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Sixth Amendment--Confrontation and the Use of Interlocking Confessions at Joint Trial

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SIXTH AMENDMENT—CONFRONTATION AND THE USE OF INTERLOCKING CONFESSIONS AT JOINT TRIAL

Cruz v. New York, 107 S. Ct. 1716 (1987).

I. INTRODUCTION

The sixth amendment guarantees a criminal defendant the right to confront his accusers.[1] In *Bruton v. United States*,[2] the United States Supreme Court firmly established that, in joint trials of criminal defendants, the right of confrontation bars the use of a nontestifying co-defendant's confession that inculpates other defendants, even if the introduction of the confession is accompanied by an instruction to the jury not to consider the co-defendant's testimony against the others. However, in *Parker v. Randolph*,[3] the Court failed to decide whether *Bruton* should apply to a situation in which a defendant had himself confessed in a manner substantially similar to that of a co-defendant. This question was revisited in *Cruz v. New York*,[4] in which the Court held that the co-defendant's confession was barred in this situation as well.

This Note examines the history of the confrontation clause of the sixth amendment and the use of confessions of nontestifying co-defendants. Additionally, this Note discusses and evaluates the majority and dissenting opinions in *Cruz*, concluding that the Court's decision rightly preserves the defendant's constitutional right of confrontation while not significantly impairing the practice of joint trials.

II. FACTS

On March 15, 1982, Jerry Cruz was murdered.[5] Following the killing, police interrogated Norberto Cruz about his brother's murder.[6] On April 27, 1982, Norberto informed the police of a visit by

1 U.S. CONST. amend. VI.
2 391 U.S. 123 (1968).
3 442 U.S. 62 (1979).
4 107 S. Ct. 1714 (1987).
5 *Id.* at 1716.
6 *Id.*

Eulogio and Benjamin Cruz[7] to the apartment that Norberto and Jerry shared.[8] Norberto told police that, during the visit, Eulogio was nervous and that his clothes were bloodstained.[9] In addition, Norberto claimed that Eulogio confided in him that he and his brother Benjamin had tried to rob a gas station the night before.[10] According to Norberto, Eulogio stated that after an attendant had interfered and shot Benjamin in the arm, Benjamin killed the attendant.[11] In his testimony to the police, Norberto also claimed that Benjamin had told him a similar story.[12]

On May 3, 1982, the police questioned Benjamin Cruz, who denied having killed Jerry Cruz.[13] In an attempt to prove his honesty, Benjamin voluntarily confessed to the murder of the gas station attendant.[14] That evening, Benjamin gave a detailed videotaped confession of the killing which implicated himself, Eulogio, Jerry Cruz, and a fourth man involved in the gas station incident.[15]

Benjamin and Eulogio Cruz were subsequently charged with the felony murder of the attendant and, over Eulogio's objection, were tried jointly.[16] At trial, also over Eulogio's objection, the court allowed Benjamin's videotaped confession to be admitted into evidence.[17] In addition to the videotaped confession, the prosecution called Norberto, who testified as to the conversations he had had with Benjamin and Eulogio about the gas station incident.[18] Although other evidence was introduced by the prosecution, by the trial's end, the only admissible evidence against Eulogio directly linking him to the crime was Norberto's testimony.[19] The trial judge instructed the jury that Benjamin's confession was not to be used against Eulogio.[20]

Eulogio's attorney claimed that Norberto had fabricated his testimony in order to convict the two brothers who he suspected were

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7 *Id.* Jerry and Norberto were longtime friends of Eulogio and Benjamin, but, despite their sharing of the same last name, these two sets of brothers were unrelated. *Id.*

8 *Id.* The visit referred to by Norberto occurred on November 29, 1981. *Id.*

9 *Id.*

10 *Id*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.* at 1716-17.

18 *Id.* at 1717.

19 *Id.*

20 *Id.*

guilty of killing his brother Jerry.[21] Unpersuaded by this argument, the jury convicted both Benjamin and Eulogio for the felony murder of the gas station attendant.[22] In affirming Eulogio's conviction, the New York Court of Appeals relied upon *Parker v. Randolph*,[23] which states that when a co-defendant's confession "interlocks" with the defendant's confession, the co-defendant's confession does not have to be excluded.[24]

III. HISTORY

The confrontation clause of the sixth amendment to the United States Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[25] The Supreme Court extended the application of the confrontation clause to the states in 1965.[26] In *Delli Paoli v. United States*,[27] the Court held that, in a joint trial, a nontestifying co-defendant's confession that inculpated the defendant could be introduced at the trial as long as the jury was instructed not to use that confession in its assessment of the defendant's guilt.[28] The determinative issue in such a case, the *Delli Paoli* Court said, was "whether [such] instructions were sufficiently clear and whether it was reasonably possible for the jury to follow them."[29] Furthermore, the Court asserted that the belief that the jurors might disregard such instructions was "unfounded speculation."[30] The *Delli Paoli* dissent argued, however, that instructions to disregard a co-defendant's confession were, as a class, "intrinsically ineffective" and that such a confession "cannot be wiped from the brains of the jurors."[31]

Following *Delli Paoli*, the Court appeared to reconsider its initial reasoning and moved towards the position of the *Delli Paoli* dissent.

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21 *Id.*

22 *Id.*

23 442 U.S. 62 (1979)

24 *Cruz*, 107 S. Ct. at 1717 (citing People v. Cruz, 66 N.Y.2d 61, 485 N.E.2d 221, 495 N.Y.S.2d 14 (1985)).

25 U.S. CONST. amend. VI.

26 Pointer v. Texas, 380 U.S. 400 (1965). The Court held the fourteenth amendment made the sixth amendment right to confront witnesses obligatory upon the states. *Id.* at 403. Concurring in the result, Justice Harlan stated that the right of confrontation is implicit in the concept of "ordered liberty" surrounding the fourteenth amendment. *Id.* at 408-09 (Harlan, J., concurring).

27 352 U.S. 232 (1957).

28 *Id.* at 239, 242.

29 *Id.* at 239.

30 *Id.* at 242 (quoting Opper v. United States, 348 U.S. 84, 95 (1954)).

31 *Id.* at 247 (Frankfurter, J., dissenting).

In *Jackson v. Denno*,[32] the Court ruled that a jury could not be relied upon to ignore a confession presented to it if that confession later was found to be involuntary and, thus, inadmissible.[33] The Court also revised Rule 14 of the Federal Rules of Criminal Procedure to allow for the in camera inspection of any confession made by a defendant that was intended to be introduced at trial.[34] The Federal Rules of Criminal Procedure Advisory Committee explained that if the defendant was prejudiced by the co-defendant's confession and the co-defendant did not take the stand, cross-examination would be prevented and the limiting instructions to the jury might be insufficient to eliminate the prejudice.[35]

Eventually, the Court overruled *Delli Paoli* in *Bruton v. United States*.[36] Writing for the majority in *Bruton*, Justice Brennan concluded that the jury could not separate the two defendants with respect to the use of the co-defendant's confession.[37] Justice Brennan rejected the argument that barring the use of limiting instructions was a subversion of the jury system, stating:

> [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a co-defendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect. . . .[38]

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[32] 378 U.S. 368 (1964).

[33] *Id.* at 388-89. In stating its distrust of the jury, the Court quoted the dissent in *Delli Paoli*: "The government should not have the windfall of having the jury be influenced by evidence . . . which, as a matter of law, they (legally) should not consider but which they cannot put out of their minds." *Id.* at 388 n.15 (quoting *Delli Paoli*, 352 U.S. at 248).

[34] Federal Rule 14 of Criminal Procedure previously stated:

> 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 trial of counts, grant a severance of defendants or provide whatever other relief justice requires.

4 U.S.C. § 3771 note (1964). In 1966, the rule was amended and the following was added:

> In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the govenment intends to introduce in evidence at the trial.

FED. R. CRIM. P. 14.

[35] 34 F.R.D. 419 (1964). Notably, the amendment gives no standards as to when the granting of a severance is warranted. *Id.*

[36] 391 U.S. 123 (1968).

[37] *Id.* at 132-37.

[38] *Id.* at 135-36 (citation omitted).

Justice Brennan also addressed the argument that the barring of a co-defendant's confession would discourage the benefits derived from the use of joint trials.[39] In *Bruton*, Justice Brennan contended that encouraging or preserving joint trials would require sacrificing "fundamental principles of constitutional liberty."[40]

Soon after *Bruton* was decided, the Court established that the admission of a co-defendant's confession in violation of *Bruton* did not automatically require the reversal of a conviction.[41] In *Harrington v. California*,[42] the Court held that a conviction would be upheld if the error was "harmless beyond a reasonable doubt."[43] Several years later, in *Parker v. Randolph*,[44] the Court was faced with the issue of whether there should be an exception to the *Bruton* rule when the defendant himself confesses and his confession "interlocks" with the co-defendant's confession.[45] Four justices felt there should be such an exception,[46] and four justices opposed such an exception.[47] Justice Powell did not take part in the decision.[48] Justice Blackmun was one of the four justices who believed *Bruton* was still applicable to interlocking confessions, but he concurred in the judgment because he felt that in *Parker*, the error was harmless beyond a reasonable doubt.[49] Subsequently, the Court ruled in *Lee v. Illinois*[50] that a co-defendant's confession could be admitted as direct, substantive evidence against a defendant at a joint trial, provided that there is sufficient "indicia of reliability."[51] Thus, the confession at issue must have "particularized guarantees of trustworthiness."[52] In the case of interlocking confessions, the Court required that any differences between the two confessions must be "irrelevant or trivial" because there is a strong presumption against admitting such evidence.[53] After the ensuing confusion in the federal courts of ap-

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39 *Id.* at 134.

40 *Id.* (citing People v. Fisher, 249 N.Y. 419, 432, 164 N.E.2d 336, 341 (1928)).

41 Harrington v. California, 395 U.S. 252 (1969).

42 *Id.*

43 *Id.* at 254.

44 442 U.S. 62 (1979).

45 *Id.* at 72.

46 *Id.* at 64. Justice Rehnquist wrote the plurality decision and was joined by Chief Justice Burger and Justices Stewart and White. *Id.*

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

48 *Id.* at 77.

49 *Id.* (Blackmun, J., concurring in part and concurring in judgment).

50 106 S. Ct. 2056 (1986).

51 *Id.* at 2065.

52 *Id.* at 2064 (citing Ohio v. Roberts, 448 U.S. 56, 66 (1980)).

53 *Id.* at 2065.

peals,[54] the Court in *Cruz* revisited the issue it left undecided in *Parker*.[55]

IV. Majority Opinion

In *Cruz*,[56] the United States Supreme Court, in a five-to-four decision reversed the New York Court of Appeals' affirmation of Eulogio's conviction. The Court held that in a joint trial the confession of a nontestifying co-defendant could not be introduced, even if the jury has been given instructions to ignore the confession in assessing the defendant's guilt and even if the defendant has given a confession that "interlocked" with the co-defendant's confession.[57] Writing for the Court, Justice Scalia concluded that the admission of the co-defendant's confession would violate the confrontation clause of the sixth amendment.[58]

Justice Scalia began his analysis by reviewing the history of the confrontation clause and its application to joint trials.[59] After noting the application of the confrontation clause to the states, Justice Scalia stated that in the situation in which two or more defendants are tried jointly, the confrontation clause makes the pretrial confession of one defendant that inculpates the co-defendants inadmissible unless there is a waiver of the confessing defendant's fifth amendment rights.[60]

Following his brief discussion of the confrontation clause, Justice Scalia explained that a witness can only be considered "against" a defendant if his testimony is part of the body of evidence the jury may consider in assessing the defendant's guilt.[61] Justice Scalia noted, therefore, that when a witness' testimony is introduced with limiting instructions to the jury that the testimony can be used in assessing the guilt of only one of the defendants, the testimony can then be admitted.[62] However, the majority stated that the *Bruton* case created an exception to the general principle where the testi-

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54 According to Justice White, the courts of appeals judges were about evenly split as to whether *Bruton* was applicable in interlocking confession cases. *Compare* United States v. DiGillio, 538 F.2d 972 (3rd Cir. 1976)(holding *Bruton* applicable), *with* United States v. Paternina-Vergara, 749 F.2d 993 (2nd Cir. 1984)(holding *Bruton* inapplicable), *cert. denied*, 469 U.S. 1217 (1985).

55 *Cruz*, 107 S. Ct. 1714.

56 107 S. Ct. 1714.

57 *Id.* at 1719.

58 *Id.* Justices Brennan, Marshall, Blackmun, and Stevens joined Justice Scalia's opinion. *Id.* at 1716.

59 *Id.* at 1717.

60 *Id.*

61 *Id.*

62 *Id.*

mony comes from a confession of a co-defendant who is not testifying at trial.[63] Relying on *Bruton*, Justice Scalia stated that an exception is justified if the risk of the jury's being able to ignore limiting instructions is high and the resulting consequences are too great.[64]

The majority next discussed the *Parker* decision.[65] In *Parker*, Justice Scalia stated that the factual situation was the same as in *Bruton*, except that the confessing defendant in *Parker* had "recited essentially the same facts as those of his nontestifying codefendants."[66] In *Parker*, the plurality of four Justices, Justice Scalia commented, found no violation of the confrontation clause.[67] Reviewing the *Parker* plurality's opinion, Justice Scalia emphasized that the plurality had reasoned that in a situation in which the defendant had himself confessed, the damaging effect on his case would be so great as to render any *Bruton* error inconsequential.[68] Thus, Justice Scalia concluded that the plurality believed that the co-defendant's confession would "seldom, if ever" have the "devastating" character referred to in *Bruton*.[69] Furthermore, Justice Scalia stated that "impeaching that confession on cross-examination 'would likely yield small advantage.' "[70] Justice Scalia also noted that the remaining justices in *Parker* agreed with Justice Blackmun's concurring opinion, which stated that although in some cases such admissions of the co-defendant's "interlocking" confession would indeed be harmless, such an admission would still constitute a violation of the confrontation clause.[71]

In *Cruz*, Justice Scalia declared that the Court was adopting Justice Blackmun's reasoning in his concurrence in *Parker*.[72] Justice Scalia remarked that although the "devastating" effect of a co-defendant's confession on the defendant's case was a factor considered in *Bruton*, it was only one justification for the *Bruton* exception.[73] In addition, Justice Scalia asserted, "interlocking confessions" could not be considered nondestructive to the defend-

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63 *Id.*

64 *Id.* The *Harrington* Court held that a *Bruton*-type error that was "harmless beyond a reasonable doubt" would not cause a conviction to be overturned. Harrington v. California, 395 U.S. 252, 254 (1969).

65 *Id.* at 1717-18.

66 *Id.* at 1717.

67 *Id.*

68 *Id.* at 1717-18.

69 *Id.* at 1718.

70 *Id.* (quoting *Parker*, 442 U.S. 62, 73 (1979).

71 *Id.*

72 *Id.*

73 *Id.*

ant per se.[74] Indeed, Justice Scalia maintained that "[i]t is impossible to imagine why there should be excluded from that category, as generally not 'devastating,' codefendant confessions that 'interlock' with the defendant's own confession."[75] The present case, Justice Scalia added, was an example of how difficult the effect of the co-defendant's confession on the jury would be to predict.[76]

Justice Scalia proceeded by rationalizing that the "interlocking" nature of the confessions made the admission of the co-defendant's confession more, not less, devastating.[77] As a practical matter, he claimed, the defendant will be trying to avoid his confession, not stand by it.[78] Justice Scalia reasoned that "[a] codefendant's confession will be relatively harmless if the incriminating story it tells is different from that which the defendant himself is alleged to have told, but enormously damaging if it confirms, in all essential respects, the defendant's alleged confession."[79] Referring to the facts of the present case, Justice Scalia explained that by admitting Benjamin Cruz's confession, the lower court had harmed Eulogio's attempt to prove that Norberto had fabricated the story of Eulogio's confession.[80]

Justice Scalia supported his position by emphasizing that what the "interlocking" nature of the confessions "pertains to is not its *harmfulness* but rather its *reliability*."[81] The more confessions interlock, Justice Scalia concluded, the more likely it is that the confessions are truthful.[82] Reliability, Justice Scalia noted, is relevant to the question of whether the co-defendant's confession might be allowed as direct evidence against the defendant, even without an opportunity for cross-examination.[83] However, Justice Scalia remarked that the reliability issue is neither relevant to the question

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74 *Id.*

75 *Id.* Justice Scalia quoted the dissent in *Parker*: "[T]he infinite variability of inculpatory statements (whether made by defendants or co-defendants), and of their likely effect on juries, makes [the assumption that an interlocking confession will preclude devastation] untenable." *Id.* (quoting *Parker*, 442 U.S. at 84 (Stevens, J., dissenting)).

76 *Id.* Justice Scalia noted that in the present case the harmful effect of the defendant's confession was difficult to determine as it was dependent on the extent to which one believed Norberto's testimony. *Id.*

77 *Id.*

78 *Id.* Justice Scalia suggested possible explanations the defendant might use to avoid his confession, such as the fact that the confession was false or inaccurately reported. *Id.*

79 *Id.*

80 *Id.*

81 *Id.* (emphases in original).

82 *Id.*

83 *Id.* at 1718-19. Justice Scalia referred to Lee v. Illinois, 106 S. Ct. 2056 (1986). *See supra* notes 50-53 and accompanying text for a discussion of *Lee v. Illinois*.

of whether the jury is still capable of obeying instructions to disregard such testimony nor relevant to the effect on the defendant's case if the jury does not obey its instructions.[84] Justice Scalia asserted that "[t]he law cannot command respect if such an inexplicable exception to a supposed constitutional imperative is adopted."[85]

Next, Justice Scalia responded to the dissenting justices.[86] Justice Scalia asserted that the Court's opinion had reaffirmed the basic proposition of *Bruton* and had not extended *Bruton* to an illogical result.[87] Justice Scalia reiterated his belief that the presence of the defendant's confession neither reduced the likelihood that the jury would consider the co-defendant's confession against the defendant nor reduced the harmful effects on the defendant's case if the co-defendant's confession was in fact considered.[88]

In conclusion, Justice Scalia repeated that courts have the power to admit the nontestifying co-defendant's confession as direct evidence against the defendant.[89] However, once the confession is determined not to be directly admissible against the defendant, the confrontation clause bars its admissibility at a joint trial regardless of whether a limiting instruction to the jury admonishing it not to consider such a confession against the defendant is given.[90]

V. Minority Opinion

Justice White, joined by Chief Justice Rehnquist and Justices Powell and O'Connor, strongly dissented from the majority.[91] Justice White began by discussing the facts of *Bruton*[92] and characterized the case as holding that the nontestifying co-defendant's confession could be barred only in certain cases in which the risk that the jury would disobey the limiting instructions would be so damaging to the defendant's case as to constitute constitutional error.[93]

The dissent then distinguished the facts of *Cruz* from the facts of *Bruton*, noting that Eulogio Cruz, unlike the defendant in *Bruton*,

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84 107 S. Ct. at 1719.

85 *Id.*

86 *Id.*

87 *Id.* Justice Scalia noted that the dissent had characterized the majority's opinion as "remorseless logic." *Id.*

88 *Id.*

89 *Id.*

90 *Id.*

91 *Id.* at 1719-22 (White, J., dissenting).

92 *Id.* at 1719 n.1 (White, J., dissenting).

93 *Id.* at 1720 (White, J., dissenting).

had confessed.[94] According to Justice White, the majority in *Cruz* held:

> the co-defendant's confession was inadmissible even if it completely "interlocked" with that of Cruz himself, that is, was substantially the same as and consistent with Cruz's confession with respect to all elements of the crime and did not threaten to incriminate Cruz any more than his own confession.[95]

Justice White questioned the logic of such a holding, asserting that "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him."[96] Justice White reasoned that the defendant is the best source of information about his own conduct, while a co-defendant's out-of-court statements regarding the defendant "have traditionally been viewed with special suspicion."[97] Therefore, Justice White continued, with the proper admission of a defendant's confession in court, the jury would not be as tempted to rely on the co-defendant's out-of-court statements and, thus, would be able to obey its instructions to ignore the co-defendant's confession with regards to the defendant.[98]

Furthermore, Justice White stated that even if the jury disobeyed its instructions, the effect would not necessarily be as devastating as it was in *Bruton*.[99] Justice White stated that the Court had ignored the potentially devastating effect that the defendant's confession would probably have on the defendant's case.[100] Justice White urged that application of the *Bruton* rule should be confined to situations in which "there is the greatest risk that jury misconduct [would lead] to the conviction of an innocent defendant."[101] In general, Justice White continued, cases in which the defendant had not confessed fit this exception, as a class, much better than cases in which the defendant had confessed.[102]

Justice White then strongly attacked the majority's conclusions as being a result of "remorseless logic" and as countering common sense.[103] He noted that the Court, in *Richardson v. Marsh*,[104] had

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94 *Id.* (White, J., dissenting).

95 *Id.* (White, J., dissenting).

96 *Id.* (White, J., dissenting)(quoting *Bruton*, 391 U.S. at 139 (White, J., dissenting)).

97 *Id.* (White, J., dissenting).

98 *Id.* (White, J., dissenting).

99 *Id.* (White, J., dissenting).

100 *Id.* at n.2 (White, J., dissenting).

101 *Id.* at 1721 n.2 (White, J., dissenting). Justice White believed that the prophylactic nature of *Bruton* and the burden *Bruton* places on prosecutors demanded this approach, thus overshadowing the majority's belief that the damaging effect of the defendant's confession would vary from case to case. *Id.* (White, J., dissenting).

102 *Id.* (White, J., dissenting).

103 *Id.* at 1720-21 (White, J., dissenting).

recently rejected a claim that, when a co-defendant's confession was redacted to eliminate any reference to the defendant, a *Bruton*-type error might result if the jury were to make inferences by considering the confession together with other evidence.[105] According to Justice White, the *Richardson* Court recognized that *Bruton* should not be "followed to the outer limits of its logic."[106] The dissent asserted that the holding in *Richardson* was, therefore, inconsistent with the Court's ruling in the present case.[107] Justice White also claimed that the majority of the courts of appeals either endorsed or favored his view, with many of the others taking "the harmless error route."[108]

In conclusion, Justice White predicted that prosecutors would not seek joint trials in cases involving interlocking confessions.[109] Justice White stated that although separate trials avoided possible *Bruton* problems, joint trials were socially desirable because they saved state funds, reduced the amount of inconvenience to witnesses and public officials, avoided court delays, and generally alleviated the burdens on the court system.[110] Justice White also noted the possibility that separate trials could result in "inconsistent verdicts."[111] As with the majority opinion, the *Cruz* dissent ended its opinion by noting that *Lee v. Illinois*[112] suggested that interlocking confessions would often be directly admissible against the defendant and reminded the New York courts that on remand it should reconsider allowing the co-defendant's confession to be admitted directly against Eulogio Cruz.[113]

VI. Discussion and Analysis

Cruz exemplifies the Court's proper concern over preserving a defendant's right to confront his accusers despite possible obstructions to an efficient criminal procedure. In *Cruz*, the Court examined the potential effects on the defendant if the jury were unable to adhere to its instructions not to use the co-defendant's confession

104 *Id.* at 1702 (1987).
105 *Id.* at 1721. (White, J., dissenting).
106 *Id.* (White, J., dissenting).
107 *Id.* (White, J., dissenting).
108 *Id.* at 1721 n.3 (White, J., dissenting).
109 *Id.* (White, J., dissenting).
110 *Id.* (White, J., dissenting).
111 *Id.* (White, J., dissenting). Presumably, Justice White meant that, between two equally culpable defendants being tried separately, one could be aquitted and the other could be convicted.
112 106 S. Ct. 2056 (1986).
113 *Cruz*, 107 S. Ct. at 1722 (White, J., dissenting).

against the defendant in its determination of the defendant's guilt or innocence.[114] Both Justice Scalia and Justice White focused on how the defendant's and the co-defendant's confessions would interact.[115]

Justice Scalia concluded that the introduction of a confession by the defendant will increase the potential that the co-defendant's confession will damage the defendant's case.[116] Such a conclusion has an intuitive appeal. It seems more likely that Benjamin's detailed confession persuaded, rather than dissuaded, the jury to believe in Norberto's vague and suspect testimony. It is likely that Benjamin's corroboration of Norberto's testimony hurt the credibility of Eulogio's claim that Norberto had fabricated his story in order to gain revenge against Eulogio. Other examples also support Justice Scalia's conclusion. In his dissent in *Parker*,[117] Justice Stevens gave an example of a nontestifying co-defendant giving a detailed videotaped confession which implicated both himself and the defendant.[118] The only evidence directly admissible against the defendant was circumstantial, except for the testimony of a third party stating that he "vaguely recalled" the defendant saying that he was with the co-defendant at the time of the killing.[119] Justice Stevens, like Justice Scalia, felt that, in such a situation, a third party's testimony would increase the danger that the jury would rely on the co-defendant's confession in deciding the defendant's verdict.[120] Conversely, Justice White's theory in *Cruz*, in which he concluded that in a case in which the co-defendants' confessions interlock the jury will obey its instructions, is flawed. His reasoning that the defendant's confession will so overshadow the co-defendant's out-of-court testimony that the jury will not be tempted to disobey its instructions

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114 *Id.* at 1718-20.

115 Justice Scalia's opinion is located *id.* at 1717-18; Justice White's opinion is located *id.* at 1720 (White, J., dissenting).

116 *Id.* at 1718.

117 *Parker*, 442 U.S. 62, 81 (1979)(Stevens, J., dissenting).

118 *Id.* at 84-85 (Stevens, J., dissenting). Justice Stevens stated the scenario as follows:

> 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 2 through 9 involve circumstantial evidence of a past association between X and Y, a shared hostility for the victim, and an expressed wish for his early demise—evidence that in itself might very well be insufficient to convict X. Item 10 is the testimony of a drinking partner, a former cellmate, or a divorced spouse of X who vaguely recalls X saying that he had been with Y at the approximate time of the killing. Neither X nor Y takes the stand.

Id. (Stevens, J., dissenting).

119 *Id.* (Stevens, J., dissenting).

120 *Id.* at 85 (Stevens, J., dissenting).

assumes that all defendants' confessions are equally reliable.[121] A dubious confession, however, would not carry the persuasive force needed to overcome the jury's tendency to look to other sources against the defendant. Often, the defendant's confession may be coerced or, as in *Cruz*, come from a potentially prejudiced source.[122] Yet, Justice White appears to believe that once the defendant has confessed and that confession has been admitted, his case has already been lost.[123] Justice White's scenario may be true in some cases, but in others it subjects defendants who would not be convicted based on the admissible evidence against them to the possibility of being found guilty due to a *Bruton*-type error.[124]

In fact, regardless of the effect the defendant's confession has on his case, this effect will not erase the presence of constitutional error. By confessing, the defendant should not lose his constitutional rights, including the right to confront his accuser, namely, the co-defendant. The admission of the co-defendant's confession constitutes such an error under *Bruton* because a potential that the jury will use the non-cross-examined testimony is present. Although the *Harrington* Court held that a *Bruton* error does not necessitate the overturning of a conviction, the *Harrington* Court recognized that an error had been committed.[125] Thus, the reviewing court must analyze all of the circumstances in the case to determine whether the error was, in fact, "harmless beyond a reasonable doubt."[126] In *Parker*, Justice Blackmun theorized that in most interlocking confession cases the error would be harmless, but he still argued that the *Harrington* standard should apply.[127] Conversly, the plurality in

121 *Cf. Parker*, 442 U.S. at 84 (Stevens, J., dissenting)("But the infinite variability of inculpatory statements . . . and their likely effect on juries, make those assertions [that all co-defendant confessions are equally reliable] untenable.").

122 *See id.* at 85-86 (Stevens, J., dissenting). Justice Stevens also noted that a confession may be due to "the well recognized and often untrustworthy 'urge to confess. . . .' " *Id.* at 86 (Stevens, J., dissenting)(footnote omitted). *See also id.* at 86 n.6 (Stevens, J. dissenting)(citing Foster, *Confessions and the Station House Syndrome*, 18 DE PAUL L. REV. 683 (1969); Sterling, *Police Interrogation and the Psychology of Confession*, 14 J. PUB. L. 25 (1965)).

123 *Cruz*, 107 S. Ct. at 1720 (White, J., dissenting). For example, Justice White refers to "the devastating effect that the defendant's own confession is likely to have upon his case." *Id.* at n.2 (White, J., dissenting).

124 *See* Haddad, *Post-Bruton Developments: A Reconsideration of the Confrontation Rationale, and a Proposal for a Due Process Evaluation of Limiting Instructions*, 18 AMER. CRIM. L. REV. 1, 30 (1980). "[N]either empirical data nor common intuition supports such a generalization [that in the presence of a defendant's confession the jury is less likely to consider the co-defendant's confession]. One may just as easily speculate that a jury is *more likely* [to do just the opposite]." *Id.* (emphasis in original).

125 *Harrington*, 395 U.S. 250 (1969).

126 *Id.* at 252-54.

127 *Parker*, 442 U.S. at 79 (Blackmun, J., concurring).

Parker and the dissent in *Cruz* limited *Bruton*'s assumption of a constitutional error to cases in which the defendant had not confessed.[128] In cases in which the defendant has confessed, the less stringent test of whether the confessions were truly interlocked would be substituted for the harmless error analysis. Under this new standard, relevant considerations such as the defendant's or co-defendant's credibility would not be considered.

In *Cruz*, the focus on how the confessions of the defendant and the co-defendant might interact in the minds of the jurors detracted from a discussion of the basic principles of the confrontation clause. In *California v. Green*,[129] it was stated by the Court that confrontation

> (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.[130]

It is difficult to see why these three goals of the confrontation clause should be disregarded when the witness happens to be the co-defendant in a joint trial. Parts one and three of the above passage recognize how the *Cruz* minority was mistaken in its belief that a defendant's confession will always render a co-defendant's confession inconsequential and make confrontation unnecessary. The analysis shows that attributes such as a co-defendant's character and his propensity for lying when he is seemingly outside the court's influence will vary widely among co-defendants. Like all other witnesses, the impact of co-defendants's confessions on a jury will vary. As for the second rationale mentioned in *Green*, it is unwise to risk a defendant's "greatest legal engine" on the basis of the belief of some that the jury will be capable of ignoring damaging testimony in certain situations. If the defendant disagrees with that belief, his only alternative would be to abandon his constitutional right to a jury trial.[131]

Furthermore, the concept of the "interlocking of confessions" has not been adequately defined, thereby making it difficult to fore-

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128 *See id.* at 74-75; *Cruz*, 107 S. Ct. at 1720 (White, J., dissenting).

129 399 U.S. 149 (1970).

130 *Id.* at 158 (quoting 5 J. WIGMORE, TREATISE ON THE ANGLO AMERICAN SYSTEM OF EVIDENCE § 1367 (1923).

131 The sixth amendment to the Constitution provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State. . . ." U.S. CONST. amend. VI.

see under what circumstances an exception to *Bruton* might apply. In *Parker*, it was unclear what the plurality considered as constituting an interlocked confession. Justice Blackmun stated that the plurality "simply assume[d] the interlock."[132] Justice Blackmun worried that the decision of the *Parker* plurality might be applied when two confessions only partially interlocked or when one confession implicated the defendant more than did his own confession.[133]

In *Cruz*, Justice White attempts to define "interlocked" confessions as arising in a situation in which the co-defendant's confession is "substantially the same as and consistent with [the defendant's] confession with respect to all the elements of the crime and [does] not threaten to incriminate [the defendant] any more than his own confession."[134] This analysis leaves unanswered the question of which confessions would not be similar or reliable enough to warrant their direct admissibility but would be similar enough to warrant an exception to the *Bruton* rule. It is unclear what is meant by the phrase "substantially the same as," and lower courts conceivably could develop greatly different standards in this regard. Comparatively, the *Harrington* harmless error test is better established and more protective of the defendant's rights.[135]

Justice White's concern in *Cruz* with the implications the majority's decision might have on the court system focused upon the potential increase in separate trials and the resulting depletion of government funds and increase in delays.[136] Apart from the view that the Court should not consider economic factors when a basic constitutional right is at stake,[137] the minority's fears seem more theoretical than real. In neither *Cruz* nor in any of the Court's other post-*Bruton* rulings has there been any mention of the *Bruton* rule overburdening the judicial system; and, presumably, because *Cruz* encompasses part of the issues addressed in *Bruton*, no new burden

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132 *Parker*, 442 U.S. at 80 (Blackmun, J., concurring).

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

134 *Cruz*, 107 S. Ct. at 1720 (White, J., dissenting).

135 For recent cases applying the harmless error test to *Bruton* violations, see Holland v. Attorney Gen., 777 F.2d 150 (4th Cir. 1985)(error not harmless, as evidence of defendant's guilt was not overwhelming); Clark v. Maggio, 737 F.2d 471 (5th Cir. 1984) (error held harmless), *cert. denied*, 470 U.S. 1055 (1985); United States v. Ruff, 717 F.2d 855 (3rd Cir. 1983)(admission of unredacted confession held harmless), *cert. denied*, 464 U.S. 1051 (1984). See *supra* notes 42 and 46 and accompanying text for discussions of *Harrington v. California*.

136 *Cruz*, 107 S. Ct. at 1721 (White, J., dissenting). For a general discussion on the costs and benefits of joint trials, see Dawson, *Joint Trials of Defendants in Criminal Cases: An Analysis of Efficiencies and Prejudices*, 77 MICH. L. REV. 1379 (1979).

137 *See Bruton*, 391 U.S. at 134.

has been added.[138]

Furthermore, the Court has affirmed a method for prosecutors to use in their introducing of a co-defendant's confession with limiting jury instructions. In *Richardson v. Marsh*,[139] the Court upheld the use of redacted confessions if the co-defendant's confession does not contain either the defendant's name or any reference to the defendant's existence, even if there is other evidence introduced at trial that links the defendant to the confession.[140] Although the Court's presumptions about the effects of redacted confessions are questionable,[141] *Richardson* does reduce the number of cases in which the co-defendant's confession will be inadmissible.

Also, an alternative to separate trials is the multiple jury trial. In that situation, a separate jury is impanelled for each co-defendant. The jury for the defendant would not hear the confession of the nontestifying co-defendant, but other evidence would be presented to both juries simultaneously. If the proceedings can be coordinated properly, the multiple jury trial can accomplish most of the savings of a joint trial, without prejudicing the defendant.[142]

Justice White's urging that the New York Court of Appeals reconsider whether the co-defendant's confession might be directly admissible against Eulogio under the principles articulated in *Lee v. Illinois*[143] is also questionable. It is likely that if courts begin to hold more confessions directly admissible under *Lee* it will reduce the number of *Bruton* issues that courts must confront. However, if the Court redefines the standard of admissibility in *Lee*, it not only will render its ruling in *Cruz* meaningless, but it will also go beyond the minority's opinion because in such a situation there would not even be limiting instructions to the jury.

VII. CONCLUSION

On its surface, the Court's holding in *Cruz v. New York* repre-

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138 *See, e.g.*, *Cruz*, 107 S. Ct. 1716 (1987); *Lee*, 106 S. Ct. 2056 (1986); *Parker*, 442 U.S. 62 (1979).

139 107 S. Ct. 1702 (1987).

140 *Id.* at 1707-08. Again, writing for the Court, Justice Scalia said that in this situation there would not exist the "overwhelming probability" that the jury would disobey its instructions. *Id.* at 1708.

141 *See* Dawson, *supra* note 136, at 1414. Many courts abuse the redaction rule, often to a point in which it is "as clear as pointing and shouting" that the defendant is the "other person," "X," or "blank." *Id.* It is difficult to understand why this seemingly slight obstacle to the jury's use of the confession against the defendant allayed the fears Justice Scalia had in *Cruz*.

142 Morris & Savitt, *Bruton Revisited: One Trial/Two Juries*, 12 PROSECUTOR 92 (1976).

143 106 S. Ct. 2056 (1986). See *supra* note 50 and accompanying text for a discussion of *Lee v. Illinois*.

sents a strong affirmation of the Court's belief in protecting defendants in joint trials from the potential harm arising from the admission of the non-cross-examined testimony of their co-defendants. The ruling is especially impressive given the background of a severely overburdened court system and given that the issue required the Court to speculate on the mental processes of jurors, in which widely differing scenarios of how juries make decisions can have, at the least, face validity. By holding *Bruton* applicable in the interlocking confession situation, the *Cruz* Court helped to insure that a criminal defendant will not lose his constitutional rights simply because he has confessed. However, the real effect of the *Cruz* holding remains to be seen. If, subsequent to *Cruz*, the Court indicates it has softened its standards for admitting an interlocking confession directly against a defendant under *Lee*, then the Court's holding in *Cruz* will be merely symbolic.

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