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SIXTH AMENDMENT—INTERLOCKING CONFESSIONS AND THE *BRUTON* RULE

Parker v. Randolph, 99 S. Ct. 2132 (1979).

INTRODUCTION

There has been a great deal of controversy and conflict among the federal and state courts[1] concerning the admissibility of a codefendant's confession that incriminates a defendant who has also confessed. In *Bruton v. United States*[2] the Supreme Court held that admission of a codefendant's confession which implicated Bruton violated his rights under the confrontation clause of the sixth amendment[3] because the codefendant did not take the stand and thus could not be cross-examined.[4] Despite the general rule that a court will rely upon the jury to follow its instructions, the Court held that "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."[5]

Unlike the situation in *Bruton*, the defendants in *Parker v. Randolph*[6] each confessed. Thus the issue before the Court was whether "*Bruton* requires reversal of a defendant's conviction when the defendant himself has confessed and his confession 'interlocks' with and supports the confession of his codefendant."[7]

Unfortunately, the Court has left this question and conflict unresolved. Justice Rehnquist, writing for the Chief Justice and for Justices Stewart and White, held that the *Bruton* rule was inapplicable when the defendants' confessions "interlocked" with one another.[8] Rehnquist argued that when a defendant has admitted his own guilt, "the incriminating statements of a codefendant will seldom, if ever, be of the 'devastating' character referred to in *Bruton*."[9] Thus, a clear instruction to the jury by the trial court is a sufficient safeguard of the defendant's sixth amendment right of confrontation. Justice Blackmun held that there was a *Bruton* error but it was harmless.[10] Justice Stevens, joined by Justices Brennan and Marshall, agreed with Justice Blackmun that it was an error under *Bruton* to admit interlocking confessions but concluded that the error was not harmless.[11] Justice Stevens argued that "the concurrent findings of the District Court and the Court of Appeals that the error was not harmless preclude this Court from reaching a different result of this kind of issue."[12]

[1] The conflict extends throughout the courts of appeals. For cases applying *Bruton* in the context of interlocking confessions, see Hodges v. Rose, 570 F.2d 643 (6th Cir. 1978), United States v. DiGilio, 538 F.2d 972 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). Other courts have implicitly applied *Bruton*. *See* Hull v. Wolff, 539 F.2d 1146 (8th Cir. 1976); Glinsey v. Parker, 491 F.2d 337 (6th Cir.), *cert. denied*, 417 U.S. 921 (1974); Ignacio v. Guam, 413 F.2d 513 (9th Cir. 1969), *cert. denied*, 397 U.S. 943 (1970); United States *ex rel.* Johnson v. Yeager, 399 F.2d 508 (3d Cir. 1968), *cert. denied*, 393 U.S. 1027 (1969).

For cases holding that *Bruton* does not apply, see 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.* Cantanzara v. Mancusi, 404 F.2d 296 (2d Cir. 1968), *cert. denied*, 397 U.S. 942 (1970). Other courts have held that *Bruton* does not apply or that if it does the error was harmless. *See* Mack v. Maggio, 538 F.2d 1129 (5th Cir. 1976); United States v. Walton, 538 F.2d 1348 (8th Cir.), *cert. denied*, 429 U.S. 1025 (1976); United States v. Spinks, 470 F.2d 64 (7th Cir.), *cert. denied*, 409 U.S. 1011 (1972); Metropolis v. Turner, 437 F.2d 207 (10th Cir. 1971); United States *ex rel.* Dukes v. Wallack, 414 F.2d 246 (2d Cir. 1969).

State courts are also divided over the issue. *Compare, e.g.*, Stewart v. State, 257 Ark. 753, 519 S.W.2d 733 (1975) *and* People v. Moll, 26 N.Y.2d 1, 307 N.Y.S.2d 876, 256 N.E.2d 185, *cert. denied*, 398 U.S. 911 (1970) *with* People v. Rosochacki, 41 Ill. 2d 483, 244 N.E.2d 136 (1969) *and* State v. Oliver, 160 Conn. 85, 273 A.2d 867 (1970).

[2] 391 U.S. 123 (1968).

[3] U.S. CONST. amend. VI. The amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." This right was applied to the states through the fourteenth amendment in Pointer v. Texas, 380 U.S. 400 (1965).

[4] This decision has been applied retroactively by the Court in Roberts v. Russell, 392 U.S. 293 (1968).

[5] Bruton v. United States, 391 U.S. at 135.

[6] 99 S. Ct. 2132 (1979).

[7] *Id.* at 2135.

[8] *Id.* at 2140.

[9] *Id.* at 2139.

[10] *Id.* at 2141 (Blackmun, J., concurring).

[11] *Id.* at 2143 (Stevens, J., dissenting).

[12] *Id.* Justice Powell took no part in the decision.

Facts and History

As noted by the court of appeals, the sequence of events involved in *Parker* "have the flavor of the old West before the law ever crossed the Pecos."[13] William Douglas, a professional gambler, had been using marked cards to cheat Robert Wood in a series of poker games. Realizing he had been cheated, Robert Wood planned a robbery of the next game. He received the support of his brother, who enlisted the aid of the three defendants, Randolph, Dickens, and Hamilton. Contrary to the plan, Robert Wood fatally shot Douglas before the defendants knocked down the door to perpetrate the robbery.

When the three defendants were captured, each confessed to his involvement in the crime. Several police officers testified to the defendants' confessions at the murder trial. Since none of the defendants took the stand at the joint trial, the Tennessee trial court instructed the jury that each confession could only be used against the defendant who gave it and could not be considered as evidence of a codefendant's guilt.[14] The jury returned a guilty verdict against all three defendants.[15]

The Tennessee Court of Criminal Appeals reversed the convictions.[16] The court held that the admission of interlocking confessions at the joint trial was contrary to *Bruton*.[17]

The Supreme Court of Tennessee reversed the state's criminal appellate court by limiting the applicability of *Bruton* to situations in which the confession inculpated a nonconfessing defendant. The state supreme court concluded that "'[t]he fact that jointly tried codefendants have confessed precludes a violation of the *Bruton* rule where the confessions are similar in material aspects.'"[18]

The United States District Court for the Western District of Tennessee granted the defendants' applications for writs of habeas corpus, ruling their rights under *Bruton* had been violated.[19]

The Court of Appeals for the Sixth Circuit affirmed the district court, explicitly rejecting the interlocking confession theory.[20] The court stated: "[I]n 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."[21]

The Supreme Court Opinion

The Supreme Court reversed the court of appeals on the *Bruton* issue.[22] Justice Rehnquist, writing for a plurality of four, held that the confrontation clause of the sixth amendment is not violated when the codefendants' confessions interlock and the trial court gives the proper limiting instructions to the jury.[23] He noted that "[t]he 'rule'—indeed, the premise upon which the system of jury trials function under the American judicial system—is that juries can be trusted to follow the trial court's instructions."[24] *Bruton*, therefore, represents an exception to this general rule.

Rehnquist acknowledged the reasons for the exception to the general rule. Citing *Bruton*, he noted that "'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.'"[25] Rehnquist also argued that another aspect of the *Bruton* case was that the credibility of the codefendant's statement was "inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift the blame onto others."[26]

[13] 575 F.2d 1178, 1179 (6th Cir. 1978).

[14] 99 S. Ct. at 2136.

[15] Tenn. Code Ann. § 39-2402 (1975) provides:

> Murder in the First Degree—An individual commits murder in the first degree if . . . (4) he commits a willfull, deliberate and malicious killing or murder during the perpetration of an arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb.

[16] 99 S. Ct. at 2136. The Tennessee Court of Criminal Appeals decision was unpublished.

[17] *Id.*

[18] *Id.* (citing Tennessee v. Elliot, 524 S.W.2d 473, 477–78 (Tenn. 1975)). The Tennessee Supreme Court decision has not been published.

[19] 99 S. Ct. at 2136. The U.S. District Court opinion was unpublished.

[20] Randolph v. Parker, 575 F.2d 1178, 1183 (6th Cir. 1978).

[21] *Id.*

[22] The Supreme Court affirmed the granting of habeas corpus relief to respondent Dickens on the grounds that his rights under Miranda v. Arizona, 384 U.S. 436 (1966), had been violated. 99 S. Ct. at 2141.

[23] 99 S. Ct. at 2140. Generally the court is required to give a clear instruction to the jury that each confession can only be used against the defendant who gave it and cannot be considered as evidence of a codefendant's guilt.

[24] *Id.* at 2140 n.7.

[25] *Id.* at 2137–38 (quoting Bruton v. United States, 391 U.S. at 135–36).

[26] *Id.* at 2138 (quoting Bruton v. United States, 391 U.S. at 136).

Recognizing these criteria as being necessary to apply the *Bruton* exception, Rehnquist argued that where a defendant has admitted his guilt, incriminating statements from his codefendant's confession "will seldom, if ever, be of 'devastating' character referred to in *Bruton*."[27] In a situation where a defendant has maintained his innocence, the Court recognized in *Bruton* that incriminating statements by the codefendant will probably weigh heavily in the jury's determination of the guilt or innocence of the defendant, despite instruction by the court. In the case where the defendant has himself confessed, and his confession interlocks with his codefendant's confession, Rehnquist argued that the codefendant's statements would not be damaging to the defendant because the jury would concentrate on the defendant's confession. Even if the defendant was allowed to cross-examine and impeach the statements by his codefendant, it would do him little good since he has admitted committing the crime in his own confession. Thus, Rehnquist felt the constitutional right of cross-examination "has far less practical value to a defendant who has confessed to the crime than to one who has consistently maintained his innocence."[28]

Furthermore, Rehnquist argued that in the case of interlocking confessions the codefendant's statements are not inevitably suspect. Since the defendant has himself admitted to and thus corroborated the codefendant's allegations, the codefendant's statement is not suspect because of the possibility he may be attempting to shift the blame onto the defendant.[29]

Rehnquist concluded that where a confessing codefendant has not taken the stand but has implicated a defendant who has made no admission of his guilt, the limiting instructions to the jury cannot be accepted as adequate safeguards of the defendant's rights under the confrontation clause.[30] However, when the defendant's confession is before the jury, Rehnquist felt that "the constitutional scales tip the other way."[31]

> The possible prejudice resulting from the failure of the jury to follow the trial 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. We therefore hold that admission of interlocking confessions with proper limiting instructions conforms to the requirements of the Sixth and Fourteenth Amendments to the United States Constitution.[32]

Justice Blackmun in his concurring opinion and Justice Stevens writing for the dissent, disagreed with the plurality because they felt that a *Bruton* violation had occurred at the trial of the defendants.[33] In finding a constitutional error, Stevens focused his analysis on a major assumption behind the *Bruton* decision. This assumption was that the jury cannot or will not follow the court's instruction to disregard incriminating statements made in the codefendant's confession.[34] Because such an instruction provides an inadequate safeguard of the defendant's sixth amendment rights, Stevens argued that "the controlling question [in applying the *Bruton* rule] must be whether it is realistic to assume that the jury followed the judge's instructions to disregard those confessions when it was evaluating [the defendant's] guilt."[35]

Stevens argued that the plurality opinion was incorrect in assuming that a jury has more ability to disregard a codefendant's inadmissible incriminating statements against the defendant when the defendant's own confession is part of the evidence.[36] For example, Stevens hypothesized a situation in which codefendant y confessed to a murder and also implicated defendant x. Defendant x made a vague statement to a drinking partner saying that he was with y at the approximate time of the killing. All other evidence is circumstantial. In such a situation, Stevens argued that the confession of codefendant y certainly would be devastating to x. In fact, the presence of x's own confession might actually increase the probability that the jury would consider y's statement in determining x's guilt.[37] Stevens concluded that "[e]vidence that a defendant has made an 'extra-judicial admission of guilt' which 'stands before the jury unchallenged,' ... is not an acceptable reason for depriving him of his constitutional right to confront the witnesses against him."[38]

[27] 99 S. Ct. at 2139.
[28] *Id.*
[29] *Id.*
[30] *Id.* at 2140.
[31] *Id.*
[32] *Id.*
[33] *Id.* at 2143 (Blackmun, J., concurring); *id.* at 2143 (Stevens, J., dissenting).
[34] Bruton v. United States, 391 U.S. at 129 (citing Delli Paoli v. United States, 352 U.S. 232 (1957) (Frankfurter, J., dissenting)).
[35] 99 S. Ct. at 2147 (Stevens, J., dissenting).
[36] *Id.* at 2145.
[37] *Id.* at 2145–46.
[38] *Id.* at 2145.

Rather than adopting a per se rule that *Bruton* is inapplicable in an interlocking confession situation, both Blackmun and the dissenting Justices would have applied the harmless error test.[39] The Court has applied this test in previous cases involving *Bruton* violations. For example, in *Harrington v. California*,[40] two codefendants' statements admitted at trial placed Harrington at the scene of the crime, but the codefendants never took the stand. The Court, in deciding whether this *Bruton* violation required reversal of the defendant's conviction, applied the rule that "'before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.'"[41] Under such a test, the finding of a *Bruton* violation during the course of a trial does not automatically require reversal of the criminal conviction. The Court stated in *Schneble v. Florida*:[42] "In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error."[43]

Analysis

The dispute between the plurality and the dissent concerned the issue of when a jury should be relied upon to follow a court's instructions. Because the plurality and the dissent rely upon different principles found in *Bruton* to answer this question, they reach different conclusions.

Stevens noted *Bruton* rejected the assumption of the Court in *Delli Paoli v. United States*[44] that a jury can follow a court's instructions to ignore a codefendant's confession when it determines the defendant's guilt. When the Court in *Bruton* overruled *Delli Paoli*, it relied heavily on the reasoning it had previously used in *Jackson v. Denno*.[45] In *Jackson*, the Court held that the New York procedure allowing a jury to hear the contents of a confession and at the same time determine whether it was voluntarily given violated the due process clause. The Court in *Jackson* believed that after hearing the contents of a confession, a jury would be biased against deciding it was involuntary, and even if it did decide it was involuntary, it would be unable to ignore the confession when it was determining the guilt or innocence of the defendant.[46]

Applying the reasoning found in *Jackson*, the Court in *Bruton* concluded that a jury cannot use a codefendant's confession when it is determining the codefendant's guilt and later ignore the confession when it is determining the defendant's guilt. The California Supreme Court had earlier applied this reasoning in reaching the same conclusion. Justice Traynor wrote in *People v. Aranda*:[47] "A jury cannot 'segregate evidence into separate intellectual boxes. . . .' It cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A."[48]

Stevens argued that the inability of the jury to segregate evidence into separate intellectual boxes requires separate trials if a codefendant's confession implicating the defendant is to be used as evidence against the codefendant.[49] He felt the plurality incorrectly assumed that a jury would be more able to disregard a codefendant's inadmissible confession when the jury also knew of the defendant's own confession.[50]

Justice Rehnquist, however, emphasized that it is the general rule that the court will rely upon the jury to follow its instructions.[51] *Bruton* is an exception to this rule which should be applied only when a two-part test is met. First, the jury must be unable to follow the court's instructions for the reasons noted above, and second, the consequences of such a failure must be vital to the defendant.[52] This would occur when the incriminating statements are devastating to the defendant. Since Justice Rehnquist felt that when there are interlocking confessions the effect on the defendant would "seldom, if ever," be devastating, he concluded that a clear jury instruction is adequate protection of the

[39] *Id.*; *id.* at 2141 (Blackmun, J., concurring).
[40] 395 U.S. 250 (1969).
[41] *Id.* at 251 (quoting Chapman v. California, 386 U.S. 18, 24 (1967)).
[42] 405 U.S. 427 (1972).
[43] *Id.* at 430.
[44] 352 U.S. 232 (1957).
[45] 378 U.S. 368 (1964).
[46] *Id.* at 388.
[47] 63 Cal. 2d 518, 47 Cal. Rptr. 353, 407 P.2d 265 (1965).
[48] *Id.* at 529, 47 Cal. Rptr. at 360, 407 P.2d at 272.
[49] Redacting all references to the defendant is another solution but is often ineffective or impossible especially when the confession is introduced by a witness. For example, in *Parker* all references by a confessing defendant to other defendants were replaced with the words "blank" or "other person." But as the court of appeals noted, the confessions left "no possible doubt in the jurors' minds concerning the 'person[s]' referred to." 575 F.2d at 1180.
[50] 99 S. Ct. at 2145 (Stevens, J., dissenting).
[51] 99 S. Ct. at 2139.
[52] *Id.* at 2137.

defendant's rights under the confrontation clause.[53] Thus, Justice Rehnquist did not necessarily assume that the ability of a jury to ignore a codefendant's implicating statements in determining the defendant's guilt or innocence is enhanced when the defendant has confessed. Rather, he was balancing the advantages of having joint trials[54] against the possibility of infringing on the defendant's right to confront witnesses against him. When a defendant's own confession is before the jury, the "constitutional scales" tip against overriding "the theoretically sound premise that a jury will follow the trial court's instructions."[55] According to Rehnquist, "[t]he possible prejudice resulting from the failure of the jury to follow the trial 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."[56]

Thus, by relying on different principles upon which the *Bruton* decision was based, the plurality and dissent reach opposite conclusions. The dissent found a violation because they believed the only issue in *Bruton* was the ability of the jury to follow the court's instructions. The plurality, however, did not find an error because they felt that in addition to the high risk that the jury would not follow a court's instruction, the failure of the jury to do so must be devastating to the defendant.

The cases since *Bruton* do little to clarify which elements of *Bruton* are controlling.[57] In *Frazier v. Cupp*,[58] for example, the Supreme Court held that *Bruton* did not apply when the prosecutor made statements implicating the defendant to which he believed a codefendant would later testify, even though the codefendant eventually chose not to testify. In distinguishing the facts in *Frazier* from the facts in *Bruton*, the Court relied upon both principles of the *Bruton* case emphasized by Rehnquist and Stevens. The Court reasoned that "unlike the situation in *Bruton*, the jury was not being asked to perform the mental gymnastics of considering an incriminating statement against only one of two defendants in a joint trial."[59] The Court also distinguished *Bruton* on the grounds that the statement made by the prosecutor was not a vital part of the case.[60]

Thus, *Frazier* fails to clarify whether the "mental gymnastics" criteria alone is sufficient to find a *Bruton* error or whether there must in addition be a devastating impact upon the defendant. Theoretically, it appears inconsistent for the Court first to state in *Bruton* that the jury instruction is an "unmitigated fiction"[61] and later for the Court in *Parker* to rely upon the jury instructions as an adequate safeguard of the defendant's sixth amendment right since there was no greater likelihood that the jury would be able to perform the "mental gymnastics" required by a court's instruction in *Parker* than there was in *Bruton*. However, the devastating effect to the defendant should the jury fail to follow a court's instruction has consistently been offered by the Court as a justification for breaking the general rule that courts will assume the jury can and will follow their directives.

In addition to the disagreement over the relative importance of the various principles found in the *Bruton* case, the dissent and the plurality differ on whether Supreme Court cases prior to *Parker* implied that the admission of interlocking confessions constitutes a *Bruton* error. Justice Stevens argued that the plurality opinion goes against recent Supreme Court cases in which the Court first found *Bruton* violations and then applied the harmless error test when there were interlocking confessions.[62] Justice Rehnquist, however, argued that the Court never decided whether there was a *Bruton* violation in any of these cases.[63] For example, in *Brown v. United States*,[64] there were interlocking

[53] *Id.* at 2140.

[54] "Joint trials ... conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial." Bruton v. United States, 391 U.S. at 134.

[55] 99 S. Ct. at 2140.

[56] *Id.*

[57] As indicated earlier there has been a conflict among the lower courts that has been evenly divided. *See* note 1 *supra*.

[58] 394 U.S. 731 (1969).

[59] *Id.* at 735.

[60] *Id.*

[61] 381 U.S. at 129 (citing Krulewitch v. United States, 336 U.S. 440, 443 (1949) (Jackson, J., concurring)).

[62] 99 S. Ct. at 2144 n.3 (Stevens, J., dissenting).

[63] 99 S. Ct. at 2140 n.8. The dissent argued that the harmless error test was applied in Roberts v. Russell, 392 U.S. 293 (1968), and Hooper v. Louisiana, 392 U.S. 658 (1968), both involving interlocking confessions. Rehnquist argued that in *Roberts* the defendant did not confess, and furthermore that the Court did not decide the interlocking confession issue but only held that *Bruton* should be applied retroactively. In *Hooper*, the Court merely remanded the case to be considered in light of *Bruton* and *Roberts* without giving an opinion.

[64] 411 U.S. 223 (1973). The defendants were convicted of conspiracy to ship stolen goods in interstate commerce contrary to 18 U.S.C. § 2314 (1976) and 18 U.S.C. § 371 (1976). Both defendants confessed that they had conspired to steal from the warehouse, stolen goods from the

confessions by the codefendants, but the prosecutor conceded that the admission of their confessions was a violation of *Bruton*.[65] Thus, while the Court applied the harmless error rule, Justice Rehnquist argued that the issue of whether a *Bruton* violation had occurred was not before the Court because of the concession made by the prosecuting attorney.[66] Similarly, in *Schneble v. Florida*[67] the Court, in an opinion written by Justice Rehnquist, again applied the harmless error test when there were interlocking confessions. In *Parker*, Rehnquist argued that the Court assumed the existence of a *Bruton* violation in *Schneble* without directly deciding the issue.[68]

Even if the plurality was correct in asserting that the prior Court cases are irrelevant in deciding whether there was a *Bruton* violation in *Parker*, there are still problems with its assumption that when there are interlocking confessions, incriminating statements by the codefendant will not be devastating to the defendant. As Justice Blackmun pointed out, this is not necessarily the case.[69] For example, a defendant's statement may concur with his codefendant's statement but the codefendant may further implicate the defendant.[70] In such a situation both elements of *Bruton*, the inability of the jury to segregate each confession to each defendant, and the devastating effect to the defendant would be present. Yet, the plurality opinion, in adopting a per se rule, would prohibit an appellate court from reversing a conviction on the grounds that the codefendant's confession was admitted into evidence.

Of course, the previous situation may not meet the plurality's definition of "interlocking confessions." A major flaw of the plurality opinion is its failure to specifically define this term and what test would be employed in future cases to determine whether confessions sufficiently interlock. The Tennessee Supreme Court felt that the defendants' confessions interlocked because they "'clearly demonstrated the involvement of each, as to crucial facts such as time, location, felonious activity, and awareness of the overall plan or scheme.'"[71] Whether this is the definition the plurality had in mind, or whether their approach requires an inquiry into the degree the confessions interlock is not clear from the plurality opinion.[72]

To be consistent with his reasoning, Justice Rehnquist would have to define "interlocking confessions" in such a manner that there would not be a devastating effect upon the defendant. Such a definition may be hard to achieve and even more difficult to apply. It would be most difficult to anticipate all the possible situations that could arise and still ensure that there was no devastating effect on the defendant. Even if the Court adopted a general definition, such as everything the codefendant alleges must be admitted to by the defendant, there would be problems. If such a definition were interpreted strictly, the *Parker* decision would probably have very little application because it is unlikely that the confessions would match exactly. If the definition were interpreted more liberally, the question would remain as to how close the confessions must interlock with one another.

The answer to this question appears to be that the confessions must interlock enough to ensure that there is no devastating effect upon the defendant. If such a result is desired, it seems practical to measure this criterion directly. A trial judge could evaluate the two confessions and determine whether each defendant's confession would be harmless to every other defendant. This would be an application of the "harmless error" (in this case it would be more appropriately termed harmless admission) test at the trial court level. Not only would it test the plurality's major criterion directly, but also would be using the test that has been applied at the appellate level to judge the harmfulness of normal *Bruton* violations.[73]

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warehouse in the past, and taken goods across state lines to an accomplice for distribution. 411 U.S. at 224-25.

[65] 411 U.S. at 226.

[66] 99 S. Ct. at 2138 n.5.

[67] 405 U.S. 427 (1972). Schneble was found guilty of murder. He confessed that he had strangled the victim and that the other defendant had shot her to put her out of her misery. The codefendant's confession had implicated Schneble by stating he sat in the back seat of the car (and thus, was in a position to strangle the victim) and that Schneble never left the codefendant alone with the woman.

[68] 99 S. Ct. at 2138 n.5.

[69] *Id.* at 2142 (Blackmun, J., concurring).

[70] *Id.*

[71] 99 S. Ct. at 2136. In United States *ex rel.* Ortiz v. Fritz, 476 F.2d 37 (2d Cir.), *cert. denied*, 414 U.S. 1075 (1973), the court of appeals concluded that two confessions interlocked, stating that "[a]lthough the three confessions [did] not all cover the same facts, they do interlock and are consistent as regards the slaying. . . . As to motive, plot and execution of the crime they are essentially the same." 476 F.2d at 39.

[72] *See* 99 S. Ct. at 2142 (Blackmun, J., concurring).

[73] It certainly could be argued that even if the plurality adopted the "harmless admission" standard, there would still be problems with their analysis because a trial judge would be unable to ascertain whether or not a codefendant's statements would be devastating to the defendant

The specific definition and analysis in determining whether confessions interlock is left unclear by the plurality. It is certain, however, that no matter what test they were to adopt, if the plurality opinion gained the support of a majority of the Court, it would allow the admission of most interlocking confessions at joint trials. This contrasts with Justice Blackmun's and Justice Stevens' analysis that would place a duty on the trial court judge to disallow such confessions unless they were properly redacted.[74] Thus, under Stevens' and Blackmun's analysis, the government would usually have to have separate trials if it desired to use a codefendant's confession against a defendant. Furthermore, only when the trial court mistakenly allowed the implicating confessions at a joint trial would Stevens or Blackmun apply the harmless error test to determine whether the *Bruton* infraction required reversal of the subsequent conviction.

In conclusion, there is a great deal of conflict among the state courts and the federal circuits about whether a *Bruton* rule applies where there are interlocking confessions.[75] Justice Stevens, writing for the dissent, argued that a court's instructions to a jury do not safeguard a defendant's rights under the confrontation clause in the interlocking confession cases because the members of a jury have no more ability to segregate evidence than they do when they only have a codefendant's confession. Justice Rehnquist, writing for the plurality, held that when a defendant's and codefendant's confessions interlock, there is seldom a devastating effect upon the defendant. Without such an effect, *Bruton* does not apply, and a proper limiting instruction to the jury is an adequate safeguard for the defendant's sixth amendment rights. Whatever test the Court adopts in the future, a clear statement to resolve the conflict among the lower courts is needed.

until he has examined all the evidence. However, Rule 14 of the Federal Rules of Criminal Procedure applies such a procedure to determine the possible prejudice resulting from a joint trial. *See* FED. R. CRIM. P. 14.

[74] *See* note 49 *supra* for a discussion of problems in the redaction process.

[75] *See* note 1 *supra*.