opposite of what the court is seeking to achieve. It has been argued that the instructions will recall the confession to the jury's attention and thereby guarantee that the jury will improperly use the confession to determine the guilt of the non-statement maker.

An additional consideration not directly addressed by the Court is the probable impact of the confessions on the jurors' minds. The sixth circuit undertook this consideration and analyzed Parker as if each defendant had been in a separate trial. It found that the jury would not have been able,

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. 352 U.S. at 239. If it were true that the jury disregarded the reference to the codefendant no question would arise under the Confrontation Clause, because by hypothesis the case is treated as if the confessor made no statement inculpating the non-confessor. But since Delli Paoli was decided the Court has effectively repudiated its basic premise.

Indeed, as Justice Stevens notes in his Parker dissent, the plurality resurrects Delli Paoli, 352 U.S. 232 (1957), and Blumenthal v. United States, 332 U.S. 539 (1947), which are the very cases that Bruton overruled, to support its contention that juries are presumed to disregard the extrajudicial confession of the nontestifying codefendant. 99 S. Ct. at 2147 (Stevens, J., dissenting).

109. United States v. Bozza, 365 F.2d 206, 216 (2d Cir. 1966); Nash v. United States, 54 F.2d 1006, 1006-07 (2d Cir. 1932), cert. denied, 285 U.S. 556 (1932); People v. Aranda, 63 Cal. 2d 518, 525-27, 407 P.2d 265, 269-70, 47 Cal. Rptr. 353, 357-58 (1965); State v. Young, 46 N.J. 152, 156-58, 215 A.2d 352, 355-56 (1965). For a general discussion of the efficacy of jury instructions see Comment, Post Conspiracy Admissions in Joint Prosecutions—Effectiveness of Instructions Limiting the Use of Evidence to One Co-Defendant, 24 U. CHI. L. REV. 710, 713 (1957); Note, Admissibility of Codefendant Admissions in Joint Trials, 36 U. CIN. L. REV. 306 (1967); 49 MINN. L. REV. 360 (1964); 74 YALE L.J. 553 (1965). See also Broeder, The University of Chicago Jury Project, 38 NEB. L. REV. 744 (1959) (hereinafter cited as Broeder), in which tape recordings of mock trials involving damage claims were played before three groups of thirty juries. One group heard the defendant and asked if he had liability insurance whereupon he answered "no." The second group heard the same question to which the defendant answered "yes." The third group heard the question, the affirmative response, an objection by counsel, and an instruction by the judge to disregard the answer. The group which heard the defendant deny having liability insurance awarded an average of $33,000 to the plaintiff. The group which heard the defendant admit having liability insurance awarded an average of $37,000. The third group, which heard the defendant disclose that he had insurance and the judge's subsequent limiting instructions to disregard the answer, produced an average award of $46,000. Professor Broeder concludes that clearly juries do not overlook potentially damaging evidence despite a direct instruction to do so. Id. at 754.

110. See Lakeside v. Oregon, 435 U.S. 333, 345 (1978) (Stevens, J., dissenting). See also Broeder, supra note 109, in which Professor Broeder concludes that not only do jurors ignore the limiting instructions but they are sensitized by them and proceed to increase the award accordingly. Professor Broeder notes that when the jury was sensitized by the instruction it increased the award from an average of $37,000 to $46,000. Broeder, supra note 109, at 754.

111. In his dissenting opinion, Justice Stevens asked whether it is realistic to assume that the jury did indeed disregard the instruction and suggested that Bruton clearly indicates that the jurors are unable to do so. 99 S. Ct. at 2147 (Stevens, J., dissenting).
beyond a reasonable doubt, to render the same guilty verdict if each confession had been weighed independent of the other confessions. 112 This admittedly speculative analysis was the same one used in Schneble v. Florida, 113 in which the extrajudicial confessions of two codefendants were admitted into evidence. 114 There, however, the Court found that the probable impact of the admitted confessions on the jurors' minds was negligible. 115 The importance of this consideration is highlighted by the respondents' argument in Parker that the major evidence of a plan to commit the robbery 116 came from respondent Pickens' confession—a confession tainted by the denial of right to counsel. 117 Indeed, the respondents maintained

112. 575 F.2d 1180, 1183 (6th Cir. 1978), aff'd in part and rev'd in part, 99 S. Ct. 2132 (1979). The sixth circuit argued that:

   It is important to point out the factors which might affect a jury's verdict in relation to these three defendants in separate trials where the Bruton rule was observed:
   1) Randolph, Pickens and Hamilton were not involved in the gambling game between Douglas, the Las Vegas gambler, and Robert Wood the hometown gambler who got cheated.
   2) They were not involved in originating the plan for recouping Robert Wood's losses.
   3) They were not in the room (and had not been) when Robert Wood killed Douglas.
   4) Indeed, the jury could conclude from the admissible evidence in this case that when Joe Wood pulled out his pistol, the original plan for three "unknown" blacks [the respondents] to rob the all-white poker game was aborted and that petitioners' subsequent entry into the room did not involve them in the crime of murder.

   Additionally, if we return to the consideration of the joint trial, that jury as charged by the state court judge had the responsibility of determining whether or not any of the three confessions testified to by Memphis police was voluntarily given. Assuming that two of the three confessions had been removed from jury consciousness by adherence to Bruton, we find it impossible to conclude that the jury finding and ultimate verdict would, "beyond reasonable doubt," have been the same.

   Id. at 1182-83.


114. Id. at 428. See note 65 supra.

115. Id. at 432. The Court noted that it needed to
determine on the basis of "our own reading of the record and on what seems to us to have been in probable impact . . . on the minds of an average jury," Harrington v. California [citation omitted], whether Snell's admissions were sufficiently prejudicial to petitioner as to require reversal . . . Thus, unless there is a reasonable possibility that the improperly admitted evidence contributed to the conviction, reversal is not required . . . In this case, we conclude that the "minds of an average jury" would not have found the State's case significantly less persuasive had the testimony as to Snell's admissions been excluded.

   Id. at 432 (emphasis added).

116. It was essential that the state showed this plan in order to convict the respondents of murder under the felony-murder doctrine. See note 35 supra for a more complete discussion of the felony-murder rule.

117. Appendix, supra note 34, at 32-38. See note 42 supra for respondent Pickens' confession.
that if each confession had been weighed separately, a juror might have logically concluded that the Wood brothers planned the robbery, murder themselves, and sought to "set up" the respondents.\textsuperscript{118} The assumption that the jury disregarded these confessions when determining the guilt of each individual becomes even weaker in light of the fact that the jury was apprised of the government's theory of the case at the beginning of the trial and subsequently the jury was charged with the responsibility of determining whether the confessions were voluntary.\textsuperscript{119}

**IMPACT**

Ostensibly, the Supreme Court has solved the lower court conflict over whether or not \textit{Bruton} applies to situations involving interlocking confessions. Presumably, the \textit{Bruton} doctrine does not apply to cases in which the complaining defendant has confessed and his or her confession "interlocks" with that of the codefendant. This is not very instructive, however, as the Court has failed to define interlocking confessions. It remains unclear to what degree the confessions must "interlock" before \textit{Bruton} is declared inapplicable.\textsuperscript{120} Thus, the lower court conflict is likely to remain unresolved.

The courts which previously employed the interlocking confession exception to \textit{Bruton} errors may continue to do so relying on the \textit{Parker} decision. The courts which previously rejected the blanket application of this per se exception may also continue to do so simply by labeling the confessions non-interlocking. Indeed, the plurality's failure to define interlocking confessions may suggest that the \textit{Bruton} rule is now only applicable to those situations in which the complaining defendant has made no inculpatory statements.\textsuperscript{121}

The \textit{Parker} analysis appears superfluous in view of the existing harmless error \textit{Bruton} analysis. That is, the harmless error approach already encompasses those situations in which the evidence presented against the complaining defendant is so overwhelming that the possible prejudice resulting from the admission of his or her codefendant's confession may not be devastating to the defendant's case.\textsuperscript{122} Indeed, in his concurring opinion Justice Blackmun stated that, at best, the adoption of the \textit{Parker} analysis only imposes an additional step to the harmless error analysis.\textsuperscript{123} Yet, there is a

\begin{itemize}
\item \textsuperscript{118} Brief for Respondents, supra note 87, at 9.
\item \textsuperscript{119} See note 112 supra.
\item \textsuperscript{120} Indeed, Justice Blackmun notes in his concurring opinion that it is unclear where the new analysis will lead the courts since the plurality does not indicate precisely what constitutes an "interlocking confession." 99 S. Ct. at 2142 (Blackmun, J., concurring).
\item \textsuperscript{121} This interpretation of \textit{Parker} is supported by the fact that the only distinction the plurality made between \textit{Parker} and \textit{Bruton} was that in \textit{Bruton} the complaining defendant made no incriminating statements. 99 S. Ct. at 2140.
\item \textsuperscript{122} See notes 59-65 and accompanying text supra for the discussion of the harmless error approach.
\item \textsuperscript{123} Justice Blackmun wrote that before making a harmless error determination, the courts must now first inquire whether the confessions interlock. 98 S. Ct. at 2142 (Blackmun, J., concurring).
\end{itemize}
key difference between the two analyses which suggests that the Parker rule is not merely superfluous and will impose more than an innocuous additional step.

Under the harmless error approach, the courts are granted a degree of flexibility denied under the per se rule declaring the Bruton rule inapplicable. As previously noted, certain situations will arise in which, although the confessions somehow interlock, the complaining codefendant might still be prejudiced. Under the harmless error approach, the courts have been able to apply Bruton in the above situation and weigh the damage done to the complaining defendant to determine whether the judgment should stand. Under the new Parker analysis, however, the courts will be locked into an analysis automatically rejecting the application of Bruton, regardless of the damage done.

At best, in addition to the apparent resolution of the lower court confusion over the admissibility of interlocking confessions, the Parker analysis will refocus attention on the nature of the confessions themselves. Courts will be forced to first gauge whether or not the confessions intertwine sufficiently to be termed interlocking. Theoretically if one confession is far more incriminating than the other or increases the degree of the offense with which the non-declarant may be charged, the court should not deem them to be interlocking. As evidenced by the various courts which employ their own version of the interlocking confession doctrine, however, not all courts will use this rigorous a test to determine whether a confession is interlocking. Therefore, it is unlikely that Parker will induce the lower courts to more closely scrutinize the nature of interlocking confessions.

124. See note 86 and accompanying text supra. See also the following hypothetical created by Justice Stevens to illustrate the potential damage done to a confessing codefendant's case once the Bruton protection is stripped away.

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 or Y takes the stand.

If Y's televised confession were placed before the jury while Y was immunized from cross-examination, it would undoubtedly have the "devastating" effect on X that the Bruton rule was designed to avoid.

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

125. For an example of a court reluctantly following the interlocking confession doctrine see Ortiz v. Fritz, 476 F.2d 37 (2d Cir. 1973), cert. denied, 414 U.S. 1075 (1973).
126. See note 81 and accompanying text supra.
127. See note 82 and accompanying text supra.
128. See notes 81-84 and accompanying text supra.
A BETTER APPROACH

The simplest and arguably the most obvious solution to the problem of how to preserve the confrontation rights of non-testifying confessing codefendants would be to grant a severance, upon request, when the prosecutor indicates he or she will use the confession at joint trial and such use will prejudice the rights of the codefendants. This device is provided for in Rule 14 of the Federal Rules of Criminal Procedure. A moving defendant, however, is rarely granted a severance because under the current interpretation of Rule 14, the defendant is burdened with showing that joinder would be prejudicial. Also, since there are no written standards for granting or denying severance, the severance matter is entirely within the discretion of the trial judge and his or her decision is irreversible.

129. In Bruton, the Court intimated that the recent 1966 Amendment to the Federal Rules of Criminal Procedure favored granting severance instead of introducing the inculpating confession of a codefendant at joint trial. Bruton v. United States, 391 U.S. 123, 131-32 (1968). The proposed amendment to Rule 14, effective July 1, 1966, reads as follows:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires (emphasis added).

FED. R. CRIM. P. 14. In making its proposal for the amendment of Rule 14, the Advisory Committee on Criminal Rules stated:

A defendant may be prejudiced by the admission in evidence against a codefendant of a statement or confession made by that codefendant. This prejudice cannot be dispelled by cross-examination if the codefendant 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 procedure whereby the issue of possible prejudice can be resolved on the motion for severance. The judge may direct the disclosure of the confessions or statements of the defendants to him for in camera inspection as an aid to determining whether the possible prejudice justifies ordering separate trials.

34 F.R.D. 411, 419 (1964).


132. Rule 14 merely states that severance is allowable if justice requires. FED. R. CRIM. P. 14.

absent a showing of abuse of discretion. The justification for placing these barriers before a moving defendant is that there is a substantial public interest in having joint trials which far outweighs the potential prejudice the defendant might suffer.

A better approach to severance is the "sever or exclude" rule, wherein the judge must grant severance when the prosecutor wishes to introduce a codefendant's confession which implicates another codefendant. This method is advocated by some courts, various commentators, the American Bar Association Advisory Committee on Criminal Trials, and the state of Wisconsin. Although granting severance will impose a strain


135. See Bruton v. United States, 391 U.S. 123, 134 (1968) (joint trials conserve funds, lessen inconvenience to government and witnesses and avoid delays); Haggard v. United States, 369 F.2d 968, 973 (8th Cir. 1966) (Rule 14 is to be given broad interpretation so as to effect the more efficient administration of criminal trials); King v. United States, 355 F.2d 700, 703 (1st Cir. 1966) (possible small prejudice to defendant tolerable due to comparatively greater benefit to court); Rakes v. United States, 169 F.2d 739, 744 (1948) (joint trial increases speed and efficiency in administration of justice). See also Wright, Federal Practice and Procedure 457 (1967).

136. Of course if a codefendant's confession may be redacted such that it in no way implicates the other codefendants then there is no need for a severance. For example, if the confession was redacted such that it contained no mention of the other parties involved in the crime and did not use any first person plural pronouns, the other codefendants could by no stretch of the imagination be prejudiced. See note 15 supra for a more complete discussion of redaction.

137. See Greenwell v. United States, 336 F.2d 962 (D.C. Cir. 1964), cert. denied, 380 U.S. 923 (1965), and Jones v. United States, 342 F.2d 863 (D.C. Cir. 1964), in which the court indicated that separate trials would be required if the prosecutor desired to use the confession of one codefendant at joint trial.

138. See United States v. Delli Paoli, 229 F.2d 319 (2d Cir. 1956) (Frank, J., dissenting), for the following suggested formula:

When several defendants are on trial for criminal conspiracy, if the government seeks to put in evidence an out of court statement by one defendant which is hearsay as to the others (i.e. an out of court statement made after the conspiracy has terminated), then

(a) unless all references to the other defendants can be effectively deleted (so that the statement will contain no hint of the others' guilt) and unless those references are deleted,

(b) the trial judge must (1) refuse to admit the statement or (2) sever the trial of those other defendants (emphasis added).


140. See WISC. STAT. § 971.12(3) 1969 which provides that: "The district attorney shall advise the court prior to trial if he intends to use the statement of a codefendant which implicates another defendant in the crime charged. Thereupon, the judge shall grant a severance as to any
on the resources of an already over-burdened judicial system, it will at the same time promote efficiency by avoiding retrials, misjoined cases, and numerous appeals. 141 It also will promote efficiency by eliminating both the need to subject the various confessions to redaction and the need to determine whether the confessions interlock.

CONCLUSION

The adoption of the interlocking confession analysis is the logical result of the Court's developing attitude toward Bruton errors. That is, the Court has departed from the apparently simple question of whether or not a defendant has been denied the right to confront a witness against him or her. Rather, it has adopted an analysis which gauges the sufficiency of evidence against a complaining codefendant before determining whether his or her confrontation rights have been violated. In cases like Frazier, 142 Harrington, 143 and Dutton, 144 the Court first began to declare certain denials of confrontation harmless due to the degree of incriminating evidence accumulated against the defendant. The Court subsequently has employed this "sufficiency of evidence" outlook to formulate a per se rule excluding application of Bruton to situations in which a defendant has produced "the most probative and damaging evidence against him." 145—a confession. This sufficiency of evidence trend is disturbing not only because it limits the application of the Bruton doctrine to cases closely paralleling the Bruton set of facts, 146 but also because the system of joint trials already compromises the rights of codefendants. 147

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such defendant." Ohio has also moved in this direction by requiring separate trials in capital cases, unless good cause can be shown for joinder. Ohio Rev. Code Ann. § 2945.20 (Page).

144. 400 U.S. 74 (1970).
146. See notes 89, 90, and accompanying text supra. It is somewhat ironic to note that defendant Bruton himself might not have withstood this sufficiency of evidence scrutiny, as he had been identified at trial by an eyewitness to the robbery. 99 S. Ct. at 2146 n.7 (Stevens, J., dissenting).
147. Although often praised as an efficient means of dealing with the problems of undue delay, cost, and inconsistent verdicts, the joint trial has been severely criticized for compromising the rights of the codefendants. Duke Note, supra note 27, at 330. Note, Bruton v. United States: A Belated Look at the Warren Court Concept of Criminal Justice, 44 St. Johns L. Rev. 54, 59-60 (1969); 56 Colum. L. Rev. 1112, 1115 (1956); 28 Ohio St. L.J. 356, 359 (1967); 36 U. Cin. L. Rev. 306, 306-07 (1967).

There is the additional risk that juries will tend to find one defendant guilty by association with his codefendant. See Note, Codefendant's Confessions, 3 Colum. J.L. & Social Problems 80, 81 (1967). Also, as most trials are conspiracy cases, there exists the risk that the jury will imply the crucial element of intent from the maelstrom of witnesses, confessions, and hearsay evidence. See Duke Note, supra note 27, at 330.